The Pure Theory of Natural Law

PART I

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The word 'law' denotes order: law is an order of things. Accordingly, the term 'natural law' denotes a natural order of things. 'Law' also connotes respectability: law is an order of things that people ought to respect. A natural law theory, in so far as it concerns human affairs, attempts to explain both what the natural law of the human world is and why and how we ought to respect it. However, whether, why and how we ought to respect the natural law are questions that we cannot address sensibly before we have a clear idea of what the natural law is.

It may not be meaningful to speak of the natural law of the universe, an order that encompasses all things. However, it is meaningful to speak of the natural order of particular sorts of things in the universe. Physicists, chemists, biologists, astronomers, geologists, and practitioners of other natural sciences all look at different orders of things, concentrating on different sorts of objects and phenomena, trying to discover and eventually to explain patterns of order (natural laws) within their chosen fields. Because this book is about the natural law of the human world[1], we shall focus on the natural order of human persons rather than the natural order of such things as particles, atoms and molecules, physical states, cells, organs, and life forms such as plants, insects, molluscs, birds and mammals other than those of the human species.

[1] Etymologically, 'world' means the era of mankind. Cf. the Dutch equivalent 'wereld' (world), from 'wer' (man) + 'alt' (age, period). Strictly speaking, then, in the expression 'human world' the adjective 'human' is redundant.

I. PROLEGOMENA

1. Natural Law and Artificial Law

Law, in the sense in which we use the term in this book, is the order of persons. Natural law accordingly is the natural order of persons, or, to be more precise, the natural order of natural persons. Persons of whatever kind are elements of the general law of persons but only natural persons are elements of the natural law of persons. Whether or not human persons are the only natural persons that exist, the concept of a natural order of the human world is meaningful in any case. The natural law of persons is the natural order of the human world. It must be distinguished from other orders of persons, say, orders of supernatural or artificial persons. All of those orders can be subsumed under the general law of persons.

It may be helpful to give some preliminary sketches of what these concepts refer to before we attempt a formal analysis of the law of persons. They should make it easier to understand the relevance of the distinctions to which the analysis will refer.

Natural persons

Persons are units of rational agency organised to use means of action in the pursuit of their goals. Natural persons are naturally equipped to act as persons. They can act and speak for themselves without having to rely on representatives or agents to do it for them. Usually, human beings are cited as the paradigmatic natural persons. Nevertheless, many people believe that there also are non-human purposeful agents with the capacity to act and speak for themselves. They may be supernatural agents, who are not even part of nature in the colloquial sense of the word. Still, they are believed to be real persons whose personality derives from their own particular non-human nature. Moreover, those who refer to such non-human rational agents usually assume that they are part of the same order as human beings or that they somehow participate in the human world. Thus, whether the concept of a natural person needs to be restricted to human persons

or not, the natural law, as the order of the human world, is the order of natural persons.

Some qualifications are in order. First, natural persons and only natural persons have the capacity to represent themselves in speech or action, but not all human beings have that capacity. Not all human beings are natural persons. Some human beings are definitely and permanently incapable of functioning or acting as persons because of a genetic condition, an accident or a debilitating disease. It serves no useful purpose to count them among the class of natural persons merely because, biologically speaking, they are human beings and therefore in some ways resemble human persons. Like many other things, animals, plants, artefacts, and so on, they belong to the human world only if some person takes the initiative to use them or to act or speak on their behalf. However, it is necessary to make a distinction between those human beings that have been non-persons from birth or early childhood and those who once were persons. Unlike the former, the latter may have appointed one who should represent them at a time when they are personally incapacitated to represent themselves and even may have left instructions for their appointed representatives. Alternatively, they may have known which of their social relations customarily would be regarded as their representative and have accepted the prevailing custom. A deceased human person may remain a person, a constituent of the human world, for as long as there is a living representative to 'carry out his will'.

Second, there are human persons that are temporarily unable to demonstrate their personal capabilities in speech or action. They may be asleep, unconscious, ill, in a coma, drugged or paralysed. Even if for a more or less considerable length of time their condition is for most practical purposes indistinguishable from that of human non-persons, few of us would say that during that time they are not persons or that it would be right to treat them as if they were not. Being asleep, unconscious, or drugged, does not turn them into non-persons. Here too we can look to their personal histories or prevailing customs to find out whether, how and by whom they should be represented while they are unable to represent themselves. However, once they regain the ability to exercise their personal capabilities, they again simply represent themselves.

We also should mention infants, who are in a special class. They are not yet capable of acting as persons, but in the normal course of

events they will fairly rapidly develop their personal capabilities and become able to exercise them. In any case, we almost invariably expect them to become persons and hope that they do. Most of us would not appreciate it if a parent or any other adult treated an infant otherwise than as a potential and future person. The same is true with respect to human foetuses. Nevertheless, neither infants nor foetuses are persons 'in their own right'. They are not part of the human world unless some person assumes the task of representing them, of acting and speaking for them, even if they could not possibly have chosen or given instructions to that person themselves. It is doubtful that there still would be a human world if at one time a mysterious disease had killed all human beings older than, say, four years.

Not all human beings, then, are natural persons. However, if no human being were able or capable of functioning as a person then I would not be writing this book and you would not be reading it. At the very least, the world exists because you and I exist. In fact, it comprises all human beings capable of representing themselves to one another, asking questions about and providing explanations, reasons or excuses for their words and actions. It comprises all natural persons, all beings with whom we can—or could, if we wanted to and had the opportunity—reason and have arguments. It is, in that sense, a speech community, a community of rational beings and, as it happens, a community of human persons. In a word, it is *our* world.

The natural order of the world

Does our world have a natural order or law? Is that law a law of persons? At the very least, the notion of the natural law of persons is meaningful. The natural order of the world is defined by the fact that it is composed of many separate persons, each a distinct entity with distinct physical co-ordinates and characteristics, the movements, feelings, emotions, actions, deeds, works and words of which are distinct from those of other persons. Thus, if and when a person respects the order of the world then he is at least doing his best not to confuse persons with other things or any one person with any other person. If and when a person confuses persons with other things or one person with another then he is at least not succeeding in respecting the order of the world or he is knowingly or wilfully

refusing to respect it. Here we have the distinction between lawful and unlawful actions—on the one hand, actions that respect the order of the world and discriminate according to the objective or natural distinctions between persons and things and between one person and another and, on the other hand, actions that do not respect the order of the world by not discriminating according to those distinctions. Lawful actions are discriminating actions, which heed the *discrimina* (boundaries, distinctions) that define the order of world. Non-discriminating actions, especially of course crimes (*crimina*), are unlawful actions: they exhibit confusion about or disregard for the relevant discrimina of the human world.

Unlawful actions are also called injustices. The worst kind of injustice occurs when one person wilfully and knowingly disregards the distinction between persons and other things, treating persons as if they were non-persons. In contrast, to treat a thing, a non-person, wilfully and knowingly as if it were a person may be irrational, absurd or ludicrous—but it is not to commit an injustice because an injustice is something a person does to another person. Another kind of injustice occurs when one person wilfully and knowingly disregards the distinction between one person and another, treating the one as if he were the other or the one's property or work as if it were the other's, praising or rewarding, or blaming or punishing, the one for the actions or words of the other. There also are cases where one person reneges on his commitments, denies that he said or did what he in fact did say or do, or obfuscates the circumstances of an action, possibly a crime, committed by himself or another. Lesser kinds of injustices involve cases where persons negligently or carelessly fail to respect the order of the world, and maybe even cases where they accidentally fail to do so.

Because the boundaries that separate one natural person from another and one person's actions and words from those of any other are objective and natural—not dependent on any convention but given in the nature of things—we can describe unequivocally, at least in principle, the natural order of the world, its natural law. In that sense, there is a positive, value-free science of natural law that involves, apart from an understanding of what being a person means, merely empirical determinations of what belongs to or falls within the boundaries of one person rather than another.

The discrimina of the natural order are unchangeable regardless of time and place, because they mark, first, what it is to be a person and, second, what it is to be one person and not another. Of course, this is not to say that they are always and everywhere recognised to the same extent or in the same way. Given the importance of language, it is not surprising that some people find it difficult to recognise as another person a speaker of a language that they do not understand as readily as they would recognise someone who spoke their own language. Nevertheless, a human language is for most practical purposes fully translatable in any other. A similar reluctance may arise when one person confronts another with unfamiliar colour of skin or attire.[2] It may take a while before people discover and learn to recognise the discrimina of the human world.

Types of order in the world

In common usage, the word 'law' not only denotes order, it also connotes respectability: the idea that an order of things is law only if persons ought to respect it, that it is right to heed its defining discrimina and wrong not to do so. Nevertheless, whether and why the natural order of the world is one that human persons ought to respect, and how they are to do so, are questions that we should not confuse with the more fundamental one: What is the natural order?

It is important to keep the priority of that question in mind because problems relating to natural law—which is the order *of* the human world—tend to be confused with or even eclipsed by problems relating to other types of order *in* the human world. These orders have a law-like character as far as their description goes. To what extent, if any, they are respectable orders is a moot question that has to be decided on a case-by-case basis.

There are many types of order in the human world. One type comprises artificial or man-made orderings of organic or inorganic

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[2] "Yet, most Americans are unconcerned about the death of Iraqi civilians. They wear towels on their heads and walk around in their pajamas. They speak a funny language and believe in a funny religion. They scream at us with hate. Why should Americans worry about them? They're barely human." Father Andrew Greeley, 'A Dove in Good Compay', Chicago Sun-Times (Suntimes.com, 24 September 2004).

material: buildings, roads, harbours, fields, meadows, gardens, tools, machines, all sorts of products. Every one of us is born and raised in a world that is full of such things and typically invests a lot of time and effort in learning to use or reproduce at least some of them. They obviously are important parts of the human world, but they are not among the constituent parts. We need not consider them here.

Other types of order in the human world comprise orders of persons that are defined by other discrimina than those that define the natural order. An important type in this category is what we may call 'the moral order' or perhaps 'the natural moral order'. It presupposes the discrimina that define the order *of* natural persons (the natural law) but adds to these its own specific lists of relevant discrimina. The natural order implies distinctions between persons and things and between one natural person and another. These distinctions relate to the questions 'What sort of thing is a person?' and 'What distinguishes one person from another?'. The [natural] moral order in addition implies distinctions that relate to the question 'What sort of [natural] person is this?'. The defining discrimina here are personal conditions (such as sex, age, health), characteristics (personality, character, temperament, virtue, trustworthiness, wisdom, knowledge, skill, and the like) and relations (for example, among friends, neighbours, rivals, and strangers). Obviously, one's personal conditions, characteristics and relations may change—in some cases more easily than in others—without one ceasing to be a person and without one becoming another person (as against a changed person).

A significant part of any person's education typically consists in learning how to deal with other persons and to make proper discriminations among those of the same sex as oneself and those of the other sex, the young and the old, the physically strong and the weak, the skilled and the unskilled, those one knows well and complete strangers, and so on.

The central normative claim of moral theory is that people ought to respect the moral order and ought to be morally discriminating, clearly distinguishing moral and immoral actions. Of course, what is commonly regarded as proper conduct may vary from one setting ('culture') to another, but at least the discrimina that define the natural moral order most probably are recognised everywhere. Whether, why and how people ought to respect these distinctions that

define the moral law are, again, questions we should not confuse with the more basic question: What is the moral order?

A characteristic of natural moral orders is that they directly involve natural persons. That is to say, natural persons participate personally in the moral order. Whether they respect or fail to respect the morally relevant distinctions, they do so in person, 'as themselves'. Another type of order in the human world comprises artificial orderings in which individuals participate not 'as themselves' but only or primarily as occupants of a more or less predefined position or performers of a more or less predefined role or function: games, theatrical plays, organisations, social orders or societies. Here the relevant discrimina are artificial distinctions within a society. For example, in American constitutional law there is a distinction between a member of the Senate and a member of the House of Representatives as well as between the President and the Governor of a State; in a corporation there is a distinction between the CEO and a Division Manager; in the Catholic Church there is a Pope and there are Cardinals, Bishops, Priests; an army has yet another ranking of well-defined positions and functions. Such distinctions are fundamental to our understanding of social morality.

The discrimina to which such artificial orders refer may but need not include those that define either the natural or the moral order. Of course, one's position, role or function, if any, in a particular society may change even more dramatically or rapidly than one's physical condition or personal characteristics. In any case, the discrimina of the natural moral order are far more universal than those that define a social morality. Some, many or all of the positions, roles and functions that exist in one society may be unknown in another. Still, societies typically have a hierarchy of superior and inferior positions. Hence, social relations exist between persons in superior positions and persons in inferior positions and also between persons who occupy the same or an equal position in a particular society. To speak of the social morality of a society is to suggest that these distinctions ought to be respected; that there are proper ways for communicating and interacting with superiors, inferiors or equals. Plato, for example, defined social justice as the mark of a society in which every member knows his place and respects the order of socially defined positions and functions.

Artificial orders, then, refer essentially to distinctions between positions, roles and functions within an organisation. In fact, they are orders of positions, roles and functions rather than orders of natural persons. Because of the widespread habit of personifying social positions, roles and functions, they often appear as orders of persons —but then we are not talking about natural but about artificial persons, which are defined by the rules of the organisation.

While artificial social orders in the world are defined by systems of rules of conduct, even direct commands, the natural order of the world cannot be so defined. The natural order is an order of being, an ontological order. Social orders are, in a specific sense of the word, organic or technical[3] orders: orders of means and actions, in which people participate, willingly or unwillingly, to achieve certain goals— in a word, organisations.

People can respect the natural order or fail or refuse to do so, but whether they do or do not respect it, the natural order will persist anyway—it does not consist of actions but of rational agents. A social order, in contrast, will not persist regardless of what the people in it do. If it is not respected, if enough people in it fail to follow or obey the rules and commands that define it, it will disappear.

Respect for the natural law or the moral law of the human world may be among the goals a social order seeks to achieve, but this is not necessarily so. In contrast, respect for its own social order is a goal, though not necessarily the ultimate goal, of every society.

Again, note that the people in a social order may not always be aware of the discrimina that are vitally important for its well-functioning or the achievement of its goals. A society may be committed to its ways and then it has to consider which goals are within reach of its present organisation; or it may be committed to one or another goal and then it has to consider which pattern of organisation it needs to achieve that goal. Moreover, because social orders are artificial orders, their actions always and necessarily depend on the actions of natural persons that occupy certain representative positions in it. Consequently, what counts as a goal a society seeks to achieve depends largely on whether or not those individuals actually

[3] The Greek word 'organon' primarily means *tool* or *work*; 'technè' means skill or method.

act to achieve it. Societies may be torn apart by conflicts about goals, priorities, strategies, and tactics.

Order and time

Every one of us is born and raised in a world that is full of artificial orders and typically invests a lot of time and effort in getting acquainted with their more or less intricate requirements and rules. For each one of us, these orders, initially at least, are just as much 'given' as is the natural order of the world. In this connection, social orders (societies and their subdivisions) are of particular interest. Some people pay so much attention to social structures and rules that they tend to forget about the natural order of the world and the personal conditions, characteristics and relations of natural persons. They see others as well as themselves primarily as occupants of this or that position in their society, called upon to perform a scripted social role or function associated with that position in the organisation of society. Socialisation can and does blind many of us to the existence of the natural and moral orders of the human world, especially when the guardians or managers of society take control of educating the young. It may lead them to define the society in which they are born and raised as 'our world' and themselves as 'products of society'. In other words, they come to identify a person's position in society as his 'self'. Because the position belongs to society, they will tend to see the person as 'social property'. People are reduced to being 'members of society' and society becomes dehumanised—as in a bureaucratic nightmare (or a bureaucrat's dream). Normative claims based on respect for the natural or the moral order are marginalized or dismissed entirely, at any rate subordinated to the claims based on the rules of the prevalent social order.

Like the natural and the moral order, many artificial orders are older than any living person, which contributes to the fallacy of interpreting them as parts of the moral or even the natural order. This is especially true for social orders or societies. The present generation of people who live in them often has little or no knowledge of their general history. It has even less knowledge of the events, interests, fashions, prejudices, ideologies, and the like, that at various times led individuals and groups to emphasise or de-emphasise, to modify or abandon certain aspects of those orders, either in their own behaviour

and actions or in the education of their children. Thus, many orders in the world appear to be natural in that they seemingly have 'grown' or 'evolved' to be what they are. However, in this context 'growth' and 'evolution' are metaphors—and possibly highly misleading ones. They betray the extent of our ignorance of the history of those orders and at the same time suggest that it is of no real importance. Nevertheless, history is the proper way to understand orders in the human world because they are the results of human actions even if in their present shape they hardly ever conform to anybody's—let alone everybody's—designs, preferences or wishes. References to growth or evolution merely obfuscate the fact that those orders essentially are historical, not natural or evolutionary phenomena. It is easy to see the ghost of Darwin in any process of change, but it is not always wise to believe in ghosts.

A reference to simple but durable artificial orders may clarify this point. A building is an artificial order of things in the human world. It does not grow old. Nevertheless an old building usually no longer resembles the building it was originally designed to be. It has the marks of wear and tear, having been exposed for a long time to the natural elements, occasional disasters, and the actions of successive owners, occupants, invaders or passers-by, all of whom may have made more or less significant changes to it to adapt it to their personal conditions, purposes, or whims. No generation has left it in exactly the same condition as the one in which it found it. It may not be possible to write its exact history, but in any case it would be nonsense to say that the building has grown to be or has evolved into what it is now.

To talk about the evolution of the motorcar is hardly more illuminating than to talk about its growth, unless its evolution is presented as an abstract summary of a part of a history of human transportation. In any case, it is the history that is illuminating. It links the development and use of motorcars to human judgement, ingenuity, endeavours, opportunities, capabilities, and the appreciation of the costs and benefits of particular types of motorcar relative to other types and alternative means of transportation. The history is about trials and errors, successes and failures. An evolutionary tale tells the same story without mentioning the human factor otherwise than as an environmental background condition to which one type of car happened to be better adjusted than another.

A building or a motorcar exemplifies a particular type of artificial order, but the foregoing remarks apply as well to social orders. There is a risk of confusion in discussing these as instances of growth or evolution rather than the vicissitudes of history. To say, with Hayek (quoting Ferguson), that they are the results of human action but not of human design is fine as far as it goes—but then, how far does it go? An old building largely is the result of human action but its present shape most likely does not answer to anybody's design. The outcome of a football match or the ranking of the teams at the end of the season are also results of human action but not of human design (unless the game or the competition was 'fixed'). The final text of a bill of law is what 'survives' a long process of amendment and haggling in informal negotiations, formal committees and plenary sessions. Arguably, none of those things is what we think of as having 'grown' or 'evolved'. The same is true for far more interesting orders such as languages, monetary units, systems of measurement and payment, conflict resolution, disposing of a dead person's goods, assigning social position and rank, responsibility and liability, reward and punishment, and so on, as well as for the complex social or cultural orders of which all of the former are merely parts or aspects. The key to understanding those orders is that they do not exist apart from what humans do and say. They have a history. If one nevertheless wants to speak of their evolution, one should think of it perhaps more along the lines of the 'evolution' (a succession of small, possibly cumulative changes) of one's handwriting or signature, or a tale that gets embellished or adapted in each retelling of it, than of 'evolution' in any Darwinian sense of the word.

From any individual's point of view, most orders in the human world are *traditional* orders, created by others and then handed over or left to people in succeeding generations as parts of their world to do with them as they think best. Because they establish a continuous connection or bond between past and present, unknown origin and unknown destiny, those traditional orders of human things are central elements of religious experience. In a sense, they are God-given—taking 'God' to be the collective name of those still significant but now unknown and unknowable others that brought order to our part of the world before we were born.

The natural order of the human world too is a central element of religious experience because it is but one part or aspect of the

universe of all things that are what they are, regardless of what we do, say or think. Like those other natural things but unlike traditional orders, it was not created or initiated by any human being, known or unknown. It is the creation of no man and as such it is God-given—taking 'God' now in the absolute sense of the biblical axiom that God is no man and no man is God. Neither the human species nor the human world nor the universe in which these exist is Man's (any man's) creation and nothing any man can do can change that fact. Thus, while it is coeval with the appearance of the species, the natural law of the human world is God-given, not man-made. It is not like the traditional laws of human things, which are local and historical orders in the human world, created or initiated by some and then perceived as 'given' (though not necessarily unalterably given) by those who come later into the world. It most certainly is not like the so-called positive laws, which are commands or rules given by those in superior positions, which those in inferior positions have to obey.

These so-called positive laws may prescribe respect for traditional orders or respect for the natural order but there is no guarantee that they will do so. They may just as well be attempts to create a new order, to eradicate a set of traditions, or even to start a revolt against nature by ordering people to behave and act as if the natural discrimina of the human world were but so many delusions. There similarly is no guarantee that respect for a traditional order implies respect for the natural order. There is no guarantee of peace or harmony between the ancestral gods, who represent men whose names have been lost, and the universal god, who, not being a man, has no name. Whereas the former fill in the blank space of prehistory, the latter defines everything that man is. He represents the order that was before man and that made man possible.

Legal systems

Considered formally, a legal system consists of man-made rules, procedures, commands, instructions, directives, prescriptions, prohibitions, permissions, norms, standards and other things of that kind. Its normative meaning is that all the things—be they objects, persons or organisations—to which it applies should obey or follow its prescriptions and act in conformity with its rules and procedures in so far as these define their position within the system. Complex legal

systems in addition assign objects, persons or organisations to be 'organs' of the system and contain rules and procedures for performing 'organic' functions—for example, making, revising, implementing, applying or enforcing its rules and procedures, and deciding with respect to particular cases which rules apply and whether they were followed or not. Some people consider this organic feature to be a defining characteristic of a legal system. In their view, a legal system is an organic system of rules; what makes it organic is that it includes rules addressed to named organs of the system, which it authorises to modify the rules and to reorganise the system itself.

The formal concept of a legal system is applicable to many artificial things, for example a human organisation, a society or social order, a game, a machine or a process of production. To find out about a legal system we do not study nature, we consult its author or [experts who are familiar with] the appropriate legal sources, statutes, law books, rulebooks, or manuals. There we ideally get all the information we need to infer with respect to any action, operation or move whether it is legal or illegal; which consequences are legally attached to it; how we can undo, rectify or remedy illegal conditions; and what we have to do when an unforeseen event occurs. Users of computers and computer software should be familiar with warnings and instructions about such things as legal and illegal operations, the built-in consequences of hitting this key or clicking that icon, error codes, disk maintenance, undo, wipe and recovery functions, restarts, contacting helpdesks, and pulling the plug. Players and umpires of a particular game and members and officials of a particular society need to know functionally equivalent things about their game or society. Of course game rules and the legal systems of many societies usually are a lot less 'technical' and therefore simpler to understand than computer manuals. However, the legal systems of the modern Western states are so complex that it takes several years of formal schooling and training at university level to learn to master their basic operations and no more than a few of their specialised subdivisions. That complexity is one reason why legal positivists assume that only the legal systems of politically organised, in particular state-dominated societies are legal systems in the full or proper sense. It is not the only reason.

In the classical legal positivist's view a system of rules is not really a legal system, if among its organs there is no organisation that not only is designated but also has the effective capability to enforce its rules by political means, that is to say, by means of organised violence or the threat thereof. According to this conception a legal system comprises a material element (politically organised rule-enforcement) in addition to the formal element (a system of rules). This sort of enforcement is supposed not only to distinguish a legal system from other systems of rules but also to make it effective. However, the positivist's argument is not that a system of rules is a legal system if it is effective. Because of their extensive error-trapping capabilities and an almost complete set of built-in responses to violations of their rules of operation, modern computers often are far more effective in enforcing their rules of operation than any politically organised society is in enforcing its legal system. Modern computers come as near to being self-enforcing orders as any man-made thing can be. Nevertheless, because the computer does not have to resort to politically organised rule-enforcement legal positivists refuse to recognise its rules as legal rules 'in the full sense'.

The classical legal positivist's argument is about the inclusion in a legal system of rules for the use of politically organised violence, especially rules that grant legal monopolies and privileges concerning the use of such violence to designated organs of the system. Whether or not these organs are effective in enforcing the legal system's rules is relatively unimportant. Efficacy, in the classical legal positivist's conception, relates primarily to the capacity of the designated enforcement organs to suppress or eliminate the competition of other suppliers of politically organised violence. Thus, classical legal positivism used the concept of efficacy mainly in support of the claim that only the system of rules of a dominant politically organised society, especially a state or a treaty-based cartel of states, deserves to be called 'legal'. What makes a society a state is the fact that it has a rather effective 'monopoly of the means of organised violence' in a territorial domain. However, from a formal point of view, the mode or efficacy of enforcement is irrelevant. Lawyers would not lose interest in the legal system of their society if its enforcement became ineffective, although other people probably would lose interest in the legal services that those lawyers provide. Nor would the lawyers lose interest if the legal system of their society ceased to depend for its

rule-enforcement on organised violence or the threat thereof. Indeed, law schools even now pay little attention to the mode or the efficacy of enforcement. As far as enforcement is concerned, they focus their teaching efforts almost entirely on the rules that the enforcers legally are supposed to follow in enforcing the rules of the legal system. From a methodological point of view, the study of a system of rules is no different whether the system is enforced by means of politically organised violence or in other ways. It is no different whether it concerns an actually existing legal system, one that no longer exists, or even one that never did or will exist. Indeed, it is no different whether the rules define a social or political order or some rather complex game.

Classical legal positivism accordingly has been de-emphasised in favour of a merely formal legal positivism that takes a legal system to be a system of rules of conduct and organisation. However, formal legal positivism still pays tribute to its classical predecessor in that it continues to pretend that only the systems of rules of politically organised societies are worthy objects of legal studies. If the mode or efficacy of enforcement is no longer a part of the definition of the positivist's concept of a legal system, it still governs his application of that concept.

A legal system, or rather the implementation of it, certainly is a type of order of persons. Hence, there is no objection against calling it a type of law, for example by referring to a society's legal system as a system of 'positive law'. However, we should keep in mind that a legal system is an artificial not a natural type of order. Positive law is artificial law. We may think of a legal system or a system of positive law as an order of imaginary, artificial persons in the same way that a game of chess is an order of imaginary kings, queens and knights among others. A system of 'positive law' applies to the human world only to the extent that one needs human beings to represent, give life to or act the part of those imaginary persons. While there are legal systems that can be implemented wholly or in part in automated machines and processes, to this day most legal systems need real living representatives or actors. Without them, the artificial persons that these systems define are no more than empty forms—as the persons in the game of chess would be when nobody was playing the game any longer and nothing remained of it but dusty rulebooks. A

legal system is an order *by* and *for* [some] human persons; it is not an order *of* human persons.

In contrast, the natural law of the human world is a natural order, an order of admittedly highly complex natural things: human or natural persons that have a life of their own and are capable of representing themselves in speech and action.

Artificial persons

'Natural law' and 'natural persons' belong to an essentially different logical category than 'artificial law' and 'artificial persons'. There can be any number of artificial laws in the human world but only one natural law of that world. How we can determine what natural persons are and can do or what the conditions are under which their relations are in order rather than disorder, differs fundamentally from how we can determine those matters where artificial persons are concerned. To find out about natural persons, go live among them; to find out about citizens, consult a lawyer! Obvious as this may be, confusion about the categories of natural and of artificial persons is rife. I cannot remember how many times I have heard people go on about the rights of citizens against the state, as if there could be a citizen apart from the state. A natural person can have rights against the state; a citizen only has rights within the state and they are only legal rights defined by the legal order of the state.

Whereas natural law is an order of persons but is not a person itself, an artificial law can, but need not be, a person. For example, a game of chess is an order of artificial persons (Black, White), but the game itself is not a person at all. However, each one of Black and White is composed of other artificial persons: King, Queen, bishops, knights, rooks, and pawns. All of those persons are defined by the rules of the game, the legal system of the game of chess. They are legal persons that derive their legal personality from the rules of the game. The rules of chess tell us what those persons are and what they can, or cannot, do. The game itself is a legal order, a type of law. However, as the example makes clear, not every legal order is an artificial or a legal person. It even is a matter of dispute whether every order of artificial persons is a legal order.

Every social organisation or society is an artificial person, subdivided in various positions, roles and functions according to its

rules and regulations, whether they are written down in a rulebook or not. For example, like the game of chess the State is an artificial law, a legal order; unlike that game it is itself an artificial, indeed a legal, person. It has its Head of State, government ministers, judges, members of Parliament, commissioners, mayors, citizens, registered aliens, etcetera. All of those are no more than rule-defined personified positions, roles and functions of, or within, the legal order of the state. Again, what they are and can do depends on the rules of the game of that state, its 'positive laws' or legal rules. Another example is a business corporation with its CEO, members of the Board, financial manager, research co-ordinator, public relations officer, and so on. A business corporation is an artificial law. It is a legal order as well as a legal person according to its own legal rules. However, whether it has legal personality in a particular state depends on the legal order of that state.

An artificial law is defined by a logically arbitrary set of divisions and distinctions among the artificial persons that are its components. Those divisions and distinctions do not refer to or depend on the physical characteristics of material things or on the natural persons that actually play or fill the roles and positions specified by the rules of the game. Whether in a game of chess a 'King' has the same powers as a 'Queen' or not, depends exclusively on the rules of chess. It does not depend on the shape or the material of the pieces, or on such conditions as whether individual men or women, teams or computers play the game. Of course, an artificial law cannot work if the human beings or the machines that it needs for its implementation simply cannot do what the system supposes them to be able to do. However, this need not mean that the rules will be adapted to the environmental conditions of the system. It may mean that the system's organisers will invest in new machinery or in training or scouting programs to get better-adapted human personnel.

Artificial persons have no physical characteristics. They are not individuals. If the rules of the game that define them allow it, they can be differentiated and split up into any number of other persons or merged into one person. Not having any physical characteristics, they do not exist independently of a set of rules. There is no such thing as 'a citizen'; there are only Dutch citizens (defined by the legal rules of the Dutch state), Bulgarian citizens (defined by Bulgaria's legal system), and so on. Nor is there such a thing as 'a King'. It depends

on the appropriate rulebook whether a King cannot be captured, can trump any other card except an ace, dismiss the government or name his own successor. Sometimes, there may be confusion concerning the natural or artificial status of a person. As a person who makes a study of, say, physics or economics, one can be a student independently of any artificial law. However, at a university there are numerous rules that define what 'students' [of that university] are and what they can, and cannot, do. Every university expects those who come to occupy the position of a 'student' to behave themselves according to its rules for 'students'. However, not all students are 'students'—and vice versa.

In contrast, the natural law must be defined in terms of natural, real, objective divisions and distinctions. It is an order of natural persons, which must be identified as they are and for what they are. The physical and other characteristics that make something a natural person are all-important. Splitting a natural person only results in maiming or killing him—a natural person is indivisible; he literally is an individual. Merging two natural persons does not result in the appearance of one new person. If there are true statements about what natural persons are and can do then those truths must be discovered. Unlike true statements about artificial persons, they are not true by stipulation. The natural law is an objective condition that we can describe as it is.

Obviously, the rules of chess do not tell us anything about what those who play chess are or can do. Similarly, the legal rules of a state or a corporation do not tell us anything about the persons who occupy positions or perform functions or roles in its organisation. It usually is taken for granted that those persons are human beings, natural persons. However, that is by no means a logical necessity, as Caligula demonstrated when he made his horse a consul of Rome[4] and as modern states demonstrate when they authorise computers, cameras and radar-equipment to perform functions formerly assigned to human agents of the state. Modern corporations apparently have a great interest in getting rid of the human factor by substituting computers and robots for their human personnel. Thus, an artificial law affects people only to the extent that they assume the role of an

[4] The story, propagated by the Roman historians Suetonius and Dio Cassius, probably is based only on rumours. However, it wonderfully illustrates the point I am trying to make.

artificial person within its legal system. Except for the organisers, rulers or owners of a society, most people in it are no more than human resources to be managed together with other resources for 'the good of society' (as defined by the leadership).[5]

Law and obligation

Philosophically speaking, it is an open question, whether natural persons ought to respect the natural law. To answer that question requires serious thought. What a natural person can do does not translate into what he may do. What such a person ought to do does not translate into what he must do.

With respect to artificial persons, that question, whether they ought to obey the appropriate artificial law, does not even arise. They do not exist independently of the rules that specify what they are or what they can or cannot do. In chess, neither Black nor White, neither a King nor a pawn *can* cheat. When the question arises whether Black, or the Black King, ought to do this or that, then it is not as a question about his obligations under the law of chess. It is as a question about the best next move—and the answer to that question depends crucially on the goals or utility-functions that the rules of the game define for the various pieces. Obviously, people can cheat when they play chess, but even *as chess-players* they occasionally may change the predefined utility-functions of the game. That happens when granddad plays against his grandson and lets him win, or when a teacher deliberately makes a 'bad move' to test his pupil's ability to spot an opportunity. Then they are not engaging in 'serious play', but they are not cheating.

For Black and White, the rules of the game are mere descriptions of what they can or cannot do while pursuing their rule-defined goals. For chess-players, those rules translate immediately into normative

[5] This condition arguably is the seed of the much-discussed moral crisis or madness of Western society: too many people, acquiescing in the status of a human resource, have come to expect that it is the responsibility of society (that is to say of its career-making managerial elite) to lead their lives for them—and to do it better than they themselves would do. "To abandon one's mind – along with the control and responsibility for one's life that follows – is to collapse into madness." (Butler Shaffer, "The Madness of Emperor George", http://www.lewrockwell.com/shaffer/shaffer84.html, September 3, 2004)

formulas. 'King can' becomes 'when moving King, you may', 'knight cannot' becomes 'when moving knight, you may not'. Likewise, what a citizen of state X can or cannot do translates immediately into what a natural person may or may not do *as a citizen* of that state. Often such a person can stay clear of the law even tough he does not play his role seriously, but occasionally a judge or administrator will confront him with a predefined utility-function and subject him to sanctions for not being 'a good citizen'.

No serious thought is required to answer the question whether a natural person, considered as an actor in an artificial order, ought to respect its rules. It is true by definition that chess-players ought to respect the rules of chess. It is true by definition that as a citizen of a state one ought to obey its rules. It is a fallacy to jump to the conclusion that people ought to respect the rules of chess, a state or any other artificial order.

Is it a matter of definition that rulers ought to respect the international law? Some people say it is, because in their opinion international law is a legal order in which rulers act as states, which are artificial persons defined by the rules of international law. Some say that the analogy with the rules of chess is even stronger. For them, the rules of international law identify not only the parties (states, the analogues of Black and White) but also the composition of the parties (the constitutional order of a state, the analogues of Kings, Queens, rooks, knights, bishops and pawns). In their view, international law requires that states have, among other things, an elected Parliament, an independent judiciary, and universal suffrage, perhaps even a predefined utility-function, say, a commitment to human rights.

Others say that states exist independently of international law and that therefore international law must be derived from the characteristics of states. For them, it is an open question whether rulers ought to respect the international law. If it is part of the self-definition of a particular state that it owes no respect to other states, then obviously the rulers of that state have no legal obligation to respect international law. To avoid the conclusion that there is no international law, some commentators maintain that international law is an analogy of the natural law of persons. The idea is that all states are 'independent sovereign persons of the same kind', irrespective of their particular size or political characteristics. Thus, it is claimed that

they are analogous to human persons, who are all free persons of the same kind, irrespective of their particular physical, intellectual or moral characteristics. Then, on the assumption that human persons, regardless of their personal opinions, are under an obligation to respect natural law, it is argued that in an analogous way states are under an objective obligation to respect international law. Consequently, rulers (acting as states) ought to respect international law, no matter what the legal self-definition of their states may be.

To think of international law as a legal order, as legal positivists are wont to do, is to sacrifice the possibility of explaining its respectability otherwise than in terms of politically organised violence. People, including rulers of states, are under no obligation, even though others may forcibly oblige them, to play by the rules of any legal system. People are under no obligation to accept the rules of chess unless and then only for as long as they commit themselves to play chess. Similarly, rulers of states are not under an obligation to play 'international legal order' unless and for as long as they commit themselves to do so. And when they do so commit themselves then their obligation must have its ground outside the game they want to play: they are obligated by their commitment, not by any rule of the game that says it lays this obligation upon them. Legal positivism remains stuck in its own arid artificial world; it is not a theory of law in the real world and it has no way to explain how law can be obligatory.

Positivism and socialisation

The central methodological dogma of positivism in fields such as 'law' and 'economics' is that every order of persons is artificial. There are no natural orders, or if there are they are not suitable objects of scientific investigation. Consequently, persons can be admitted as objects of study only if they are disguised as artificial persons. In economics, positivism typically involves the personification of 'theoretical constructs' (for example, utility functions) constrained by the rules of a model or a simulation.[6] It fits the profile of a technology

[6] The analogy with the game of chess is close. After all, Black and White also are personified utility functions constrained by rules. However, chess players do not assume that they are only a few adjustments of the rules away from having a 'true model' of what happens in a real battle.

of want-satisfaction that characterises modern neo-classical and mainstream economics, but obviously is of little use for the study of the conditions of order and disorder of the real human world.

Legal positivism concentrates on the study of artificial 'positive' law while ignoring or denying that there is a natural law. Human beings, however, are involved only accidentally in 'positive law', namely as occupying one social position or another or as performing one social function or another: citizen, government minister, senator, voter, and the like. Ideally, they are fully socialised. Having internalised the rules that define it, they identify themselves completely with their position, role or function. As Rousseau put it in his classic *Du Contrat Social*, they then no longer can act according to their own natural particular will. Instead, they will act according to the society's general will, which is expressed in its statutes and other legal rules. In short, they must act as if they really were citizens—or rather, they must shed their natural humanity and actually *become* citizens. Unless that condition is satisfied, a state can never be lawful.[7] In plain language: a state never can be lawful in the real human world; to be lawful it must transform its own imaginary order into an effective psychological reality. (The whole history of compulsory 'public education' is encapsulated in that idea.)

However, if a human being is not fully socialised, he or she is a 'deviant' and needs to be 'corrected' or forced to comply with the general will. At the very least, 'incentives' must be administered to enhance compliance with the legal rules. Hence, the positivist's insistence on coercive sanctions and manipulative regulations to manage the recalcitrant human resources with which legal systems have to be put to work.

Legal positivism has no resources to comprehend relations in which people participate regardless of their social position or function in this, that, or indeed any legal or social order. It cannot recognise the natural order of human affairs, which is the primary object of study for natural law theorists. While legal positivism is deficient in that respect, it also is a bearer of an ideological program of socialisation

[7] Of course, in this age of 'internationalism' and 'supra-nationalism' the argument needs rephrasing. For example, the European Union cannot be lawful until every Frenchman, Englishman, Spaniard, Greek, Pole and so on really and truly identifies with his role as a European citizen (as it is scripted for him by the ruling organs of the Union).

('socialism') that seeks to control the human factor to immunise particular social orders and their artificial law from the incessant corruptive influences of human nature. As such, it is radically opposed to the endeavours of the natural law theorists, who are intent on humanising societies rather than on socialising human beings. Long dominant among adherents of the major traditions of Christianity and classical liberalism, the natural law theorists consistently have urged that societies, especially political societies, should respect the natural law no less than individuals. After all, societies are nothing more than organisations of human endeavour, ways in which people do things to one another in the pursuit of some alleged common purpose. If there is a respectable order of the human world then it is respectable for social or political organisers no less than for others.

Jurists and legal experts

We see that there is reason enough to distinguish between the concept of law and the concept of a legal system. Nevertheless, the influence of different strains of the political ideology of legal positivism is so pervasive that many people, including most lawyers, simply assume that human law is a legal system, or perhaps no more than a subsystem or a function of a legal system. Their conceptual error makes it impossible for them to consider that there may be a law or order of the human world independent of any legal system—an order with its own characteristic patterns of order (*natural laws*) that may be respectable because it *is* the natural order of the human world. They never get to the point of asking what we should do if we want to respect the natural law. Trying to discover rules or devising methods and procedures for doing that is not on their program. Thus, the essential art of the jurist, which is to devise *rules of law* in conformity with the natural order of the human world and its laws, is pushed into the background or abandoned altogether. It is replaced with the skill of the legalist. The latter's expertise consists mainly in guiding people through the complexities and opportunities of a particular legal order to allow them to reach their goals without running afoul of the order's authorities. No doubt, legalist skills are useful but so are the skills of a jurist. If the former get better pay than the latter then the probable reason is that legal systems legally permit

some people to gain what they could not gain if they had to respect the natural law. Those people have an incentive to invest in legal expertise and in efforts to change the rules of the system to their advantage—for legal systems are as changeable as the wind. So do the people whose lawful interests are threatened by the legal or legalised predations of others.

Before the advent of state-idolatry, of which legal positivism is but one expression,[8] jurists generally held that a society's legal system should consist in part of rules of natural law and should not contain any element that is logically incompatible with or effectively disruptive of the natural law. By dropping the natural law requirements and replacing them with the material element of politically organised rule-enforcement, positivism has spawned a conception of legal systems that lacks any finality. The rationale of a legal system no longer is to maintain, strengthen or restore respect for the natural law within the confines of a particular society. It is to maintain, strengthen or restore the social order of a society, that is to say, to make a society an effective tool for realising the goals set for it by its ruling parts—whatever those goals may be and whoever may set them. 'Law', as positivists define it, basically is a technology of social control.

Justice and legality

Law, then, is either natural or not. Natural law is an order of natural things; artificial law is an order of artificial things. The natural law of the human world is the order of natural persons. There is no artificial law of the human world, even though there are many artificial orders in the world. An artificial law is a legal order, an order of artificial persons. Such persons are in some respects analogous to a natural person. However, an artificial person, for example a King in chess or a Belgian citizen, is not a thing of the same sort as a natural person.

[8] Nowadays, positivists tend to deny that they have anything to do with state-idolatry. Sometimes they invoke the maxim 'Criticise freely; obey punctually' to sum up what they want lawyers and other legal professionals as well as citizens to do. Of course, there is no small problem for them if there is a legal rule that forbids free criticism, or a rule that stipulates what is open to criticism and what is not, or who is licensed to criticise what. It is a safe bet that when push comes to shove, positivism reduces to 'obey punctually.'

Nothing but confusion will result from a failure to distinguish properly between questions of legality and questions of lawfulness.

Questions of legality or illegality only arise in connection with things that are governed by artificial or man-made rules, for example a move in a game, an instruction in a computer program, or an act or procedure in one or another society. Except when we use them in certain artificial settings (games, experiments, production processes), it is pointless to distinguish between the legal and the illegal behaviours of a brick, a petunia, or a horse.

With respect to human behaviour, questions of legality and illegality also arise only in artificial settings defined by man-made rules. Whether it is legal or illegal to kill an innocent passer-by in a particular society depends on whether its legal system has a rule that makes it legal or one that makes it illegal. Moreover, from the fact that it is legal to do something in one society we cannot infer that it is legal in all societies or even in any other society. From the fact that something is legal in a particular society at a given moment in time we cannot infer that it always was and always will be legal in that society.

Questions of lawfulness and unlawfulness are independent of legal rules. To kill an innocent passer-by is unlawful, regardless of what any legal system may say. It is unlawful because it upsets the order of the human world, the order of natural persons; it creates disorder in the world. Moreover, it is unlawful not just at a particular place or time but at any time and place in the human world. The distinction between lawful and unlawful things within an order of natural being is absolute, objective and universal. In contrast, the distinction between legal and illegal things is internal to a legal system: it is relative, subjective and local. It is different in different legal systems, even systems of the same type; it depends on what some people prefer to make legal or illegal; and it is practically significant only in legal orders, which are implementations one particular legal system or another.

The difference between natural law and artificial law is reflected in two types of lawlessness (disorder, confusion, conflict) and in corresponding notions of justice. A breakdown of artificial law typically manifests itself when people fail to play by its rules. Perhaps they refuse to do so. Perhaps the rules are such a mess that it is hardly feasible to follow them even if one wants to do so. Justice, in the setting of an artificial law, is the attempt to ensure compliance with its

rules, whatever they are. That function often is assigned to a specialised subdivision or department of the legal order, for example an error-trapping piece of computer code, a Disciplinary Committee or the Department of Justice under the direction of a Minister of Justice.

A breakdown of natural law manifests itself when people do not heed the real distinctions between persons and other things and between one person and another that define the natural law. The words, actions or property of one person are ascribed to another and action is based on the ascription rather than the reality. One person is blamed for, or credited with, what another said or did. The guilty and the innocent, the producers and the parasites, the debtors and the creditors, the malefactors and the victims—they all get confused with one another. Accordingly, justice, in the setting of natural law, is the attempt to instil respect for the real distinctions among persons and between persons and other things.

II. WORDS AND CONCEPTS

1. The Lawful and The Legal

Whatever the natural law of the human world may be, it is not a legal system. It appears that we must get away from the prevailing conception of law as a legal system, if we want to study and discuss the natural law of the human world. We have to get rid of those elements that properly belong only to the sphere of legal phenomena and not to the sphere of lawful phenomena. In short, to get a pure concept of law we have to separate the legal from the lawful, legality from lawfulness.

Terminologically at least this separation should be fairly easy in English. Indeed, the English word 'law' is not etymologically related to the Latin 'lex', which survives in English words such as 'legal', 'legality', 'legitimate', 'legislate' and 'legalise' and also in the French 'loi' and 'légal', the Italian 'legge' and the Spanish 'ley'. One way to effect the separation of the lawful from the legal is to look at the language of law, particularly from an etymological perspective. It will pay to do so to see whether the language of law in so far as it relates to order in the human world is tied wholly or unequivocally to the concept of a legal system or whether it reveals other concepts, in particular of course the concept of a natural law.

Etymology

Etymology, in its classical sense, is the study of the reality (*etymon*) behind the words; the study of the way language reflects objective differences in the real world. It is the attempt to pierce the veil of current linguistic usage and to uncover the real differences in the things themselves or in their significance for human needs and aspirations. It does this by reconstructing as far as possible the history of a word, not only of its spoken and written forms in one or several languages but also of its uses and meanings in various ages and contexts. The guiding idea is that language developed in primitive conditions of human existence and served primarily to assist people in identifying things, actions and conditions that were essential to

their survival. It is recognised that, as time goes by, words acquire new uses and meanings in being applied to new situations or to more or less abstract notions on the basis of genuine or spurious analogies, by mistake or for particular reasons of, say, propaganda, indoctrination, ideology, or etiquette. Of course, words may lose some of the meanings they once had or even fall into disuse, although traces of them may survive in idiomatic expressions or as parts of compound words.

Why and how such changes in meaning or use occur are interesting questions but they are not directly relevant for our purpose. What is important is the fact that they do not necessarily reflect changes in the reality to which language refers. Thus, it is conceivable that we lose sight of real distinctions for no other reason than that our language no longer clearly recognises them. The risk is real in a context such as the modern Western world, in which fairly uniform formal schooling and book learning, especially textbook learning, are principal sources of information about the world. They emphasise the ability to reproduce set formulas rather than the ability to discriminate among real things as the decisive mark of knowledge and learning. Moreover, requirements of efficiency are likely to push a large educational system towards uniformity and standardisation in producing large numbers of people who have no other knowledge of many aspects of the world they live in than the formulas and phrases they have learned to master in school. Because many of those people will end up working in the same educational system or in the mass media, such formulas and phrases are likely to have a large and durable impact on public opinion and on the sorts of arguments that are readily accepted in public discourse. They may come to define what passes for common sense.

To a more or less significant extent, one's language determines one's worldview. Real differences and distinctions will be recognised more easily if the language one has learned to use draws attention to them. For example, if with respect to human affairs current language-use treats 'lawful' and 'legal' as full or near-synonyms then we lack words to distinguish clearly between legal and lawful phenomena and may come to believe that there is no distinction to be made. It is useful, then, to consider the etymology of these words to discover whether they always and everywhere were synonyms or whether they once used to have different meanings. If the latter turns out to be the

case then we may wonder whether one of those words simply took over the other's meaning, losing its original (or previous) meaning, and also whether the meaning it lost is now adequately affixed to another word or is no longer available except by means of cumbersome circumlocutions, technical definitions or unfamiliar qualifications. The point of an etymological investigation obviously is not to determine 'the true meaning' of a word but to look for traces of concepts that current language-use may have obscured. To the extent that etymology reveals different concepts, it immediately provides a handy terminological tool for referring to them without getting stuck in the ambiguities and confusions of contemporary linguistic usage.

As we shall see, the etymologies of 'lawful' and 'legal' point to radically different aspects of reality: the lawful (what conforms to law) and the legal (what conforms to a body of legal rules) are distinct concepts of categorically different sorts of human interaction.

Law and lex

Etymologically, words such as 'legal', 'legality', 'legitimate', 'loi', 'legge', and 'ley' are related to the Latin 'lex' (plural 'leges'), which derives from 'lectus', a form of the verb 'legere' (to pick [up], to choose, to collect or assemble, even to steal, and to read[9]). 'Lex' is related to 'dilectus'[10] (the action of picking or choosing men to form an army or a legion—Latin *legio*). Its original meaning is a solemn proclamation of a state of war, a call to arms or more generally a summons. In old and medieval English the term corresponding most closely to 'lex' is 'ban', which also means a summons, a solemn proclamation or a curse. Logically, 'lex' and 'ban' presuppose a vertical relationship within an organisation between at least two persons, one occupying an active, commanding or ruling position that entitles its occupant to give orders and to be obeyed, and the other

[9] Reading a text is picking up or collecting the meaning in it. Intelligence (from 'inter-legere') is the ability to read between the lines, to pick up not just the meanings that are made explicit in a text but also those that are merely implied or suggested.

[10] The Dutch word 'lichting' probably derives from 'dilectus'. It has the same meaning: either *the act of raising troops*, or *the troops that have been raised by some particular act*.

occupying a passive, subordinate position that obliges its occupant to obedience. Strictly speaking, we should say that 'lex' presupposes a relationship between positions in an organisation rather than between natural persons. It presupposes, say, the relationship between the general and the private soldier, not between Mr X, who happens to be the general, and Mr. Y, who happens to be a private soldier in the same army. In a sense, of course, the general and the private are persons, namely artificial persons: positions, roles or functions defined by army regulations and the legal order of the military organisation.

A lex, in the original sense of the word, implies that the people to whom it is addressed no longer are at liberty to continue the normal activities of daily life but instead are obliged to put themselves at the service and command of the legislator, who issues the lex. Those among them that do not heed the summons are declared, at least implicitly, enemies or traitors, and cursed to suffer the same fate as the enemies against whom the call to arms is directed. 'Lex', therefore, has an unmistakable military connotation. It refers to an organisation involving a hierarchy of commanding or ruling and subordinate positions, using armed force and coercion in mobilising people in the pursuit of particular ends. Even if the end is not the waging of war, a lex is a command or rule within an organisation that implies or at least connotes loss of liberty or freedom. Thus, for the Romans, a *lex* was a decision of the highest public authorities (in particular the *comitia*) that willy-nilly binds their subjects.

We shall use the term 'lex-relation' to refer to relations of this type. 'Legal order' will be used to refer to a connected set or system of such relations, for example if both A and B are at the command of C or if A is at the command of B and B at the command of C. Clearly, there is nothing natural about lex-relationships or legal orders. If there is a natural law, it is not a lex. The expression 'lex naturalis' has no literal sense.

In modern English 'law' would be a proper translation of 'lex'. However, that translation gives 'law' a different focus than its etymology suggests. The etymological root of 'law' is the old-English

'lagu', which is of Scandinavian origin: 'lög', 'lag',[11] meaning the layout, order or due place of things. 'Law', in short, means order. It may refer to a legal order or indeed to any other type of non-natural, artificial order but its primary meaning is the necessary or natural order of things, the conditions that must prevail if they are to exist and function. Thus, when Montesquieu defined 'les lois' (the laws) as 'les rapports nécessaires des choses' (the necessary relations of things), he obviously was thinking of the law in this sense, not in the sense of a legal order, let alone a legal rule.

If 'law' means order then law is the opposite of disorder, chaos, confusion. Etymologically related to 'law' (lag) is 'orlaeg', an old-English word of Germanic origin meaning fate, the inevitable decay or dissolution of order. 'Orlaeg' corresponds to the Dutch 'oorlog', which now means war or violent conflict. The English 'war' also is a word of Germanic origin (Frankish 'werra', German 'Wirre', Dutch 'war' and 'wirwar') meaning disorder, disturbance, trouble, confusion. The related French word 'guerre' also means war. Thus, with respect to the human world, 'law' connotes peace and friendly relations, the absence of war, conflict and confusion. This puts it in stark contrast with 'lex', which connotes loss of liberty, coercion and even mobilisation for war, as we have seen.

In Dutch, the word 'wet' is used to translate the Latin 'lex' but its etymology, like that of 'law', reveals a concept that has nothing to do with the action of *legere*. 'Wet' is derived from 'weten' (to know) and refers to what is known. This etymology semantically links the Dutch 'wet' to the English 'law', because only order can be an object of knowledge; disorder implies loss of information and entails a diminishment of our ability to know. According to the Dutch etymology, laws of nature ('natuurwetten') are known patterns of order in nature. Law (natural order) is knowable regardless of whether it has been made known or not. As for a legal rule, a legal or any other artificial order, only those who have made or organised it or have been told what it is can know it.[12] A lex cannot be known—and, some would say, does not exist—until it is made known. Moreover, except for those relatively few people to whom a lex applies or who

[11] The Swedish equivalent of 'law' is still 'lag'. Cf. Dutch 'leggen', German 'legen', *to lay*.

[12] That is why archaeologists often indulge in speculations about the meaning or use of some 'cultural artefact'.

are likely to be victimised by what those who obey the lex might to do them, most people have no interest whatsoever in knowing it. Indeed, many people readily admit that they have little knowledge of the legal system of their own society, let alone of the legal systems of other societies, but that does not mean that they are a loss about how to behave when they meet other people in course of the ordinary business of life.

Unless otherwise indicated by a suitable adjective ('positive', 'artificial'), the words 'law' and 'laws' will be used in what follows to refer to a natural order, in particular the natural order of the human world. The words 'lex' and 'leges' will be used to refer to an artificial order, in particular the legal order of a politically organised society.

Right and ius

'Law' not only serves to translate the Latin 'lex'; it also serves to translate words such as 'Recht' (German, Dutch), 'rätt' (Scandinavian), 'droit' (French), 'diritto' (Italian) and 'derecho' (Spanish), which correspond etymologically to the English 'right'. The word 'right' is nowadays understood mainly as referring to elements in a real or ideal legal system. Not surprisingly, it has acquired excessively normative overtones: a right is what the legal rules say, or ought to say, that a person, animal, plant, or whatever, should be given or allowed to have or do. It has lost virtually all of its descriptive content.[13] Nevertheless, it is an indispensable word. In its original meaning it points to a very basic aspect of human life. It reminds us of the Latin 'rectus' and 'directus', forms of the verbs 'regere' and 'dirigere', to make straight, or erect, and by extension of meaning: to measure, regulate, rule, control, direct, manage, govern. The one who does the straightening, erecting, measuring, ruling or governing, is the *regens*[14] or *rex* (usually but misleadingly translated as 'king'[15]) or the *rector* or *director* and that which is under his control is his

13 Cf. Lomasky-1987, Chapter One: "The Use and Abuse of Basic Rights".

14 Cf. regent, (French 'régent'); also French 'dirigent' (conductor, leader).

15 The word 'king' originally denotes the descendant of a noble family ('kin') of ancient lineage, and in particular the descendant of the first family, the one that traces its origin to the beginning of the world. Thus, the king, by providing a link with the first age, is a symbol of tradition and justice: the one who knows and safeguards the original order of things. Eventually, however, the concepts

rectum or *regnum*—it is his right. Whether it is a respectable right, one that others ought to respect, is an entirely different matter that need not concern us here.

The word 'right', shorn of the current overgrowth of legal and normative meanings evokes the drama of the struggle against an indifferent, often inhospitable or even hostile environment. The farmer has to clear his land of rocks, bushes, and weeds; he has to control the flow of water over it and protect it against pests and animal and human predators. Building a dwelling and making tools require the art of transforming raw materials to make them suitable for various uses. The herdsman has to master the art of controlling his herd and also of protecting it against predators and thieves. A rider has to master the art of controlling his mount, as a driver must learn to be in control of his car or train and a pilot of his aeroplane or boat. Parents have to control the behaviour of their children while these have not yet reached the age at which they may be supposed to have sufficient self-control. Clearly, the action of *regere* often connotes the production, creation, improvement or growth of things. That is why *regere* is often associated with having authority (Latin 'auctoritas', the quality of being an *auctor* or author). 'Auctoritas' derives from the verb 'augere', which means to grow [something], and also to improve, augment, produce, make, create, or found. However, not all instances of *regere* are as benign as the foregoing examples suggest. Tyrants, dictators and rulers have to keep their victims or subjects in check just as slaveholders must control their slaves. Their fashion of *regere* does not connote the production, creation, improvement or growth of things. Nevertheless, smart rulers of men are always keen to propagate the idea that if it were not for their rule their subjects would be in far worse condition. In that way they are staking a claim to rule by authority rather than mere force or cunning.

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of *king* and *rex* fused. Under the influence of chiliastic or millenarian expectations, the accession to the throne of a king came to be seen as the beginning of a new and glorious age (the millennium). Thenceforth, the king became a symbol of radical change, a maker of a new, hitherto unknown order of things, establishing a new rule. In short, the king became a ruler: a legislator rather than a mere judge, a governor or manager rather than a mere caretaker. The idea survives in modern politics in the electoral rhetoric of 'change' and newness: New Deal, New Frontier, New World Order, and the like.

In any case, 'right' conjures up an image of the use of technical skill, force and occasionally violent activity, of using physical power, manipulating things and subjugating people. In that sense at least, might is or gives right. Although we are concerned here with the rights of human beings, we note in passing that also animals may have rights in this sense.

Obviously, legal relationships may be relevant here in as much as legal rules, commands and procedures are means of controlling and directing other people. However, legal relationships always involve persons, both in the ruling and in the subordinate positions, in an organisational setting. This is not the case with relationships established by the action of *regere* or *dirigere*, which imply exercising power over things in general. The controller or ruler is a person but what he controls may be any thing: an object, a piece of land, a plant or a beast, a human being, a tool or a machine. The general form of control in what we shall call the 'rex-relation' is of a physical nature: control by physical force, physical or psychophysical conditioning and technical skill.

Clearly, unlike the lex-relation, the rex-relation does not presuppose an organisational setting in which a hierarchy of positions is defined. Nevertheless, the lex-relation may be an internalised or institutionalised form of the rex-relation between persons. This is the case when the power to control comes to be seen as affixed to a superior social position and the commands and rules given by the occupant of that position are regularly, habitually or customarily obeyed by those who have come to define themselves in terms of the subordinate position they occupy in the same society. The conqueror rules the vanquished as a rex; his heir or successor rules their children as a legislator because both he and they have come to see themselves as born to a social status in what is now their common native society. Even so it often will be necessary to use physical or armed force to enforce the rules and commands, or to rely on more or less sophisticated techniques of human resources management to indoctrinate the ruled or to trick or cajole them into compliance and obedience. However, legal orders need not be rex-based. They may be ius-based (see below), that is to say founded and maintained by mutual commitment, agreement or recognition of voluntary undertaken mutual obligations.

Given this etymology of 'right', we easily can make sense not only of the expression 'might is right' but also of the expression 'natural right'. It refers to what is naturally or by nature under one's control or within one's powers. For example, a large class of the movements and states of my body and its limbs directly are under my control. So is focussing my mind on solving a particular problem. It may be impossible to intend not to think *of* a blue bear without thinking of a blue bear; it is easy to intend not to think *about* a blue bear and to do as intended. Thinking of something is just a mental event that one may not be able to control; thinking about something requires asking questions and considering ways to answer them—and these are activities that one can control.

Many things I can do only by doing other things, but some things I can do immediately, without first having to do something else. I can make my arm rise by just raising it, utter a word simply by saying it. Others can make me raise my arm or make me utter particular words, but they'll have to do something else to make me do so; they cannot do it simply by raising my arm or saying my words. One person's repertoire of such basic actions may be more or less extensive than another's—can you wiggle your ears?—but we should not call something 'a natural person' if it lacked the capacity to perform at least some basic actions. We can distinguish the natural rights of a person (the things that are naturally under his control) from rights that he acquired, say, by bringing things under his control or by other persons transferring their control of things to him. Consequently, if there are natural persons then there are natural rights of persons. If persons have natural rights then actions can be classified either as interfering or as not interfering with another person's natural rights. If there is a natural order or law of persons then natural rights are central aspects of it. Again, we leave aside here the question whether natural rights are respectable rights. We only note that if the natural law is a respectable order of persons then the natural rights of persons are respectable also.

We may well ask how the essentially physical denotations of the concept of right-as-might can be connected with justice, which is not a physical concept. As we now use the word 'right' and its equivalents in other languages (for example, 'recht', 'rätt', 'droit', 'diritto'), the original meaning has vanished almost completely. The focus has

shifted to the concept corresponding to the Latin 'ius' (plural 'iura'), which obviously is related to justice. The Latin 'iustitia' means what corresponds to ius, in particular an act, practice, virtue or skill that makes, strengthens, or restores ius.

The Latin 'ius' derives from 'iurare', to swear,[16] to speak in a manner that reveals commitment and obligation. A *ius*, then, originates in solemn speech (ratio, logos), which is different from merely uttering words, babbling or having a conversation. It may be fun or heart-warming, but there is no logical sense in speaking to a dog, a wall, the wind, or even to a human being that lacks the capacities of reason and logic. Nor is there much sense in speaking to one who will not take one's own rational capacities into account. A ius is the outcome of an interaction in speech, a meeting of minds, a dialogue, argumentation or negotiation, to which the participating persons commit themselves by speaking as they do. They reveal their commitments with respect to the issues under discussion. Agreements, covenants or contracts are particularly important types of iura because they represent a mutual or joint commitment with respect to the same object. However, an interaction in speech may reveal commitments (iura) even if it does not result in a formal agreement.

By speaking to another, and waiting for his answer, by committing oneself towards him and waiting for him to commit himself, one treats him as a person of the same kind as one is oneself. Assuredly, the ius-relation does not exist between a person and the things under his control, even if they are human. Although use of language and pretending to speak may be means of exercising control (even over a machine, for example a computer equipped with devices and software for voice-recognition), genuinely speaking to another is not a means of making him do things. Thus, the ius-relation is not like the rex-relation. It is not a physical bond (or yoke[17]) that serves to control or govern another as if he were an animal to be tamed and steered. Instead it denotes a bond that is moral (in view of the action of committing oneself) as well as rational or logical (in view of the way that commitment is expressed). The common idea of a bond links the

16 "To swear' (Dutch: 'zweren') comes from the old German 'swerren', which means "to speak to another, expecting him to *an-swer*, i.e. to speak in turn".

17 From the Latin 'iugum', which is related to 'iungere', *to connect physically or by physical means*.

notions of ius and right-as-might,[18] but the different natures of the bonds, logical in the one case, physical in the other, are too obvious to ignore. Ius, in short, stands in stark contrast to right-as-might. One can meaningfully discuss animals as having rights (in the sense of being in control of some things), but not as having rights that originate in their moral, rational or logical capacities.

Even if we disregard the aspect of physical force and violence in the practice of ruling (*regnum*), we should not overlook the difference between speech by which one obligates oneself (swearing, promising) and using language to oblige others (commanding). Like the lex-relation, the ius-relation involves persons but, unlike it, it does so directly as real persons 'in their own right' (in full control of themselves). It does not involve them as occupants of this or that organisational position, whose words and actions in an obvious sense belong to the position and not to them personally. As a commander or ruler one gives orders to or lays down the rules for one's underlings; one does not engage them in a dialogue, leaving them free to accept or reject what one says to them and to commit themselves accordingly. In contrast to the lex-relation, which implies a hierarchy of positions and therefore a vertical dimension, the ius-relation is reciprocal and implies a horizontal order of persons of the same natural rational kind. Thus, the ius-relation also is different from the lex-relation.

The Latin 'ius' stands in opposition to 'iniuria' (plural 'iniuriae'), the general term for typically warlike and fraudulent actions: insults, wilfully inflicted injuries, embezzlements, taking and damaging property, kidnappings, false accusations, libels, and the like. Such acts are incompatible with the conditions of the ius-relation. That is obvious when we consider a simple situation. On an island with only two inhabitants there is no law, if they regularly or wilfully engage in actions that are injurious to the other. In larger settings, such actions continue to produce their disorderly and destructive effects, although these may not be so immediately obvious or threatening when they leave a large number of interactions in a lawful condition.

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[18] This link may have been exploited at an early stage by rulers to dignify their rule over their likes. It may also have played a role in the choice of using 'right' as the translation of 'ius'.

As we have seen, law implies the absence of war and warlike actions that create disorder or confusion by treating persons as mere things or one person as if he were somebody else. Law implies the absence of *iniuriae*. Thus, 'law' and 'ius' obviously are related semantically. Indeed, 'law' may be a proper translation of the Latin 'ius' (in the singular form) because the latter word also referred to an order of human relations, either the order of ius-relations or the legal order of a particular society. For example, for the Romans 'ius' denoted not only a particular bond between two persons but also the entire ius-based order of human relationships. Thus, the Romans used the expressions 'ius naturale' and 'ius gentium' to refer to the law or order of the human world, involving natural persons regardless of their social affiliation or legal position (if any) in this, that or any particular society. To refer to the legal order of a particular society they used the term 'ius civile', especially of course the legal order of the Roman Republic and later also the legal order of the Roman Empire. However, in this usage, 'ius civile' no longer referred to the ius- or speech-based order of human interaction; it stood for the legal order of relations among citizens in their private capacity (ius privatum) or in their public or official capacities (ius publicum).[19]

Extra-legal orders and natural law

The language of law and rights certainly is ambiguous and confusing (and not only in English) but, as we have seen, it is possible to begin to sort things out by means of etymology. We found that there are three different types of action that are particularly relevant for understanding that language: *legere*, *regere*, and *iurare*—commanding subordinates, physically controlling things, and speaking to another rational being. Thus, we see that 'right' (from 'regere') is at bottom not a moral or normative but a descriptive, indeed often physical notion. It refers to what is under the effective control of a person,

[19] 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 qvis ivs non esset rogarier, evs ea lege nihilvm rogatvm.' M.T.Cicero, *Pro Caecina* §95. The quotation can be found at www.TheLatinLibrary.com under Cicero > Orationes > Pro Caecina (March 27, 2002).

what he masters by skill, force or violence, or manipulates at will.[20] '*Lex*' (from 'legere') applies when a number of people are within the right of some other, who can set them to work by a single call or command. '*Ius*' (from 'iurare') indicates a rational or moral bond, a commitment or agreement that originates in solemn speech.

Perhaps the positivistic current in thinking about law harks back to the original idea of right-as-might, and to its application in the form of *leges* to human subjects. This would explain its fascination with the phenomena of power and its almost total neglect of questions of *ius* and *iustitia*. However that may be, it should be clear by now that this neglect is not a minor omission: as far as the human world and interactions among human persons are concerned, *iurare* is a universal and far more characteristically human sort of activity than either *legere* or *regere*. Consequently, if we want to know about the natural law the human world then it is to the ius-relations among human persons that we should turn our attention.

We note that legal orders are, in a sense, epiphenomenal: they presuppose an organisational setting which wholly or in parts may be ius- or rex-based, founded and maintained by mutual commitment, by unilateral force and control, or by a combination of these factors. In contrast, ius-based and rex-based orders can exist independently of any legal order. In that sense, they are pre- or extra-legal orders, in any case non-legal orders. Because of this, people who view law primarily as a legal order tend to be confused about the meaning of 'natural law'. If they do not remove their confusion by a sleight-of-hand, defining the natural law as a legal order established by a personified non-human or suprahuman legislative authority (God, Nature, Reason, History), then they can only make sense of it as a non-legal order—but which one?

One line of thought, excising the rational or logical aspects of human nature, leads to the interpretation of the natural law as an order of force akin to orders of other natural but non-rational things. On this view, the natural order of the human world is constituted by rex-relations, which can also be found in the animal world.

Another line of thought interprets the natural order of the human world as the order of human persons as they are, complete with their

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[20] The Romans did not consider this relationship as a *ius*, but as *dominium* (literally: *mastery*). Cf. Tuck-1979, Chapter I.

faculties of reason and logic. This is the traditional view of the natural law as a ius-based order of rational beings.

Philosophically, of course, only the latter interpretation is acceptable. For some purposes such as studying the effect of gravitation on the human body or the properties of blood cells it is intellectually legitimate to regard human persons as mere material bodies or animals, abstracting from their rational faculties but not assuming that those faculties do not exist. It is not legitimate to assume that only human beings without those faculties are natural or that those faculties are not natural merely because they are not found to any significant extent in non-human natural things. We do not say that only non-flying birds are natural because the faculty of flight is not common among natural things other than birds. It is one thing to study animals in the wild, say, the great apes, if one wants to speculate about how human beings would live if they never had developed the capacities for speech, reason or logic. It is another thing to say that now that human beings have those capacities they are no longer part of nature.

Property and authority

The conception of property as the product of one's work within the bounds of justice is familiar to all students of political thought. It corresponds to Locke's assertion that the property of an object originally belongs to its maker.[21] Thus, the original title of property is *auctoritas* in the sense discussed earlier. The link between property and *auctoritas* is straightforward: what the *auctor* produces is, in an obvious sense, his - it is by him or of him. This makes him solely responsible, answerable and liable for it, for what one produces cannot answer for itself; having no independent status in law, it cannot be held liable.[22] In this sense, the *auctor* guarantees what he produces.[23]

We are inclined nowadays to view authority as primarily a direct vertical political relationship between one person who wields

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[21] Locke-1690, II.6: "For Men being all the Workmanship of one Omnipotent, and infinitely wise Maker ... they are his Property, whose Workmanship they are...", and also chapter V, "Of Property".

[22] This is true even in the case of small children - the only case where *auctoritas* applies directly to human beings.

[23] In Roman law, the *auctor* acted as bail or surety.

authority and another who is subject to it. However, in its original sense authority exists between a person and his work, regardless of any legal or institutional framework. In that sense, its proper place is in the rex-relation as defined earlier, at least in those forms of it that are constituted by *augere* rather than any other type of *regere*. 'Authority' applies to an interpersonal relationship only indirectly or metaphorically. For example, one person who uses the property of another should concede the latter's authority over it; a legal superior has authority over an underling in the sense that the latter's productive activities are ascribed to the former—as being the superior's but not the underling's work. A important borderline case of *augere* is rearing small children (would-be persons) to be persons in their own right. That is where we find parental authority, responsibility and liability.

Having authority is often confused with having a power to issue commands or to make decisions that are binding on others, apart from property relations. For example, in Dutch 'authority' is often translated as 'gezag' or 'zeggenschap' (from 'zeggen', to say). Their literal meaning is the right or power to have a say, to influence or make a decision, such as it belongs to a ship's captain, a commander, or the leader or governing body of a society or organisation. Note that these words properly apply only to a relationship between persons, in particular artificial persons within a legal order. Having authority, in this sense, means having command or at least having a say over others. It is to be found in lex-relations, where it denotes a legal attribute of the superior position.

Ironically, to say in Dutch or German that something belongs to or is the property of a person one should say that it *listens* to him, or that it *obeys* him.[24] In these translations, the original idea of *auctoritas* is lost and replaced by the idea of a relationship between master and subject. In this respect, they remind us of the extravagant conception of property proposed by Aristotle in *Politics*, where he claims that, properly speaking, only articles of direct consumption (food, clothing, a bed) and slaves can be property.[25] The characteristic of property, for

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[24] 'Toebehoren' (Dutch), 'zugehören' (German). These words derive from 'toehoren', resp. 'zuhören', *to listen to*. In Dutch, 'to obey' is translated as 'gehoorzaam zijn'; the German translation is 'gehorsam sein' or 'gehorchen'.

[25] Aristotle-PO, I,4. The relevant passage (in Benjamin Jowett's translation, revised by Jonathan Barnes) is this: "Thus, too, possession is an *instrument for*

Aristotle, is that it is *immediately* useful to its owner. Articles of consumption are property because they yield their utility immediately in the use we make of them; and slaves are property because they are means of action (or *life*) that are serviceable without requiring any work on the part of the master "whose will they obey or anticipate". Aristotle also considered a slave as "being better off when under the rule of a master... [because] he participates in reason enough to apprehend, but not to possess it." Thus, Aristotle cunningly suggests that owning slaves rests on *auctoritas*: the master "improves" the slave, who thereby becomes "a part of the master, and wholly belongs to him."[26] For the same reason that slaves are property, tools ("means of production") are *not* property in Aristotle's sense. They do not yield immediate uitility. They belong to the banausic sphere of non-intellectual, manual and wage labour, which, in the philosopher's appreciation, is a sort of "limited slavery", the user of a tool being like "a tool of his tool". In this manner, while paying lip-service to the naturalistic conception of property as resting on *auctoritas*, Aristotle assimilated owning property to the rule of man over man, and at one

maintaining life. And so, in the arrangement of the family, a slave is a living possession, and *property a number of such instruments*; and the servant is himself an instrument for instruments. For if every instrument could accomplish its own work, obeying or anticipating the will of others, ... chief workmen would not want servants, nor masters slaves. Now the instruments commonly so called are *instruments of production*, whilst a possession is an *instrument of action* [i.e. for maintaining life - FvD]. From a shuttle we get something else besides the use of it, whereas of a garment or of a bed there is only the use. Further, as production and action are different in kind, and both require instruments, the instruments which they employ must likewise differ in kind. But life is action and not production, and therefore the slave is the minister of action. Again, a possession is spoken of as a part is spoken of; for the part is not only a part of something else, but wholly belongs to it. ... [T]he slave is not only the slave of his master, but wholly belongs to him. Hence we see what is the nature and office of a slave; he who is by nature not his own but another's man, is by nature a slave; and he may be said to be another's man who, being a slave, is also a possession. And a possession may be defined as an instrument of action, separable from the possessor." (My italics, Fvd) Note Aristotle's emphatic insistence that instruments of action are property (possessions), and that instruments of production (tools) are not. Property is wholly a part of the owner, but tools are not part of the artisan, and therefore are not property. On the contrary, the artisan is an instrument of the instrument, and so presumably a part of it.

[26] Aristotle-PO, I,5.

and the same time justified the regulation of trades by legislation as well as the legal inviolability of the ownership of slaves.

Clearly, whether due to the influence of Aristotle or not, a lot of modern legal thinking about property fits nicely into the Aristotelian pattern: apart from an individual's claims to what he needs for direct consumption, only the state's claims to obedience are considered inviolable property; all other claims are subject to legislative regulation.[27]

Equality and likeness

The ius-relation necessarily involves at least two persons, who must be natural persons of the same rational kind because only such persons are capable of committing themselves to one another through speech acts.[28] Moreover, because of the nature of a speech act, those persons must be free or independent of one another; neither of them is under the control of the other; neither of them belongs as a means of action to the other. For the same reason, they cannot be related to one another as the occupant of a superior position in an organisation is related to the occupant of an inferior position in the same organisation. As far as we know, only human persons are naturally capable of speaking to other human persons and they are naturally and independently capable of representing

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[27] Arguably, this is exactly what Aristotle had in mind. The city or state gives "man" (i.e. the full citizen) far more self-sufficiency or freedom from want by making it possible for him to rule over non-slave labour. With astonishing frankness Aristotle writes, that the slave is in fact a more excellent being than a worker, artisan or tradesman: "For the slave shares in his master's life; the artisan is less closely connected with him, and *only attains excellence in proportion as he becomes a slave*" [*Politics*, I,13, *in fine*; emphasis added - FvD]. Not being slaves by nature, the lowly but free workers, artisans and traders cannot be enslaved without injustice by any other man. However, in the cities they are a part of the whole, and wholly belong to it. Thus, the political elite of the city—its ruling class of citizens—is morally and constitutionally entitled to the deference and obedience of the workers, artisans and traders.

[28] Better, perhaps: 'only natural persons are capable by nature of committing themselves by speech acts'. I am not going to speculate here about artificial intelligence, speaking computers, robots and the like, whether they ever will be persons in their own right and, if and when they are, they will be inclined to respect us as persons.

themselves in speech and action. In that sense, at least, the ius-relation involves human beings as free persons among their likes. This conforms to the old idea that law or ius is an order of 'free and equal' persons—the idea that the natural law of the human world is given by the fact that it is an order of rational beings or persons of the same human kind.

When I was a student, some of my older professors still defined the law as a relation among free and equal persons. Apparently, for them the ius-relation still was the main focus of the study of law. They thought of it as the essential form of private law (*ius privatum*, *droit privé*, *Privatrecht*) as opposed to public law (*ius publicum*, *droit public*, *Staatsrecht*). Moreover, in the tradition of the doctrine of the State as the guarantor of the rule of law (*État de droit*, *Rechtsstaat*), they saw public law as merely or mainly an organisational or institutional device in support of the ius-based order of free and equal persons. Of course, in my student-days, that view already was obsolete as far as fashionable opinion about legal practice and teaching was concerned. Under the influence of legal positivism public law, which is a complex of lex-relations pertaining to a State's organisation and its means of social control, had displaced private law and its ius-relations as the essential form of law. Private law had come to be seen even as something produced by the organs of the State, its legislature and its nationalised judicial or court system with its judges appointed and paid by the State and sworn to obey and apply its laws (leges, legal rules). Private law, in short, was just one of the techniques that the State used to order the society under its control. Nevertheless, 'freedom' and 'equality' continued to be brandished as essential qualities of legal orders. Obviously, however, these words cannot have the same meaning in connection with a vertical legal order of command and obedience as they have with respect to a horizontal ius-based order. We therefore shall turn again to etymology to see if it can help us to discern relevant different meanings underlying our language of freedom and equality.

In some languages, for example in Dutch and German, the word for equality is one that in a literal translation would be rendered in English as 'likeness': 'gelijkheid', 'Gleichheit'. The etymological root is 'like' ('lijk', 'leich'), body, physical or natural shape or constitution. Thus, one's likes are those who are of similar shape, or those who

have the same sort of body. There is no connection here with the Latin 'aequus' (even) and 'aequalitas' (evenness), which do not suggest likeness, similarity, sameness or being of the same sort but refer to having the same measure as and consequently being in some respects at least indistinguishable from something else. Thus, speaking strictly, we cannot apply the concept of aequalitas to human beings as such, because they are not the sort of things of which it is meaningful to ask whether they are even or uneven. It applies only to measures of particular aspects of human beings, for example measures of shape, rank, ambition, ability or excellence: two persons cannot be equal as such, but they may be of equal height or equally good at doing something. It would be an extraordinary coincidence, if two persons were found to be and to remain equal in *all* respects. One consequence of aging is that in many respects a person does not even remain the equal of himself. In contrast, likeness or similarity is the outstanding characteristic of all human beings because they all have a human body or shape. We might say that it is only in their likeness or humanity that people are equal. However, this is an extremely abstract and qualitative rather than quantitative sort of equality. It adds nothing to the real or natural or objective likeness of all human beings, and it should not divert attention away from the fact that apart from their common humanity people are different in many ways, and unequal with respect to many measures of shape, rank, ability or whatever.

Whereas 'likeness' pertains immediately to natural persons as such, 'equality' does not. However, it makes sense to refer to people as equals within the context of a social order or an organisation, if they occupy the same position or have the same legal status in it. In an army the position of the supreme commander is not equal to that of a soldier of the lowest rank; therefore the supreme commander and the recruit are not one another's equals whereas two soldiers of the same rank are equals in the army. However, the natural human persons who fill the position of a general or a soldier are alike and because of their natural likeness they have an equal status in the natural order or the natural law. Thus, the equality of the soldiers properly refers to the legal order of the army. The likeness of the men who have a position or status in that order, refers to their common humanity, in particular their capacities for recognising other natural persons and entering into ius-relations with them.

Even in a strictly egalitarian society legal equality is not the same as likeness. Such a society typically has a simple vertical structure: the legislative or top-position is assigned to the general assembly in which all the members have the same legal 'rights', for example under a 'one man, one vote' rule; every single member is assigned an equal position under the assembly, all the members are equally bound by its legal decisions. Of course, outsiders have no standing in the assembly and are not bound by its decisions: they are not the equals of the members. However, as far as the ius-relation is concerned, it makes no difference whether it has a member of an organisation on the one side and a non-member on the other. Inequalities of rank or status are immaterial. In that sense, the natural law (the ius-based order of human co-existence) is far more 'egalitarian' than even the most egalitarian sect.

Likeness, as noted before, does not make one person the measure of another; it does not refer to excellence in any respect. Also, to say that all people are alike does no violence to the fact that people are separate beings. Whether we are discussing the human person as a real physical entity (the human body) or as a source of physical activity (movement, emotions, actions, thought), we always run into the inescapable fact of the separateness of persons. My body is nobody else's, my actions or deeds, my feelings and thoughts, are as a matter of fact my own. This is true not only for me and mine, but also for you and yours, her and hers, and so on and on. My existence is and remains separate from your existence. This separateness goes together with our individual or indivisible existence as natural persons.

Unlike likeness, equality is not compatible with separateness: it refers to positions within the same society or organisation, that is to say, to positions that are defined by the same legal rules. A position is a part of an organisation: it is not an individual entity; it has no separate existence, no separate action. Hence, it is always possible to ascribe the legal actions of the occupant of a position within an organisation to the organisation itself while holding him personally responsible and liable for his illegal actions, for example abuses of the power vested in the social position that he occupies.

The distinction between equality (having the same measure or rank) and likeness (similarity, being of the same natural sort) is of the

utmost importance for the logic of justice. For most people 'justice' and 'equality' are inseparable. But there is a world of difference between justice-as-aequalitas and justice among likes. It is often said that the fundamental requirement of justice is distributive equality: treating everybody equally, giving everybody the same treatment. Taken literally, this is a requirement no one can possibly meet, and no one will appreciate. There is no way in which one can treat oneself as one can treat others, and no occasion on which one can meet out the same treatment to *all* others—for example, one's own children and all other children, one's neighbours and all other human beings. Distributive equality applies, if at all, only to a well defined closed group, when all its members stand in the same relationship to the same distributive agent. This is the case, for example, with a parent and his or her children, a teacher and his or her pupils, a commanding officer and his troops, a hostess and her guests. Even so distributive equality presupposes an inequality (for example of rank or social position) between the distributor and those in his care. In complex situations distributive equality merely disregards the inequalities that, by way of specialisation and the division of labour and knowledge, give rise to all the advantages of co-operation and co-ordination.

It is precisely because 'equal treatment' in complex situations is an absurd requirement, that Aristotle found it necessary to add the amendment, that distributive justice requires that equals be treated equally, but unequals unequally. The whole point of distributive justice would be lost if it did not serve to perpetuate the right sorts of inequality.[29] And the point of distributive justice was for Aristotle essentially *political*: to make sure that the best and only the best rule and perpetuate the particular morality or way of life of the political community. Who are the best? They are those who are considered the most eminent representatives of the community's way of life: its traditional elite. Given the yardstick of a community's traditional way of life, one can determine who contributes more to it and therefore, according to Aristotle, deserves special rewards (honours or material goods), which are to be denied to those that do not contribute as much. Aristotle knew very well that to apply the concept of distributive justice the rulers should be able to measure virtue; he also knew that to measure virtue the rulers always should keep the ruled

[29] Cf. the discussion of justice in Aristotle-NE, V.

under close moral investigation to determine the degree of their political correctness or defects.[30] These consequences did not bother him in the least. The whole of his political thought was framed by his vision of the *polis* as a small, self-sufficient community ruled by a political elite.[31]

None of these complications arise with the concept of commutative justice.[32] Unlike its distributive counterpart, which presupposes a legal order and its hierarchical or vertical relations, commutative justice operates in the horizontal plane defined by the ius-relation (for example, as give-and-receive-in-exchange or take-and-give-back). It is the requirement that one treat others as what they are, namely one's likes, and not, say, as one would treat an animal, plant, inanimate object, ward, underling, subject, servant or slave. Of course, this requirement can be phrased in terms of equality, for example that every one should accord all others equal respect, or that one should recognise in all one does that all others are equally human. But again nothing is added by using the language of equality rather than that of likeness or similarity, except the risk of confusing equal justice with equal treatment. Equal justice is achieved by doing injustice to no one, by treating others as one's likes; equal treatment can be achieved, if at all, only by not doing anything.

Liberty and freedom

We can make a similar distinction with respect to 'freedom' and 'liberty'. The latter word obviously derives from the Latin 'libertas', which refers to the status of a full member of some social unit (originally, a family or tribe). Libertas is the status of the *liberi*, the children, considered not as babies or young people, but as direct descendants or successors.[33] 'Liberty' is a birthright, an inherited

30 Aristotle-PO, III, 9, 1280b5.

31 Aristotle-PO, III, 9, 1281a3-8: "It follows, that those who contribute the most to [a political society that exists for the sake of noble actions] have a greater share in it, when their political excellence is greater than that of men who may be of higher rank where freedom or birth or wealth is concerned."

32 See Aristotle-NE, V

33 The same meaning attaches to the Greek 'eleutheria' (*liberty*), which is derived from a verb meaning 'to come'. *Eleutheria*, like *libertas*, is the status of the successors ('those who come after'). In Dutch this meaning is rendered literally

status, or the status of one who has been adopted as a full member of the family or tribe—one who has been accorded 'the liberty of the tribe'. As a political term, it suggests full membership in a political society, and points to notions such as nationality and citizenship. Even more clearly than 'equality', 'liberty' is a legal notion, applicable only to human beings. It is meaningful to discuss the respects in which animals living in groups have equal or unequal status in their group, or the respects in which objects are equal or unequal. It does not make sense to discuss the liberty of objects or animals or even of men or women who have not been born to, or have not been assigned, a position in any legal order. Like objects and animals they may be free or not, but the concept of liberty does not apply to them. For Robinson Crusoe, liberty was not an issue, but his freedom certainly was of vital importance to him.

Etymologists trace the origin of the word 'free' and its equivalent in other languages (Dutch 'vrij', German 'frei', Swedish 'fri') to an old Indian stem 'pri-' meaning: the self, or one's own, and by extension: what is part of, related to or like oneself, or even: what one likes, loves or holds dear. Latin seems to have transformed 'priya' into 'privus' (one's own, what exists on its own or independently, free, separate, particular), 'privare' (to set free, to restore one's independence), and 'privatus' (one's own, personal, not belonging to the ruler or the state, private). The picture that emerges is clearly focussed on the natural person and his or her property, not on some conventional status within a well-defined social unit. This becomes even clearer when we consider other words that etymologists trace back to 'pri-': the English 'friend' (Dutch 'vriend', German 'Freund') and the old-English 'fridhu' (meaning peace, Dutch 'vrede', German 'Frieden', Swedish 'fred'). There is of course nothing mysterious about the logical connection between the concepts of person and property and the concepts of peaceful, friendly and free relations.[34]

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by the word for descendant: 'nakomeling' (one who comes after).

[34] A strong hint of the direct, personal character of freedom can be found in the Dutch word for making love and having a continuing intimate relationship with someone else: 'vrijen'. Morphologically and etymologically this word is the same word as 'vrij' (*free*). It connotes not only the secondary meaning of 'priya' (*dear, lovable*), but also its primary meaning (*one's own*). Making love or getting intimately and sexually involved is even now often referred to as a way of making someone else one's own, or of giving oneself to someone else - "You're

Friendly relations are peaceful relations, without *iniuriae* to person or property. Peace is a condition in which people can enjoy their property and independence, without being subjected to hostile treatment. And people are free to the extent that others treat them peacefully and friendly and respect them, their work and their property by abstaining from *iniuriae* or warlike actions. Thus, the security of each person and his or her property against predatory attack emerges here as a necessary condition or principle of order in the human world, its basic law or *ius*.

Political rhetoric may have forged a link between freedom and liberty, but this should not obscure the fundamental distinction. Logically speaking, being a free person may well be a ground for claiming liberty under the constitution of a society or State, but even if a constitution denies the status of liberty to a free person (for example a tourist), it does not thereby automatically deprive him of his freedom. Conversely, if a constitutional convention grants liberty to a person, it does not automatically make him freer than he was before. The grant of liberty gives him full membership and status in the constituted political organisation, nothing more. Indeed, it may burden him with many legal duties and obligations. For example, being a free man does not entail any duty or obligation to pay taxes or to serve in an army; having the liberty of this or that society may well imply being obliged to pay taxes or to do military duty, if its constitution so stipulates. A visitor from the countryside may enjoy the freedom of city life but that does not mean that he has the liberty of the city. While he is obligated to respect other persons that he might meet in the city, he is not under an obligation to assume the burdens that come with being a citizen or burgher of that city.

Unlike liberty, freedom has no nationality: a free man is a free man, whether he is English or French, but the liberties of a subject of the English king are different from the liberties of a French citizen. The famous conservative quip about there being no rights of man only rights of Englishmen, Frenchmen, Russians and so on merely illustrates the ease with which some people reduce the lawful to the legal. In moving from one society to another, one cannot take one's liberty in the former along with one's personal belongings. A Frenchman taking up residence in England cannot exercise the liberty

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my girl", "He's my man", "I'm yours now".

of a French citizen in English society. A teacher in a refugee camp, teaching orphans of diverse but unknown origin, need not find out about the nationality of each one of her pupils before she can start telling them that they should respect each other's freedom and that this implies that they should not start fights, steal, cheat, lie or bear false witness. Neither does the camp commandant need to know their nationality before he can begin to instruct them about the rules and regulations of the camp or the extent of their liberty in it.

Freedom belongs to the natural human being; free, in the original sense of the word, is one who is 'his own man' or who lives 'with a mind of her own'. Liberty belongs to a role player, a functionary or the occupant of a position in an organisation. In modern terms, we might say that liberty belongs to the public sphere, where one has to deal with officials of the State or can act only according to prescribed procedures. In contrast, freedom belongs to the private sphere where people act on their own initiative and meet one another as free natural persons with full responsibility for their own actions. In the public but not in the private sphere people play the roles of legal or fictional persons (for example 'citizens') and are likely to explain and justify their actions in terms of the legally or constitutionally defined powers and privileges of their legal positions and roles. Freedom is a correlation of likeness or equality-as-likeness; both are characteristics of the ius-based order of human interaction. Liberty and equality (in the sense of *aequalitas*) properly belong to the sphere of legal organisation.

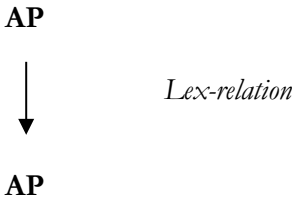
Summary

Let us take stock. Pursuing the current language of law and rights etymologically to its Latin origins, we discern three clearly different types of action: *legere, regere* (with *augere* as an important subtype) and *iurare*. They establish three different types of relations between persons or between persons and things that appear to be directly relevant to our understanding of that language: lex-, rex-, and ius-relatons.

Lex-relations involve at least one person commanding or ruling at least one other person but only in an organisational setting where the right to command and the duty to obey attach to different positions

or offices witin the organisation.[35] Because these positions ordinarily are manned by human persons, they easily are personified. Hence, we may say that lex-relations primarily are relations between artificial persons. Human or natural persons are involved only as occupants of such positions, not 'in person' or 'in their own right'. As occupants of a social position they may or may not enjoy the liberty or liberties of their society; they may or may not be the equals of other members of their society.

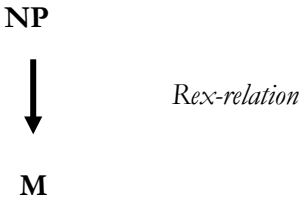
Obviously, lex-relations are asymmetrical and transitive: it makes a difference whether a person is in the superior commanding position or the subordinate position; moreover, if a position is subordinate to another and the latter is subordinate to a third position, then the first is subordinate to the third. We can graphically represent the lex-relation as follows (where AP stands for 'an artificial person'):



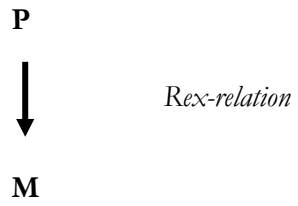
In the strict sense, rex-relations involve a natural person (called in this context a *rex*) who controls or manages things, perhaps other persons, by any means or method whatsoever (force, cunning, training, technical mastery). If the thing controlled or managed is a human person then, as the object of the action of *regere* or *dirigere*, he or she is not treated as an independent or separate human person but manipulated as a human resource or means of action of the rex—as if he or she belonged to the rex. An important type of action that falls under the general concept of *regere* is *augere*, which involves control of productive or creative processes.

Like the lex-relation, the rex-relation is asymmetrical and transitive. Its graphical representation looks like this (with NP standing for 'a natural person' and M for 'a means of action', that is to say, for anything of whatever kind that the person can control or manipulate):

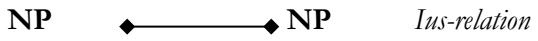
[35] To avoid any misunderstanding, the position of 'a judge' in a national court system, with a monopoly of adjudication, is that of a legislator: he makes legal rules that need not have any basis in justice. Such a 'judge', strictly speaking, is not a judge but a magistrate.



Speaking more loosely, we can say that an artificial person may act as a *rex* or *regens* in control of one or more objects. Nevertheless, in such cases natural persons necessarily are involved as agents or representatives of the artificial person. The generalised rex-relation looks like this (with P standing for 'a person', whether a natural or an artificial person):



Ius-relations obtain between free natural persons who interact as likes (outside any legal hierarchy) by rational means (speech). In the ius-relation human persons are involved directly, 'in their own right'. The ius-relation obviously is symmetrical:



By way of analogy, a ius-relation may also involve independent artificial persons, for example when one society or company negotiates or contracts with another. Here, the same caveat applies as to the rex-relation: artificial persons cannot by themselves engage in the action of *iurare*; natural persons must represent them.

Of course, natural persons enter into ius-relationships not as disembodied minds. Justice, that is respect for ius or law, requires

respect for the whole person, his body, which is the embodiment of his natural rights in the strictest sense, and his justly acquired rights (his property), whether these reflect his *auctoritas* or some ius-based transaction with other persons. His property may include objects or natural or artificial persons. If we apply the ius-relation by analogy to mutually independent artificial persons, we likewise should consider them together with their property, which in this case includes other artificial persons that are their parts or subordinates. Taking this into consideration, we can merge the diagrams of the ius-, rex- and lex-relations to get a representation of the basic form of law as an order of persons. The vertical lines in the diagram below represent either rex- or lex-relations. In other words, the diagram abstracts not only from the difference between natural and artificial persons but also from the different modes of controlling things (*legere*, *regere*).

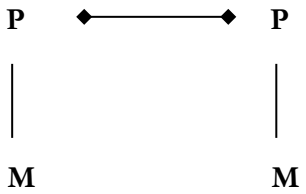


Figure 0: The law of persons

To get the basic form of the natural law we only need to replace P with NP.

In a later chapter we shall use the relationships depicted in this diagram to formulate an abstract formal theory or logic of law. As we shall see, this logic is not concerned with norms or directives. It is neither some kind of deontic logic nor some kind of logic of imperatives. It is instead a logic of just or lawful rights.

We also noted that terms such as 'liberty' and 'equality', understood etymologically, belong to the language of lex-based orders, whereas 'freedom' and 'likeness' belong to the language of ius-based orders. 'Authority' belongs with the rex-relation, at least where this is established by the action of *augere*.

Orders in the human world are constituted by ius-, rex- or lex-relations. Obviously, a particular individual may belong to or participate in several orders of the same or different kinds at the same time. Every individual, then, may be a point of contact where many lex-, rex- and ius-relations come together, possibly revealing conflicting obligations and demands. To a superficial observer, lex-, rex- and ius-relations easily can become one big blur of 'social relations', but it behoves us to keep the analytical distinctions firmly in view.

Some preliminary conclusions

An interesting conclusion that we can draw from the preceding analysis is that 'natural law' is *not* an essentially normative concept, no more than 'natural right'. It is an order of things that we can describe without prejudging the question whether or not it is a respectable order. To judge whether some action or relationship is lawful or not, we should not focus on what people *ought* to do according to some moral or legal code, but on the objective or agreed on boundaries among persons. The interesting questions are strictly factual: Who did what, when, how, and to whom? Who made or acquired this? How did she make or acquire it, alone or with the help of others? Did the others consent to help? Did they consent to help only if some conditions were granted? Were these conditions honoured?

The common presupposition of all of these questions is that every natural person is a finite, bounded being, separate from others not only in his being but also in his actions and work or *auctoritas*. Of course there may be all sorts of complications and uncertainties when we try to answer these questions with respect to particular cases or situations of an unfamiliar type. There is need for efficient and effective ways of dealing with these. This is precisely the area where the expertise of lawyers (jurists) is so valuable. However, as it is clear what the questions are and aim at, there is a definite standard by which we can judge any proposed answers or methods for answering them. From this point of view, the objective of the practice of law is to determine and safeguard the law and the just or lawful rights of persons in situations where these may be unclear or contested. In this sense, the practice of law is a *rational discipline* of justice, not of legality.

For the layperson, who gives little thought to all but a few cases where determining rights is problematic, it may be difficult to grasp the point of much of what lawyers practise. However, just as one need not have the knowledge of an architect to know what a house is, one need not know the lawyer's business to know what is law or *ius*. The knowledge of law requires no more than an ability to grasp the idea of freedom among likes, the ability to recognise others as one's likes—to recognise at the same time their likeness and their otherness. That knowledge consists in the recognition of the difference between what one is or does oneself and what one's likes are or do. This ability is, from a psychological, even biological, point of view, so vital, and at the same time, from a sociological point of view, so fundamental for the existence of order in the human world that we simply expect any person to possess it. *Nemo ius ignorare censitur*: nobody should be thought to ignore the law. While this old maxim makes no sense whatsoever when we take *ius* or *law* either as the specialised skills of lawyers or as the output of legislation and regulation by governments, it makes eminent sense when we take *law* or [objective] *ius* as the condition that makes peaceful, friendly co-existence of human persons possible: the recognition of the separateness and likeness of persons. When it is applied to legal systems, as it often is, the maxim merely expresses the arrogance of rulers who assume that everybody else carefully takes note of and obeys their commands, or else turns for advice to those who specialise in listening to the rulers (lawyers, not as experts in *iustitia*, but as experts in the current state of legislation and legal practice).

2. The Social and The Convivial

Speakers of the Dutch language must chose between two words to translate the English 'society' or its equivalent in Latin and other Romanic languages ('societas', 'société', 'sociedad', 'società'). Those words are 'samenleving' and 'maatschappij'. They have very different meanings.

The literal meaning of 'maatschappij' is society or company (in German *Gesellschaft*). A company is composed of companions (literally, people who share their bread); a *maatschappij* is composed of *maten* or mates (literally, people who share their food,[36] eat in the same mess). In short, the reference is to a group that eats at the same table or, more generally, that derives its income from a single common source. Of course, a *maatschappij* need not be a small tribal community that lives on what its hunting parties bring back to the village. Whatever its size, it is an organised group of people, unified by a particular structure of authority and command and a set of more or less widely shared opinions and values. Its basic aim is to make those people work together to produce and then to share the social income according to some customary, agreed-on or imposed scheme of 'distributive justice' for allocating burdens and benefits.

The literal meaning of 'samenleving' is living-together, symbiosis. For lack of an appropriate direct translation of 'samenleving' in English, I shall use the expressions 'order of conviviality' and 'convivial order'. They remind us of the Latin 'convivere', which literally means to live together.[37]

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[36] Cf. old-English 'mete', food, hence meat.

[37] While 'convivere' primarily means to live together, to interact or deal with one another, it also means 'to eat together'. The noun 'convivium'—for our purpose, unfortunately—lost the primary meaning of the verb but retained the second: a convivium is a dinner or lunch party. Thus, it implies people sitting at the same table. This does not mean that a convivium is like the shared meals to which both 'maatschappij' and 'company' refer. The latter are meals shared by mates or companions in the same organized group; a convivium is a meal that a host shares with his friends, guests or visitors. The modern English 'convivial' also has lost the general sense of 'convivere' while retaining that of a friendly party (without conjuring up the image of soldiers eating their grub in the mess).

According to the etymology of the Latin 'societas', a society is a company or *maatschappij*, not a convivial order. It is a band of *socii* (plural of 'socius', mate, companion, partner, assistant). 'Societas' and 'socius' are related to the verb 'sequi', to follow. Thus, the basic relationship of a *societas* is that of following or, looked at from the other side, leading, directing, managing or governing. A *socius*, in the strict sense of the word, is a follower, a fellow traveller or companion. In a wider sense, it is any member, associate, employee or servant of a society, regardless of his position or function in it.

Since the advent of state-organised or state-funded 'public education', the word 'society' has been used more often than not as a near-synonym for what is under the control of a state. However, even now, the meaning of the word is much wider than that. Thus, we speak for example of the famous 'friendly societies' of nineteenth century Britain and of various 'secret societies'. The Dutch refer to student-associations as 'sociëteiten' and to commercial, industrial and financial associations as 'maatschappijen'. The French use the term 'sociétés' for such entities.

Social order

As we know from the study of history and anthropology as well as from casual observation, the varieties of forms of social organisation defy the imagination. Societies may be distinguished according to the degree to which they rely on lex-, rex- or ius-relations, both for their internal dealings and for their interactions with other societies and non-members. Societies, be they small, large or huge, may be organised for peaceful action in the pursuit of convivial, economic, cultural or religious ends or they may be organised for conquest and exploitation. They may rely in different degrees on economic or political means, on influence, pressure, or coercion to acquire and exploit material resources and to recruit and control partners, collaborators and workers.

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.

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. Every society needs a set of institutions and procedures for formulating and implementing policies and for maintaining social control. To perform these social functions a society must rely on either professional or volunteer managers, officers and other officials and agents. They may be recruited by or from the members of a single family or a small set of families or at the other extreme by or from the whole population of the society. Their modus operandi may be more or less dictatorial, authoritarian or democratic. In these respects too, the varieties of social forms and practices are uncountable.

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 society has a formal condition of membership, and usually a number of more or less elaborate procedures for admitting new members, determining the status of a member within the organisation, confirming and terminating membership. This is necessary because the members are to be distinguished very clearly from those who are not members, have no claim to a share of the income of the company, no position or status in it and no obligation to obey its leaders or to perform social duties.

Some societies may be active all the time and aspire to direct almost every aspect of life for its members and subjects. Other societies may exist in the background and surface only intermittently (say at an annual meeting) or content themselves with no more than marginal social control. Whether totalitarian or liberal, societies may be somewhat egalitarian or on the contrary extremely hierarchical. For historical or administrative reasons, they may have a greater or smaller

number of subdivisions, classes, castes or local, professional, ethnic or religious groups with more or less differentiated legal rights and duties.

Complex societies such as the empires of earlier times or the modern states are to a greater or lesser extent societies of societies. They typically encompass a large number of smaller local or functional societies: families, clubs, political parties, churches, universities, charities, firms, companies, corporations and so on, maybe even criminal gangs. In many languages, all of these are called 'societies'. Often the leading members of some of these societies are also full members of the ruling elite of the encompassing complex political society. This conforms to the Aristotelian aristocratic conception of the polis, according to which the politically active citizens—the political elite, in contrast to, say, the free workers who are citizens in name only—are also the heads of the great and notable (that is, noble) families and therefore, in Aristotle's time, of the leading economic entities in the city. Of course, in today's world, corporations (business corporations, trades unions, large cities, churches, universities, pressure groups and the like) have replaced the familial households or domains of olden times as the main centres of 'economic power'. However, their leaders and spokespersons are the elite of notable politically active citizens, the modern nobility, known from frequent appearances on radio and television and in the other mass media.[38] Other, merely nominal citizens should be satisfied with their 'right to vote', which they may exercise whenever they are summoned to do so, on the tacit understanding that the elite will interpret 'the meaning' of their votes. In other words, political speech is reserved for the ruling aristocracy; the voters occasionally may howl to vent their pleasure or displeasure.[39]

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[38] His insistence that economic and political power should go together (preferably of course with moral excellence or at least moderation) marks perhaps the most decisive break of Aristotle's political theory from that of his teacher, Plato. For Plato, politics should be rigorously separated from economics, lest the one corrupts the other. Hence, his 'guardians of the city' should be kept away from anything that might arouse their private economic interest just as workers and traders should have no access to the corridors of political power.

[39] Cf. Aristotle's incisive remark (*Politics*, 1253a10-16): "[M]ere voice [read 'vote'-FvD] is but an expression of pleasure and pain, and is therefore found in other animals; […] the power of speech is intended to set forth the expedient

Given the bewildering variety of social orders, we easily can see why legal positivists, when they engage in legal theory, usually arrive at the conclusion that 'the law can be anything'. They take 'law' to be an abstract term for referring to any social order (at least any politically maintained social order) organised by means of or according to legal rules. Thus, all societies have a legal order but no two societies need have the same or even a roughly similar legal rule for dealing with any particular type of situation (casus). It even may prove difficult or impossible to compare the ways in which they deal with a particular type of case: there is no underlying stratum of cases that is independent of any legal system, with each case having a legal solution in every legal system. Hence, legal positivists quite rightly deny that there are any invariant material principles of 'law' for the same reason that there are no invariant principles that are valid for all games or sports. The abstract legal form is all that societies have in common. Their fixation on the variety of possible social orders leaves legal positivists no objective basis for any talk about natural law. However, some of them have tried to appropriate the term 'natural law' for ideological purposes. They claim, for example, that some form of political society—usually their own or one that answers to a social ideal they have formulated—is the embodiment or fulfilment of the social essence or 'social nature' of man or that the propensity of man to congregate in social structures has a well defined social model or legal system as its 'final cause'. Obviously, the fact that some ideologues claim that their program of legal reform is an expression of the nature of things does not make it an expression of the natural law.

In logical terms, a society is a mereological structure, a whole composed of many parts (positions, roles, functions) that have no independent existence apart from the whole. While the individuals who are members, directors or treasurers of a society can exist apart from the society, the positions that define their social status (Member, Director, Treasurer) obviously exist only as parts of the society. A graphical representation of a social order looks like this:

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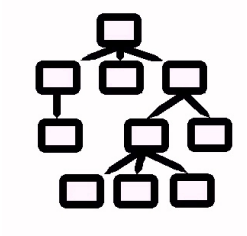
and inexpedient, and therefore the just and the unjust.'



Students of legal systems, business administration, public administration, and social systems in general, are familiar with this type of representation of an organisation's structure. 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.

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, a state, an international organisation or bureaucracy.[40] Every member, employee or subject is assigned a position in the organisation of the society, which determines his role or function as well as the claims he has on the society. Thus, the society itself appears as a vertical, hierarchical legal order, a system of lex-relationships. Indeed, a social order is a legal order. Its constituent relations are lex-relations.

From the point of view of political science, a society is a teleocracy (a system of rule aiming to achieve a particular end). That explains why the lex-relation is the constitutive social relation. Its essential function is to combine the powers and assets of many into a single collective or public action. It is by means of leges that the members are identified, classified, organised, made to contribute to the social undertakings and allocated a part of the social income. Again there is no limit on the kind of goal(s) to which the resources and powers in a society may be dedicated.

'Teleocracy' usually stands in contrast to 'nomocracy',[41] which denotes an order that is maintained by adherence to general rules of

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[40] Interestingly, the Dutch word for 'economics' is a literal translation from the original Greek: 'huishoudkunde' (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.

conduct and does not aim at a particular goal or end state. 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, embedded in one or another teleocratic structure—as, for example, the Fifa (Fédération Internationale de Football Association) fixes the rules of soccer and the state fixes the rules of legal competition. Typically, a complex teleocracy will include several nomocratic arrangements. Even a rigidly planned economy such as there was in Nazi-Germany or the Soviet Union will leave some space in which authorised persons freely can buy and sell goods at market-prices.[42] The New York Stock Exchange and e-Bay are examples of a teleocracy that seeks its goal by organising a marketplace, a nomocratic system of exchange that is regulated by general rules. Both the NYSE and e-Bay have owners.

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. We can easily and with little risk talk about a society's goals, values, opinions, expectations and actions (as distinct from those of any one of the people in that society). A society does have leaders, perhaps even owners, who can be held responsible and liable for the actions of the whole. It is coextensive with the actions of its members only, at least in so far as these take part in the action of the company itself.[43]

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41 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'.

42 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".

43 Other contrasts have been used to make the same, or a similar, distinction: open-closed (Popper), cosmos-taxis, cosmopolitan-tribal (Hayek), nomocratic-telocratic (Oakeshott), natural-artificial, spontaneous-constructed, global-local, market-state. However, some of these contrasts are relevant only in particular

Most of the time we can easily distinguish those actions the *socii* perform as part of their *public* or social functions and roles from those they perform privately. However, different societies will draw the line between the *public* and the *private* sphere in different places. Some societies may not legally recognise a private sphere at all. For them, private activity is simply irregular or even criminal activity. For the same reason, some societies may not recognise the concept of a private person except in reference to criminals or legally incapacitated individuals.

In a literal sense of the words 'natural' and 'society', there is no such thing as a natural society. Being a teleocratic order, a society is an *artificial* order of human action. It is an amalgam of more or less explicit conventions and more or less successful attempts by some to reshape the society wholly or in part according to their own designs. Of course, the artificiality of the social order may be obscured by the wear and tear of a complex history of almost daily adjustments to tensions, disasters, conflicts, challenges, ambitions and changes in the availability of scarce resources.

Convivial order

The convivial order requires no social organisation, only friendly, peaceful interpersonal relations. 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. Obvious examples can be found also in regions along the border separating two states: people who live there usually have many convivial relationships, relating to work, business, religion, sports, entertainment, and other cultural and leisure activities, with people on the other side of the border. Conviviality is not confined to members of the same society. We find conviviality, 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.

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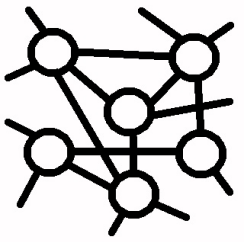
discussions, and some are suggestive, and possibly misleading, rather than analytically useful.

Conviviality is best described as the way of life of those who live as free persons among their likes.[44] Conviviality is defined by mutual respect or respect for the ius-based order of the human world. In that sense, the convivial order is a more or less effective realisation of the order or law of natural persons. It is a *horizontal* network of ius-relations, without a hierarchical structure. It is inappropriate and misleading to say that one who lives convivially is related to the convivial order as a part is to a whole. Interactions among people in a convivial order have the character of meeting, exchanging and parting, or of freely entering into, or exiting from, more or less durable relationships on peaceful, friendly terms. Symbiotic or convivial relations among persons are catallactic, not mereological. A graphical representation of the convivial order, therefore, would look like this:



The figure 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.

Because in the convivial order the bonds among human persons are established as iura, not by any lex, it is not a legal order but an order of justice. Indeed, in many respects the order of conviviality is the exact opposite of a social order. People can live together without being involved in any common enterprise. Consequently, the order of conviviality is by no means a teleocratic order. However, although a convivial order is not a teleocracy and is an order maintained by adherence to general rules of conduct (rules of law), it would be

44 "Samenleving" denotes *living with or or among one's likes*. The word 'samen' belongs to the same etymological group as the Latin 'similis', the Greek 'homos', and the old Indian 'sama', all of them meaning "the same", or "similar".

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. Unlike such nomocracies as the markets organised by the NYSE or e-Bay, the convivial order has no owners; it is not a managed nomocracy such as soccer or other professional sports organised under the supervision of a rule-setting and rule-enforcing federation.

The convivial order is not an organisation. Nor is it a community.[45] Therefore, it does not make sense to distinguish between its members and non-members or between its rulers and its subjects. Anyone who accepts to live according to the requirements of conviviality is, by that fact alone, within the law of conviviality; anyone who does not is, by that fact alone, an outlaw, one who is outside the law of conviviality. The distinction between law-abiding people and those who prefer to live as outlaws is of an entirely different sort than that between a member and a non-member of a society. A convivial order does not need such things as formal conditions or procedures of membership. 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 a soccer-game or a state's private sector, people need some sort of

[45] The German 'Gesellschaft' (society) usually is juxtaposed to 'Gemeinschaft' (community), which translates in Dutch as 'gemeenschap', not as 'samenleving'. A community is neither a society nor a convivial order: it is a group of people who have, are aware of, and generally value a common cultural characteristic or focus (language, religion, place of residence, ethnic origin, nationality, interest, skill, and the like). Members of a society usually have several interests in common 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. Unlike a society, a community has no legal order, no officials, no legally defined positions, roles or functions. A community has no 'collective decision-rules'. It may have more or less influential and prominent members but no formal leadership. In those respects it is like a convivial order. Community leaders typically are strong personalities, not occupiers of some predefined position. However, socially or politically ambitious members of a community often try, sometimes successfully, to transform it into a society encompassing among its membership the whole or a significant part of the community, or to create a society that will represent the community or its interests in other societies. They like to 'make it official'.

certificate of registration or licence to be permitted to play, they need no such thing in a convivial order. Conviviality requires no papers. It 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. Similarly, the fact that there may be people who are outstanding in some respect (learning, wealth, magnanimity, influence, bargaining power or whatever), does not establish a distinction between rulers and ruled. There may relations of power and influence in the convivial order but there are no positions of power and influence.

In short, the convivial order 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, a society is always a local, temporary and contingent construction, even if it envelops its members to such a degree that they no longer can see beyond its boundaries and have no sense of its artificial nature.

Moreover, as the convivial order is neither a natural agent nor an artificial actor, it makes no sense to personify it, to ascribe some sort of legal or fictional personality to it. Except in an allegorical play, 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.[46] No more than the order of conviviality, war can be personified (except in an allegory). *It* is no purposeful agent. It is often a clash of rulers, each with his followers, but *war itself* has no rulers or directors and no members. Both the order of conviviality and war are like a soccer-game, which would be a fraud if *all* the participants acted according to the directions of the same director or coach. The order of conviviality can be temporarily weakened or in places permanently destroyed by war. However, *it* cannot wage war—which is something societies most certainly can do. Societies may thrive in and by war, and emerge from a war stronger than ever, even if they are on the losing side. Clearly, war is

[46] Cf. Frank van Dun, 'The Lawful and the Legal' *op.cit.*

not the opposite of society even if the destruction of other societies may well be the reason why some societies go to war. However, to the order of the human world, characterised by peaceful, friendly relations, war is always and necessarily detrimental. As such the convivial order is the very opposite of the disorder of war.[47] Indeed, with respect to any set of interpersonal relations, war and conviviality are two mutually exclusive states of the human world.

Not being an organisation, the convivial order has no organisational or statutory purpose, no particular common goal and no central authority that controls or directs the activities of the people in it. No person owns it, and no person is responsible or answerable for it. No society takes the blame or appropriates the praise 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. In contrast, 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 necessarily is personal and not diluted by organisation.

Social administration and the science of law

Among the conditions of existence of a society one finds such things as loyalty, fairness (or distributive justice) and solidarity: loyalty of the members to the company or its leaders, and of the leaders to the stated goals of the company; the members' perception and appreciation of the fairness or [distributive] justice of its government or management, and the solidarity of its leaders and members, whether in the strong sense of a willingness to assume responsibility for all the actions of the company or any of its members, or in the weaker sense of a willingness to help other members. Probably the most important factor is commitment to the goal of the society in question, whether it be the keeping of the peace or the waging of war, making profits by honest means or foul, providing charity, scientific enlightenment, cultural enjoyment, entertainment, or promoting a particular lifestyle or the observance of a particular religious creed.

[47] See the etymological derivation of 'law' from 'lag' and the latter's logical opposite 'orlaeg' (war), to which we alluded earlier.

Moreover, while many societies are dedicated to a particular goal and exist for the purpose of achieving it, others basically are organisations that seek to perpetuate themselves and pick their goals opportunistically as pretexts for mobilising or as means to keep or gain the allegiance of large numbers of people. A society for the restoration of an old building would be an example of the dedicated type; states are paradigmatically opportunistic societies.

None of the conditions of social existence (loyalty, fairness, solidarity, commitment to social purpose) can be taken for granted. It is not surprising that a great deal of effort is spent in trying to figure out how societies can be kept going. The object of this 'science of management (or government or administration)' is not essentially related to the study of law, even if the existence of a company is undermined by conflict, internal hostility, and other divisive factors that reduce the company's ability to function as a unit.

However, because societies can have so many different goals and find themselves in so many different environments, there cannot be a general science of management or social policy. There are large and small societies. Some are rich, others poor. Some have a many-talented membership and others have not. Some have many competitors for members and funds and others have not. A commercial corporation is not an army; a church is not a state; a charitable organisation is not a soccer team; a law firm is not an insurance company; a retail business is not a mining company, a hospital is not a school; a choir is not a crime syndicate. They all are societies; they all have their rules and systems of government, methods of recruiting members, getting funds and seeking their goals —but it is even more absurd to imagine that there is a social ideal that fits every society than it is to imagine that there is an ideal way of life that fits every individual person. There is no general answer, applicable to all societies, to questions such as whether a society should be large or small; whether it should be governed democratically or autocratically; whether it should be liberal, restricting its demands on its members to only a few aspects of their activities or a few moments of their time, or totalitarian, attempting to regulate every aspect and moment of their lives; whether it can achieve its purpose without overstepping the bounds of the ius-based order of the human world, without coercive control of its members, merely relying on their voluntary contributions of money or effort,

and without aggression against outsiders; whether it can achieve social cohesion best by relying on spontaneous commitment or by providing pecuniary or other positive incentives, organising persuasion and indoctrination, social pressure, coercion or terror; how many (if any) of its members should be residual claimants with respect to the social income; how the social income should be distributed; which members (if any) will be liable for the social debt; how it can deal most effectively with its rivals and competitors, and so on.

Unlike the convivial order, societies are *means of action*; they are not indispensable conditions of human coexistence. The convivial order is not a means of action of anyone. It is the condition under which every person can lawfully pursue his own goals, individually or in the company of others. In contrast, except perhaps for the leaders or organisers, most members of a society primarily are tools to be used and managed in furthering the goals of the company, its leaders or owners. Moreover, no society is a fixed feature of the human world. People can and do move in and out of societies, or become members of more than one society. Societies can be merged or split up, reorganised, dissolved, and so on, without weakening the texture of the convivial order.

In contrast to the bewildering variety and changeability of social forms, structures and functions, the order of conviviality always and everywhere implies the fulfilment of the same condition, which is that people abstain from war-like or unlawful action in their dealings with one another. This means that there can be a genuine general science of the laws of conviviality and the natural law of the human world. Whether respected or not, freedom, likeness and natural rights (including the capacity to engage in ius-relations with others) are objective universal qualities of human persons.

Justice in society and justice in conviviality

If 'society' is an ambiguous term then there is ambiguity also in the notion of a right as what is acceptable to society. Speaking generally, a right or ius is *id quod iustum est* (what is in accordance with objective *ius* or law). In the context of a society, a right is a condition, action or activity that is in accordance with the requirements of the society, its legal order. It is what is socially acceptable and in particular what is

acceptable to public opinion, or the ruling opinion, the opinion of the ruling or dominant or majority group in a society. For those who identify themselves with their society, 'law is what is acceptable to us' and 'we are [the source of] the law'. In the context of a convivial order, a right or ius is what is in accordance with the objective condition of freedom among likes, which is not defined by opinion.

Consequently, the famous maxim 'Ubi societas, ibi ius' (no society without [respect for] law) takes on an entirely different meaning if we interpret 'societas' to mean a company rather than a convivial order. The conditions of existence of a society or company are very different from the conditions of conviviality. Conviviality reflects people's ability to interact with one another, while going their own way, individually or in the company of others, in freedom, peace and friendship. Its condition of existence is respect for the ius-based order of the human world, in particular respect for other persons to the extent that they abstain from injurious or warlike actions: *ubi convivium, ibi ius naturale* (no convivial order without [respect for] the natural law of persons).

The conditions of existence of societies, in contrast, usually are discussed in terms of the fact that the members, whether leaders or followers, and the other subjects of a society need to respect its legal order: *ubi societas, ibi ius civile* (no society without [respect for] its legal order among its members).

The popular idea of justice as necessary for society is therefore ambiguous in exactly the same way as the popular use of the term 'society' itself. Within a particular society, justice is social justice—and that necessarily is a relativistic notion. Every society will have its own particular conditions of existence and success in achieving its social purposes, which serve as the standards for evaluating the justice of its principles of organisation and policy, its *leges*.

Of course, many separate societies can exist side by side as mutually independent artificial persons and interact in more or less friendly ways. If they coexist in a friendly way, their relations mimic the ius-relations among natural persons. If they do not, they engage in actions that are like the iniuriae that natural persons may inflict on

one another. In that sense, the ius-based order of natural persons has an analogue in the order of mutually independent artificial persons.[48]

Like individuals but on a larger scale, societies may act unlawfully even when, in terms of their own legal order, their actions are legal. Unlike individuals, societies also may *be* unlawful, if their constitution itself is in violation of the principles of law. As a legal order, a society may be ius-based or rex-based in various degrees. There have been, and are, many societies (ranging from simple households to large States) that are constituted in clear defiance of the principles of law, yet behave lawfully towards outsiders. A brutal regime need not be a threat to any neighbouring society or person outside its jurisdiction. On the other hand, there have been, and are, many societies that are constituted in a lawful manner, yet operate in a warlike fashion towards others. 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 not only between members and outsiders but also among its own members (for example, a totalitarian sect or commune). They regularly engage in invasive actions of lesser or greater magnitude, from occasional raids to permanently making lawful activity illegal[49] to all-out war and repression.

A perfectly voluntary society may be organised specifically for the purpose of aggressing against, subjugating and exploiting non-members or neighbouring societies. This may be the case for instance with criminal and terrorist conspiracies, and even states—at least if we were to give credence to the notion of a state founded on a social contract. Such organised crime evokes the need for organised defence, maybe even for what is usually called a political organisation. Indeed, most apologies of the state (or of a particular state) present the state as the pre-eminent institution of defence against violent aggression and other forms of injustice. A defence organisation, like any other sort of company, may be organised in a lawful or unlawful manner. However, let it be ever so lawful in all respects, let it be ever so vital for the protection of the convivial order, its own

[48] The classical theory of the so-called international order or law of sovereign states was built precisely on that analogy.

[49] Prominent examples are the 'underground economy' and 'victimless crimes'.

organisational principle or *lex* is in no way a determinant of the law of conviviality. This holds true even when a society grows really big and powerful enough to defy the law of conviviality with impunity and on a large scale—for example, when it sets itself up as a state. Social orders are not necessarily compatible with the convivial order.[50]

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 being socially organised. Of course, as the word is used at present, war is primarily a social phenomenon in that it usually involves high degrees of social organisation and mobilisation.

The order of conviviality faces an even greater and more permanent danger than outright war: the rise of social formations that in their internal or external relations repudiate justice (respect for ius). Criminal gangs, with their policy of 'take the money and run', are the most obvious examples of these, but they are not necessarily the worst. Their policy is arguably less destructive of the convivial order than the policy of 'take the money and stay to take the money again and again' of those that succeed in institutionalising robbery, theft, fraud and exploitation. Whether in the form of some regal or legal regime of rule, the institutionalised injustice of various types of political regimes has been a constant feature of history. It has always fascinated students of human affairs. On the other hand, many political regimes have sought to justify themselves with the claim that whatever justice there is must be credited to their account. Conceding that other political regimes or types of regime need not have any positive correlation with justice, they have insisted on the indubitable justice of their own arrangements. In the twentieth century, many states have made indoctrination of the population with such beliefs a primary policy objective via the institution of compulsory 'free' (tax-funded) schooling. Moreover, capturing the universities and other institutions of higher learning either by means of direct censorship or by making them financially dependent on government expenditures, the states patronised the development of the so-called 'social sciences'. Actually, they were weaning students away from the classical humanities (or 'moral sciences', which had focussed on the

[50] 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.

universal categories of human life and action). Instead, they taught them to interpret the world in terms of the locally or nationally relevant artificial categories of legislation, administration and management. At the same time, they were forming vast armies of bureaucrats, technocrats, statisticians and policy-analysts to help them devise ever cleverer and more efficient means and techniques of social control. For the first time in history, Plato's idea that politics could only be legitimised by thought-control and therefore required comprehensive state-controlled 'education',[51] became a practical proposition. The ground had been prepared in the eighteenth century, for example by Rousseau's insistence on censorship and government-controlled indoctrination in the endeavour to make citizens out of men.[52] In his wake, many would-be legislators proposed systems of 'education' to raise the coming generations as 'productive republican machines', always ready to work for the government, to pay its taxes and to assist it in controlling its subjects.

For almost two centuries now states have used systematic indoctrination and propaganda to erode the convivial order. The

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51 Thomas Hobbes, *Leviathan*, Chapter XXX 'Of the Office of the Sovereign Representative', also stressed that point (and at the same time offered his services as the supreme censor of higher learning). "It is therefore manifest that the instruction of the people dependeth wholly on the right teaching of youth in the universities. But are not, may some man say, the universities of England learned enough already to do that? Or is it, you will undertake to teach the universities? Hard questions. Yet to the first, I doubt not to answer: that till towards the latter end of Henry the Eighth, the power of the Pope was always upheld against the power of the Commonwealth, principally by the universities […]. For in such a contradiction of opinions, it is most certain that they have not been sufficiently instructed; and it is no wonder, if they yet retain a relish of that subtle liquor wherewith they were first seasoned against the civil authority. But to the latter question, it is not fit nor needful for me to say either aye or no: for any man that sees what I am doing may easily perceive what I think."

52 Lutherans and Calvinists had been ardent advocates of censorship and compulsory education and schooling, but their motives had been primarily religious rather than 'republican'. See (…….). Of course, there had been attempts at instituting compulsory education earlier in the Renaissance, for example James IV of Scotland's Education Act of 1496, which required the barons and freeholders of the realm to send their eldest sons to grammar school to learn Latin and then to study art and law—on pain of a £20 penalty. (Magnus Magnussen, *Scotland, The History of a Nation* (HarperCollins*Publishers*, Hammersmith, London, 2000) p.285.

process continues with the rapid increase of structures and institutions of intergovernmental co-operation on every scale, from local to global. Doctrines of 'human rights' and 'democracy', developed under the auspices of the victorious warlords of the Second World War, provide standing pretexts for global intervention and meddling in the internal affairs of other states, spanning the spectrum from diplomatic pressure to trade sanctions and war.

While these developments have significantly changed the role of the state-based political sovereigns, they have not helped to revive respect for the convivial order. Indeed, many so-called non-governmental organisations, without any formal constitutional authority, now straddle the border between 'private' and 'public' spheres. Endowed with subsidies and other legal privileges or by way of privileged access to centres of political decision-making, they are drawn into the process of devising, implementing and evaluating 'public policy'. They are a motley crew: banks, large public corporations, professional, commercial and industrial lobbies, and consumer and cause-groups. The current buzzword 'multilevel governance' euphemistically describes what once was called 'ochlocracy'. That word is often translated restrictively as 'mob rule', but it is derived from the Greek for meddling in, causing trouble to, and generally disturbing other people's affairs. Recalling the etymology of 'war', we may say that the currently dominant socio-political regime in the Western world resembles nothing so much as a 'cold war' among various warlords, each of them with his own socially organised power-base. However, the propagandistic self-representation of the regime uses such terms as 'democracy', 'consultation', 'consensus', 'solidarity', 'third way' and other social pieties. They serve to mask the fact that no one's property or personal agreements are safe from the legislative, administrative or plain political interference that emerges from the always-renegotiable compromises of the lords of the day. At the same time they communicate the message that everything is up for grabs for those who are most skilful in playing by whatever the rules of the day may be. Moreover, that generalised institutional uncertainty, punctuated by eruptions of panic fear of life-threatening disasters[53], is met with a barrage of propaganda of 'citizenship', 'social responsibility' and 'national mobilisation'. In such an environment,

53 See Frank Furedi, *The Culture of Fear* (……)

there is little room for the culture of mutual respect and independence that is the essence of the convivial order of law.

The irony here is that many social theorists continue to argue that situations of that kind demonstrate the need for central government and social control to keep the strong and cunning from exploiting others. They apparently fail to see that such situations are inevitable whenever and wherever legal orders take precedence over the order of conviviality. The reason is that, unlike the conditions defining the convivial order, leges are man-made things. Anybody, including any Machiavellian calculator or psychopath, can have a go at trying to change them to suit his purposes. From time to time, some of these attempts are bound to succeed. In a democratic system, where everybody is supposed to have as much right as anyone to impose his will or fancy, that risk is not diminished. Democracy may greatly reduce the chances of an all-encompassing dictatorship. However, it does so only at the price of setting off a scramble to occupy whatever political niche appears to be within one's grab. We cannot all be The Legislator of All Leges, but each of us can be the legislator of some lex or other. If that sort of participation in the games of power answers to some people's notion of liberty, it certainly is no guarantee of freedom for anyone.

The order of conviviality is not a social order. Its existence is nevertheless compatible with and no obstacle for the existence of any number of societies, provided they are themselves ius-based and ius-respecting, especially if they have the defence of [natural] law as their main purpose.[54] However, not all societies are of that kind. Moreover, 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 resources that they can use for their particular social purposes. 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, perks of office and rewards. Unlike the

[54] The classical ideas of the 'rule of law' and even the continental 'Rechtsstaat' implied that political organisation (the state) should be directed towards the defence of the ius-based order of law, not just of its own legal order (whatever that may be).

convivial order, where the concept does not even make sense, societies offer 'career opportunities' and feed 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. On the one hand, the members may deal with one another as 'free and equal persons', thereby undercutting the society's or its leaders' capacity for acting efficiently in the pursuit of its official ends. On the other hand, the members can interact as enemies, with a similar effect. 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'.

3. Law and Its Alternatives

In a previous chapter, starting from an etymological investigation of the language of law, we constructed a figure (see page 56) representing the basic relations of order among persons. In this chapter we shall derive the same figure and its components from a theoretical point of view, namely as parts of a representation of one or another theoretical solution to the problem of conflict or disorder in the human world. In addition we shall see that the figure of the basic form of law and in particular of the natural law again emerges as the only plausible representation of the order of natural persons.

The following argument is abstract and formal. Its purpose is not to arrive at a material theory of law, one that is so to speak ready to be applied to familiar situations. It is intended to determine law as a type of order of persons while distinguishing it from other types.

Causes of interpersonal conflict

Let us consider the necessary and sufficient causes of interpersonal conflict as well its possible cures. We are not interested in the particular historical or psychological causes of particular conflicts but only in the conditions that must be present in any case if there is interpersonal conflict. For ease of exposition we shall confine the formal analysis to a two-persons situation such as that of Robinson Crusoe and Friday on their otherwise uninhabited island. Thus, we formally shall consider only conflicts between two persons but the analysis will apply immediately to larger populations.

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. 'Plurality' indicates the co-existence of at least two separate personal agents, capable of acting independently of one another.

However, Plurality is not a sufficient condition. The two persons, 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 agreement on all questions, there would be no possibility of conflict between them. Therefore, we should add Diversity as a necessary cause of conflict.

Diversity operates on many levels, and is not always clearly visible. Consensus or uniformity at one level may hide disagreement at another. It may happen that two persons agree on a formal or abstract statement such as "Things should be used for the good of all", "God exists" or "Man is a rational animal". Agreement on the latter does not necessarily mean that they have the same views on what sorts of characteristics a rational animal would have. And even if they agree on the kinds of characteristics they should be looking for, they still may disagree with respect to the question whether these characteristics are present in a particular case. They may have different views on how to establish the presence or absence of one of these characteristics, or different views on whether it is prudent to err on the side of strictness or laxity when applying criteria—for example, do you want a strict application of the concept of a human being, at the risk of excluding some humans from your conception of humanity, or do you prefer a loose application, at the risk of including non-human things in your conception? On the other hand, people may disagree on a formal definition, while they are mostly in agreement on particular cases. The fact that people disagree in their abstract "theoretical" opinions does not necessarily mean that they cannot agree on concrete "practical" decisions.

Plurality and Diversity do not constitute a sufficient set to explain significant conflicts other than mere differences of opinion. If they 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 their conflict is about the use of some object M, accessible to both of them, that is scarce in the sense that it cannot serve the purposes of both of them simultaneously. If that is the case then there is interpersonal scarcity. 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 the same scarce means or resources to the list of causes. However, as we shall see, we should decompose 'free access to the same scarce resources' into its constituent components: Scarcity and Free Access.

Conflict implies the chance of winning and the risk of losing. Thus, conflict implies that the parties to the conflict are not indifferent to all possible outcomes. If nothing mattered to any of them, we should be

at a loss to explain where the energy comes from that sustains their conflict. Conflict is driven by people's desires to profit, if necessary at the expense of others, or by their desires to avoid losses that might result from the actions of others. The underlying cause of profit and loss is scarcity, the fact that there is no guarantee that everybody, or anybody, will be able to satisfy all of his needs and desires. If there were no scarcity, everyone could have everything he wanted, and nobody would suffer as a result of anybody's (another's or his own) attempts to get anything.

Scarcity in the strict or, as we shall say, personal sense of the word does not imply the existence of other persons. It is the sort of scarcity with which Robinson Crusoe had to cope before the arrival of Friday. Personal scarcity is inseparable from a person's existence as we know it. It refers to the fact that each person faces opportunity costs. In using a means for one purpose, he cannot use it for other purposes for which he might want to employ it. 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.[55] 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—needs no further comment; it is standard fare in any elementary economics textbook. However, the physical constitution of the person is equally relevant. Human persons are finite beings, not only because they are mortal and vulnerable but also because at any moment their capacity for consumption is limited just as their productive capacity is limited. Consequently, a mortal or vulnerable person with a finite capacity for consumption would have to make economic choices, even if he had infinite productive powers or immediate access to boundless supplies of consumption goods. He

[55] 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 (see further down in the text).

still would face the risk of getting less out of life by choosing the wrong sequence of acts of consumption. No matter how rich his natural environment, unless he was completely indifferent with respect to all possible sequential orderings of enjoyments, he still would have to make decisions about what to do first, thereby incurring the risk of never being able to do or have some of the things he is now postponing. He would have to do some things at the cost of not enjoying the benefits of doing other things; he would have to avoid some risks at the cost of exposing himself to other risks. He may waste his life or his resources (say, his health and sanity) by making the wrong choices. 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. He would be able to have everything at once. Whether this condition is compatible with mortality and, if so, whether his mortality still would be a problem for him are moot questions.

Thus, we should add [personal] Scarcity to our list of causes of interpersonal conflict. Without it none of those who are involved in an interaction would ever lack sufficient means to realise any of his purposes. No action of his would have any opportunity costs for him —and neither would any action of the other party entail a change of his opportunities. He literally would have nothing to lose and therefore nothing to fear from the actions of any person (himself or another) or, indeed, anything else. Clearly, there may be many ways of alleviating Scarcity (see below) but to eliminate it entirely one would have to effectuate drastic and maybe unthinkable changes in the physical structure of the universe and human nature.

When Friday arrived on the scene, both he and Robinson still faced personal scarcity but their problems were compounded by the fact that each of them had more or less free access to the same scarce resources. Free Access too is a necessary condition of interpersonal conflict because without it scarcity would necessarily be restricted to the personal kind—as if Robinson and Friday were each inhabiting different islands, or different planets. Where many people co-exist and the same goods and services are accessible to several of them, scarcity implies that occasions may arise where one person's gain is another's loss. In such cases, a person's welfare and well-being, perhaps his life itself, are at risk not only because he himself might

make the wrong choices, but also because others might make choices that affect him in some harmful way.

Note that interpersonal scarcity is implied by the co-existence of two or more persons that have access to one another. Let us suppose the co-existence of two or more persons, each 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. For example, A may consider that it would be good for him if B did action *a*, whereas B may think it best for himself to do *b*, where *a* and *b* are actions that he cannot perform simultaneously. Therefore, to the extent that one has desires and ideals that can be satisfied or realised only if others are or do what one 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; complete immunity from harm or frustration; or total indifference.

Scarcity, whether of the personal or the interpersonal variety, implies the inevitable frustration of some wants, but only personal 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.

Problems of personal scarcity belong to the fields of ethics and economics.[56] These are essentially 'managerial' or 'governmental'

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[56] Etymologically and semantically, ethics and economics are closely related terms. The etymology of 'economics' points to the Greek words for *house* (*oikos*) and custom or rule (nomos), and so reveals the idea of the custom or rule of the house, of managing or governing a household. 'Ethics' points to the Greek word Homer used for *dwelling*, *home*, *residence* (*èthos*). Its adjectival form (*èthikos*) was used to refer to whatever pertains to housekeeping. Later *èthos* came to stand for character, i.e. for the characteristics of a person that reveal his upbringing, his cultural background and origin. A different, but semantically related, word is *éthos* (customs or mores). The combination of these two words and meanings led to the Greek conception of ethics or ethical philosophy as the study of the cultural aspects of character, and in particular of the role of convention and custom on the formation of character. In this sense, ethics is concerned with the effects of morality, of getting instruction in, and knowledge of, the ways and customs of one's society. The primary meaning of 'economics' for a long time

disciplines: their basic concern is to provide answers to questions such as 'What to do now?', 'How to go about securing this or that goal?', and similar questions relating to the management or government of scarce resources (including an individual's time and energy, his life). Where there is interpersonal scarcity, ethics and economics no longer suffice. The fact that Friday uses a given means for a different purpose or in a different way than Robinson would have done, if he had acquired control of it, is no ground for saying that Friday used it wrongly or inefficiently. Given the conditions of plurality and diversity, we cannot simply assume that one man's opinions, preferences or values provide an objective basis for judging the rightness or wrongness or the efficiency or inefficiency of another's action.[57] In the presence of Friday, Robinson's question 'For what purpose and how am I going to use this means or resource?' presupposes that he and not Friday has control of the relevant resource or means. It presupposes an answer to the question 'Who is going to use it?' The latter question is not one that each man can decide for himself. Neither for Robinson nor for Friday is it a question of management. It belongs to the sphere of human interaction rather than personal action.

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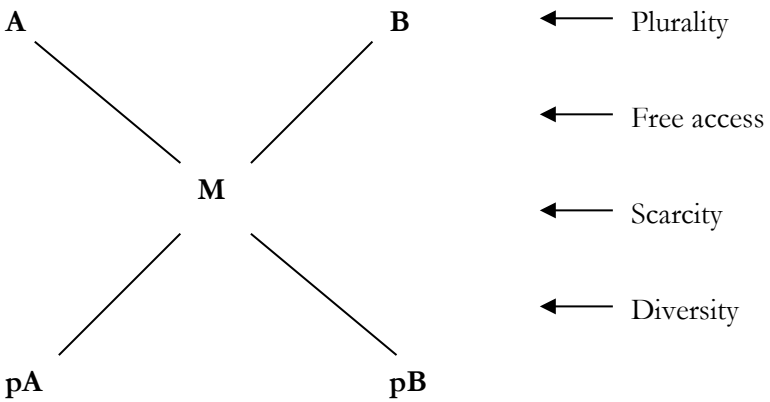
remained unchanged: managing a household, and by extension any other organisation characterised by well-defined criteria of membership, hierarchy and authority (armies, firms, clubs, and even states). Modern academic terminology is highly misleading: 'economics' is now reserved for studying the relations that exist *among* various economic entities (or economies, such as households, firms, factories, public and private corporations) and the dynamic order that results from these relations; on the other hand terms such as 'business administration' and 'public administration' are used for the study of the management, government or administration of economic units. Confusion is at its maximum in expressions such as 'the market economy': the market is the space within which many economies interact, or the result of their interactions, but it is not itself an economy in the etymological sense. It has been proposed to call the study of markets 'catallactics' (from the Greek *katallassein*: to exchange, to come to terms, to mediate, to conciliate; also *katallagè*: profit, conciliation), but few have done so.

[57] This statement is not compatible with the formalistic approaches of present mainstream economics. They assume that 'the efficiency of an action' should be judged from an 'Olympian' point of view, one that looks at the degree to which the action meets not just the agent's preferences but those of every other person as well. Of course, there really is no Olympus from which the economist can see everybody's preferences.

One cannot manage that over which one has no control. Publicly or freely accessible goods are by definition not controlled by any one person or party. We cannot tackle the problem of interpersonal scarcity by placing ourselves mentally in the shoes of *the* manager or *the* governor of the resources in question, and then asking ourselves what would be the best thing to do. If we tried, we would merely indicate thereby that we failed to understand the situation. The following analogy may help to clarify the point. If we found out that the two opponents in a game of chess, or all the players on a soccer-field, took directions from the same man (the same 'manager' or 'governor'), we should say that their game was rigged, or that they were merely actors pretending to play. We readily understand that such a man (a movie director, or a crook) faces a different sort of situation than a player or coach in a fair game. The one might wonder how to make *all* the players behave so as to give the *pretended game* a desired quality (drama, comedy, beauty, a particular outcome); the other can only control his *own part*, not the entire real match itself. Playing chess against oneself or writing a scenario for a simulation of a chess game is not at all like the real thing. In the former case, one can never fail to know the opponent's thinking because there is no independent opponent; in the latter case, one must always prepare to some extent to deal with unexpected moves by the other party.

The implications of the interpersonal aspects of scarcity are studied by disciplines such as law, catallactics (what most people misleadingly call 'economics'), and politics (as the study of the processes affecting the distribution of the powers of making and implementing decisions in society). These disciplines are of an entirely different nature than ethics and economics (household management) precisely because they cannot assume the 'Olympian' position of a single controlling actor who can make decisions about the most ethical or economic behaviour of "the whole system".

Together the four causes—Plurality, Diversity, Scarcity and Free Access—are sufficient causes of the possibility of interpersonal conflict. A and B each have access to the same scarce resource M which A can use for realising his purpose pA and B for realising his purpose pB. We can visualise the situation in the Conflict-diagram, which depicts the separately necessary and jointly sufficient causes of interpersonal conflict.



Given that each of the causes is necessary, it is sufficient to eliminate (reduce) only one of them to eliminate (reduce) the possibility of interpersonal conflict. 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 types of mixed strategy. 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.

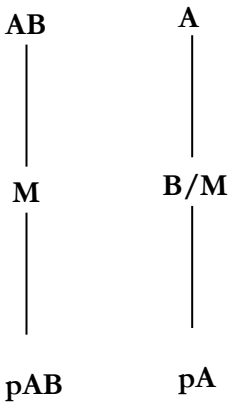
'Political' remedies: Unity and Consensus

The most drastic strategy for achieving Unity is one that seeks to physically eliminate all other persons. If successful it eliminates the possibility of interpersonal conflict. Typically, however, Unity involves either the merger of A and B into a single person (AB) or

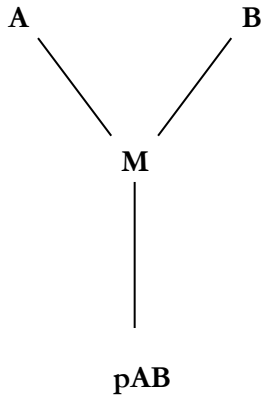
else the reduction of a person (B) to the status of a mere means or a subject or servant of the other (A). Everybody submits to the will of one, so that they all end up co-operating in a single collective action, acting according to a single coherent plan. This is a powerful political idea that has had, and perhaps still has, a great appeal for many people. It is often expressed as the idea, that in society there should be one leader willing and able to make decisions that are binding for all, or that society should act "as one man".

Obviously, where there is unity there no longer is a problem of diversity; also the problem of free access disappears. However, unity does not end scarcity. Hence, the one remaining decision-maker still would face problems of ethics and economic management, but problems of exchange and interpersonal order would be eliminated.

Consensus requires that a set of shared opinions, valuations, preferences and the like be available in terms of which A and B always can reach agreement on the purpose for which and the manner in which M will be used. 'Consensus', in the sense that is relevant here, refers to a deep and pervasive agreement on what is good, useful and right, which ensures that collective deliberation yields a unique solution, agreeable to all, to any practical problem.



Political solution: Two varieties of Unity



Political solution: Consensus

Consensus does nothing to eliminate either plurality or scarcity but it does solve the problem of free access. None of the parties involved

will act until or unless there is an agreement among all parties with respect to the proper use of any scarce means. Again, problems of exchange and interpersonal order disappear from the picture.

In the history of political philosophy Plato and Hobbes stand out as eminent proponents of the Unity-solution. A particularly strong statement of unity as a political idea is to be found in Plato's last work, *The Laws*. The quote is from book V:

> 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.

Hobbes expressed the need for unity in less exalted, but no less clear terms, in chapter XVII of *Leviathan*:

> [I]f we could suppose a great multitude of men to consent in the observation of justice, and other laws of nature, without a common power to keep them all in awe, we might as well suppose all mankind to do the same; and then there neither would be, nor need to be, any civil government or Commonwealth at all, because there would be peace without subjection. […] The only way to erect such a common power,

> […] is to confer all their power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, unto one will […]This is more than consent, or concord; it is a real unity of them all in one and the same person […] And in him consisteth the essence of the Commonwealth; which, to define it, is: one person, of whose acts a great multitude, by mutual covenants one with another, have made themselves every one the author, to the end he may use the strength and means of them all as he shall think expedient for their peace and common defence.

Despite their very different positions on almost every question of philosophical method, Plato and Hobbes were in agreement on the thesis that only a strong form of political organisation under the unconditional supremacy of a single authority can defuse the supposed tendency of men to start and escalate universal war and conflict. That supreme authority preferably should be one natural person (Plato's philosopher-king or Hobbes' sovereign and absolute monarch) but it might also be, probably as a second-best option, an assembly (Hobbes' Parliament) or council (Plato's Nocturnal Council) producing binding 'collective decisions' according to some decision-rule.

As a political ideal unity stands for the reduction of the social to the individual: society becomes an individual, and that individual is personified in the ruler or ruling authority. Consequently, the solution to the problems of social existence depends on the ability of the ruler to impose his will, or on the willingness of everybody to surrender his will to the ruler. Only this will ensure that the whole of society acts as one person. But then all social and political questions become questions of government and management. The arts of managing society—that is to say: economics and ethics, as defined earlier[58]—become the supreme skills, which the rulers should master. However, the rulers' first task is *to rule*, to make and impose their decisions; it is not to be mere guardians of the moral standards of the community they are in charge of.

[58] See note Error: Reference source not found above.

In Antiquity Aristotle was the foremost proponent of the Consensus-solution. In Modern Times, Jean-Jacques Rousseau picked up this solution is his *Du Contrat Social*. Aristotle's basic consensus was rooted in the common ancestry, tradition, experience, educational practises and intermarriage of the families that constitute a local community—in shared opinions about what is right and useful. Rousseau, in contrast, thought of Consensus primarily as a merely formal agreement to agree (the social contract) that some legislative genius (the *législateur*) would have to turn into a real or living consensus by skilful manipulation and propaganda. In short, Aristotle presupposed an existing agreement on fundamental values and opinions while Rousseau addressed the question of constructing a consensus as it were from scratch.

In Book III, chapter 9, Aristotle makes it clear that not just any association of moral beings with a sense of justice makes a state. On the contrary, justice, in the ordinary sense of securing people's natural rights, is explicitly denied to be what the state is all about. The state is said to exist "for the sake of a [morally] good life", "to take care that there is no wickedness or vice, not merely to take care that there is no injustice". The enforcement of a particular morality, which is supposed to be that of the community, is the essential task of the state.

> But a state exists for the sake of a good life, and not for the sake of life only: if life only were the object, slaves and brute animals might form a state, but they cannot, for they have no share in happiness or in a life of free choice. Nor does a state exist for the sake of alliance and security from injustice, nor yet for the sake of exchange and mutual intercourse; for then the Tyrrhenians and the Carthaginians, and all who have commercial treaties with one another, would be the citizens of one state. True, they have agreements about imports, and engagements that they will do no wrong to one another, and written articles of alliance. But there are no magistrates common to the contracting parties who will enforce their engagements; different states have each their own magistracies. Nor does one state take care that the citizens of the other are such as they ought to be, nor see that those who come under the terms of the treaty do no wrong or wickedness at all, but

> only that they do no injustice to one another. But those who care for good government take into consideration virtue and vice in states. Whence it may be further inferred that virtue must be the care of a state which is truly so called, and not merely enjoys the name: for without this end the community becomes a mere alliance which differs only in place from alliances of which the members live apart; and law is only a convention, 'a surety to one another of justice,' as the sophist Lycophron says, and has no real power to make the citizens good and just. […]It is clear then that a state is not a mere society, having a common place, established for the prevention of mutual crime and for the sake of exchange. These are conditions without which a state cannot exist; but all of them together do not constitute a state, which is a community of families and aggregations of families in well-being, for the sake of a perfect and self-sufficing life. Such a community can only be established among those who live in the same place and intermarry. Hence arise in cities family connections, brotherhoods, common sacrifices, amusements which draw men together. But these are created by friendship, for the will to live together is friendship. The end of the state is the good life, and these are the means towards it. And the state is the union of families and villages in a perfect and self-sufficing life, by which we mean a happy and honourable life.

What Aristotle had in mind was a sort of 'deep consensus' to which the members of a political society[59] 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.

In chapter 1 of book II of *Du Contrat Social*, Jean-Jacques Rousseau (1712-1778) introduces the case for consensus as the basic requirement of political life in the following terms:

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[59] 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.

> If the opposition of particular interests has created the need for the establishment of societies, it is the agreement of these same interests that has made their establishment possible. It is only what is common in these different interests that constitutes the social bond; if there were not some point on which all the interests are agreed, no society could exist. Well, it is only on the basis of this common interest that the society should be governed.

The common interest or will should be the source of all legislation, and hence of every particular application of the laws. But the common interest that makes society possible does not amount to a mere interest in justice–for that is a universal interest, that cannot serve to separate the members of one society from that of another. Rather it is a common interest in a particular set of fundamental values and opinions–Rousseau is not talking about the convivial order or human society in general, but about particular politically organised societies.

The idea of consensus resembles that of unity, but does not imply the need for a authoritarian monarch and a strong apparatus of power devoted exclusively to enforcing his will on the rest of society. In political terms: the state, or whatever the actual system of rule might be, is an institutionalised expression of shared beliefs and convictions. As such it supposedly is not an oppressive institution, but an instrument of self-realisation or self-determination.

Consensus presupposes that diversity of opinion, taste, and ambition are no more than symptoms of some remediable deficiency of intellectual or moral education, or of perverse habits or institutions that prevent people from seeing everything in the same light. Thus, disagreement is often attributed to foolishness, irresponsibility, or bad faith, either of the disagreeing person himself or of those who are responsible for his education or circumstances. It is sometimes held that diversity of opinion is an illusion, and that deep down all people are of the same opinion on all fundamental, and by implication on all, questions. Sometimes it is said that because all opinions are acquired, it should be possible to teach people to always agree on everything that is in any way important to social existence. Diversity of opinion

is a cause of conflict, but it is one that some people apparently believe is relatively easy to manage.

As the graphical representations (see page 88) make clear, Unity and Consensus involve the replacement of a plurality of independently chosen actions by 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 ends should be pursued but also which ends should be pursued. Unity and Consensus require social organisation. At any rate, they involve an organised structure of collective decision-making, command and obedience, and usually also a hierarchical stratification of rulers and subjects, leaders and followers, directors and members or employees. In short, they presuppose a legal order. In particular, they subordinate 'law' (which they typically interpret 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. Unity and Consensus rely in distinctive ways on the existence of an effective society or social order. Each actor has his proper place in that society, either as a policy-maker or as a policy-taker. However, the decision-making power is lodged at the top of the social hierarchy. For this reason, we may label Unity and Consensus 'political solutions'. The common thrust of both is to rearrange decision making in such a way that all human actions within a particular society—a politically organised community—are governed, or at least controlled, by the same will, the same values and opinions. Thus, their main emphasis is on control over people.

In the graphical 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'.

Obviously, in the Unity-solution there is no place for the ius-relation, although there may have been ius-relation in the background of the constituted unity, for example if it was the result of a mutually agreed upon merger. Of course, if there are several unitary organisations that co-exist as neighbours then the ius-relation re-

emerges as a principle of order among them. However, if that is the case then we again have a situation characterised by Plurality. Logically, Unity presupposes a closed autarkic society that has no external dealings with any person outside its borders. Thus, Unity would be a complete solution to the problem of conflict if there were a unitary world government. 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.

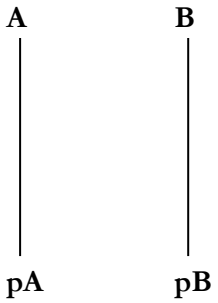
'Economic' remedies: Abundance and Property

Neither Abundance nor Property 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.

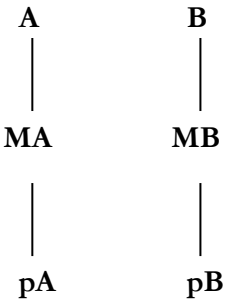
Abundance is a condition in which it is possible for every person to do and get whatever he wants, regardless of what he or anybody else might do and therefore also without having to rely on anybody else's co-operation or consent. Abundance clearly is consistent with plurality, diversity and free access. It only sacrifices scarcity. That is why it is so perennially attractive. Property leaves scarcity, plurality and diversity as they are and only eliminates free access. It implies being restricted or limited by the mere existence of other persons. That is why so many people abhor the property solution: they do not object to having property, they do object to respecting other persons and their property.

Property requires only that each person can know which parts of the set of scarce means are his and which are another's and confines his actions to those that do not make use of anybody else's means. Of course, we should not assume that there is some sort of distribution, allocation or assignment of property among a class of persons, either by the decision of a single ruling authority or by the consensus of all. As a distinct solution to the problem of conflict, Property refers to

what naturally or as matter of fact is a person's own; it does not refer to what is his by another's decision or some convention or other.



Economic solution: Abundance



Economic solution: Property

Unlike the political solutions, Unity and Consensus, the economic solutions do not require a social or legal order, a central decision-making apparatus, or a hierarchical stratification of rulers and subjects, leaders and followers, directors and members or employees. The order they constitute is an order of conviviality, in which many people live together regardless of their membership, status, position, role or function in any, let alone the same, society.

As we can see in their graphical representations (see page 96) the economic solutions, abundance and property, are compatible with the ius-relation and the general form of law. Indeed, if we connect the A and the B at the top of each diagram and leave out the reference to the agents' purposes at the bottom of it then we get the same figures for the ius-relation and the general form of law that we constructed on the basis of the etymological analysis in an earlier chapter. However, there really is no need for any ius-relation in the context of true abundance, where nothing depends on anybody's commitments. Neither A nor B could gain anything from taking on obligations in a world without scarcity. Thus, 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.

Eliminating scarcity obviously is an attractive thought. Put simply, Scarcity is the inadequacy of the available means (M) to satisfy existing needs or desires (N). As a teacher of elementary economics might say, using a pseudo-mathematical formulation, Scarcity implies that $M<N$. Hence, Abundance implies that $M \geq N$. Clearly, there are two pure ways of achieving Abundance; one is by increasing the available means (M) while keeping needs and desires (N) constant; the other is by diminishing needs and desires while keeping the available means constant.

In the history of philosophical thought we can discern many examples of those two radically different approaches to Abundance. Before the technological and industrial revolutions of the nineteenth century, Abundance was associated mainly with asceticism. Regardless of changes on the supply-side (M), there would be plenty for everybody if only people would reduce their 'demand', that is to say their needs or desires (N). 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 and the Industrial Revolution, the idea of Abundance rests primarily on the prospect of an enormous increase in the productive powers of mankind and the concomitant increase of available means (M). Thus, abundance or liberation from wants and frustration now implies satisfaction of all desires, regardless of their number, quality or intensity, which is brought about by technological progress or by removing any historical, psychological or other obstacles to the supposedly 'infinite' productive powers of man. Many early nineteenth century utopian socialists already fitted this definition, 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.[60]

[60] 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 a autonomous

In a well-known passage from Marx's *Critique of the Gotha Programme,* we read:

> In a higher phase of communist society, when the slave-like subjection of individual human beings to the division of labour, and therefore also the opposition between manual and intellectual labour, will have disappeared; when labour will no longer be a mere means of survival, but also the foremost expression of vitality; when together with the universal development of the individuals also their productive powers will have grown, and all the sources of social wealth will overflow—then, and only then, will it be possible to move beyond the limiting horizon of law, and to inscribe on the banner of society: From each according to his abilities to each according to his needs!

The passage is famous for its final phrase, which is usually interpreted as a principle of distributive justice. However, as the context makes clear, Marx does not present it as such. What he says is, that in communist society there will no longer be a problem of distributive justice, because scarcity itself will have come to an end. Communism is not defended on the ground of its justice, but on the ground that it allows us to dispense with the notion of justice altogether. Communism, in short, is not just another political regime, but the outcome of a radical transformation of the human condition, in which all the boundaries separating one person from another—in particular, property and law—will have disappeared. Consequently, there will be no more need for justice, which is respect for law. Everything, including every human talent and faculty, will be common, and therefore accessible to all. It follows, that there will be no one who will deny anything to anybody. There are then no human limits to the fulfilment of the human potential. Moreover, 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.:

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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).

> Communism [is] the positive abolition of private property and thus of human self-alienation, it is therefore the real re-appropriation of the human essence by and for man. This is communism as the complete and conscious return of man himself as a social, i.e. human being. Communism... is the genuine solution of the antagonism between man and nature and between man and man. It is the true solution of the struggle between existence and essence, between objectivication and self-affirmation, between freedom and necessity, between individual and species. It is the solution to the riddle of history and it knows itself to be this solution. […] [In Communism] society completes the essential unity of man with nature, it is the genuine resurrection of nature, the fulfilled naturalism of man and humanism of nature... For not only the five senses, but also the so-called spiritual and moral senses (will, love, etc.), in a word, human love and the humanity of the senses come into being only through the existence of their object, through nature humanised. The development of the five senses is a labour of the whole previous history of the world.[61]

In other words, communism is the condition in which every human being becomes one with every other human being, with the human species as a whole, with the world, and finally with the universe itself. In short, communist man is the ultimate being—what other religions called God—for whom there are no limits. Being all and everything, communist man lacks nothing; he is perfect, wanting nothing. And what keeps man from achieving this blessed state? His addiction to private property and exclusive personal relationships, such as they exist in the traditional family–in short, his addiction to his particular individual personality.[62]

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[61] However, "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)

[62] The idea that *selfhood* is the root of all evil, is a recurrent theme is mystical religious thought. Plato's statement of this idea in the fifth book of *The Laws* is characteristic: "Of all evils the greatest is one which in the souls of most men is innate, and which a man is always excusing in himself and never correcting; I

Asceticism remains a relevant force in today's politics, for example among environmentalists or ecologists and other *New Age* adepts, in which we find similar mystical views of the unity of nature and the need for a reunification of man and nature. The main difference seems to be that the utopian communists want to reabsorb nature into man (that is, to make nature a part of man) while the greens apparently want man to be reabsorbed into nature (that is, to make man a part of non-rational nature). Thus, the communists proclaim the superiority of man over nature and the "liberation" of man from natural constraints, while the greens proclaim the superiority of nature over man and the "liberation" of nature from human constraints. A common theme is that mankind, as it has evolved throughout history, must adopt a new way of life that is the reverse of the old way of production and exchange. In fact, it is a characteristic of both views that they are clearly opposed to a market society, and very much in favour of stringent controls on what Adam Smith called 'the human propensity to truck, barter, and exchange one thing for another'. As one "green" educator put it:

> For a long time to come, our top national priority...should be to reduce the GNP as fast as possible, because we are grossly overdeveloped and over-producing and over-consuming and there's no possibility of all people ever rising to the per capita levels we now have, let alone those we are determined to grow to. […] There would be far less trade and transporting of goods than there is now. There would have to be many co-operative arrangements: the sharing of tools, many community workshops, orchards, forest, ponds, gardens, working bees, and regular community meetings.
>
> Applying the concept of appropriate development in the over-developed countries would make it possible for most people to live well on only one day's work for cash a week, because many

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mean, what is expressed in the saying that "Every man by nature is and ought to be his own friend." Whereas the excessive love of self is in reality the source to each man of all offences; for the lover is blinded about the beloved, so that he judges wrongly of the just, the good, and the honourable, and thinks that he ought always to prefer himself to the truth. […] Wherefore let every man avoid excess of self-love, and condescend to follow a better man than himself, not allowing any false shame to stand in the way."

> of the relatively few things they need would come from their own gardens, from barter, from gifts of surpluses and from the many free resources within the neighbourhood.[63]

This direct attack on the city and on civilisation—which is also an implicit plea for a phenomenal reduction of the human population—echoes the dreams of the eighteenth century aristocrats of an Arcadian utopia, where everybody would find complete happiness in the ascetic and supposedly simple life of a shepherd living on the generous bounties of nature. It also echoes the utopian socialism of Charles Fourier, and, of course, the Book of Revelation.

On the practical side, the New Asceticism manifests itself as the New Protectionism, a concept promoted by such powerful lobbies as *Greenpeace* and *The International Forum on Globalisation* (as well as numerous business groups and trade associations). Summarising the political programme of the New Protectionism, one of its most outspoken advocates notes the need for "import and export controls, controls on transnational corporations, controls on banks and pensions, insurance and investment funds [to insure] 'an invest here to prosper here' policy, limits on the size of companies and subsidies to new local companies, international aid in stead of international trade, relocalisation [of industry]" and, of course, "resource taxes, tariffs and controls"–all in the name of "sustainable regional self-reliance".[64] Apparently, building the road to Arcadia requires a massive re-direction of investment, away from economic institutions of production and trade and into political institutions of taxation, regulation, and police power.

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63 Ted Taylor of the Department of Educaton, University of New South Wales, quoted in N.R. Evans, "The Basel Convention: A Toxic Treaty for a Toxic Trade?", *Economic Affairs*, XVI, 5, 17

64 Quotes are taken from Colin Hines, "The 'New Protectionism"', *Economic Affairs*, XVI, 5, 29-32. Note, however, that sustainable regional self-reliance, the ostensible goal of the New Protectionism, is to be brought about by global planning agencies (such as the World Bank, the International Monetary Fund, and the World Trade Organisation) that should have ample police powers to enforce the New Order on regions and local people who might succumb to the temptation to specialise in their most productive skills and to seek gains from [long-distance] trade."

'Property' rests on the idea that the physical, 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 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. 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.

Formally, the basic mechanism of the Property solution is the defence of person and property, according to some property rule. A property rule does two things: 1) it assigns the power to make decisions about particular scarce resources to particular persons; 2) it assigns responsibility and liability for those decisions as well as for [many of] the actions or activities of the resources themselves to their owners. In a purely formal sense, there can be as many property rules as there are ways of distributing all the scarce resources among all persons. At one extreme, the property solution coincides with the unity or consensus solutions, where "all" scarce resources, including "all" persons, are assigned as the property and responsibility of one and the same sovereign authority, which may be an individual, a senate, parliament, or any other collective body, that represents the whole of society. At the other extreme, Abundance 'assigns' all resources to all persons. However, as one of the four basic alternative solutions, Property does not refer to any 'assignment' of scarce resources to persons; instead it tracks by whose agency scarce resources come to be part of the human world as means of action and what those agents subsequently do with it. Thus, Property implies that particular scarce resources, to the extent that they are part of the human world, belong essentially to individual persons, although these

may have an obligation to cede their property to or share it with others because of a prior agreement (for example, a contract of marriage, employment or partnership). Individual human beings are the natural constituents not only of convivial but also of social life: conflicts can arise not just between groups, but also between individuals within groups, families, clans or societies. Moreover, clans, families and other more or less organised groups, are contingent on the willingness of individual members to remain within the group, on their loyalty, appreciation of the costs and benefits of membership, and so on. Consequently, the natural starting point for the study of social phenomena is to be found in the interactions and exchanges among individual human beings.

"Property" signifies reliance on the "rule of law" rather than on government or management. If each person or property holder is entitled to make his own decisions concerning his own property, there is no room for a single ruling authority, and no need for a fundamental consensus on almost everything. Instead one has to rely on mutual agreement on particular issues among those who are directly involved, and on the protection of property rights. In other words, one has to rely on natural motives, and especially on self-interest. The assumption is that every interaction is an opportunity for those involved to experiment with known or newly devised schemes of co-ordination or co-operation and that self-interest is more likely to lead to peaceful co-existence than to war, because over the long run, and in most circumstances people have more to gain from peace than from war and more to lose from war than from peace. In other words, interaction with others tends to reward what the ancient Sophists of the 5th century BC called 'the convivial skills', especially αιδως, a concept that links respect for others and their property to the sense of honour and shame, and δικη (justice), which links respect for others and their property to the obligation to seek and keep agreements. Civilisation is the combination of these convivial skills with the technical skills (which derive especially from the ability to make and control fire, to increase the supply of useful energy).

The essential distinction of the convivial skills is that they accept the equal standing of the people involved in an interaction. People come to it as equals, hence have to reach an agreement, or else part again in the same condition as they came. The agreement does not

reflect a deep consensus about fundamental values, but the common agreement that in the particular circumstances a particular arrangement or course of action is satisfactory for the purpose at hand. People or their properties are not available as means for others, unless and to the extent the former give their consent.

The political implication of these views is, that political organisation is compatible with conviviality only to the extent that it is an organisation for mutual protection and for negotiated solutions to problems of disagreement. Concepts of "rule" (by, say, a monarch, aristocracy, or *demos*) do not enter into the scheme. People are members or patrons of mutual protection agencies, not their subjects. They solve their problems by diplomatic negotiations or by appointing a common judge or arbitrator, without becoming subjects of either the diplomatic or the judicial agent.

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.[65] With few exceptions they were travelling teachers with no 'fixed position' in any of the societies or cities that they visited. In a way, they were always just visitors, outsiders. No particular city, its traditions or religion, determined the object and the framework of their speculations. 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

65 Eric Havelock, *The Liberal Temper in Greek Politics* (Yale University Press, New haven; 1957).

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.[66] 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'.[67] 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 order of 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, 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'. Unfortunately, formal Christian philosophy in the middle ages was so impressed with the teachings of Aristotle that it strove mightily to find a synthesis between its own religious individualism and the political corporatism of the Greek. The result was the conflation of the classical notion of the political and the Christian notion of personal salvation in the conception of man as a 'social animal', albeit one that belongs to two

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66 Cf. their rational capacities may be natural but no particular language or theory is natural to them.

67 See Aristotle, *Politics* (Book III, section 9), 1280b11 and 1280b30.

cities, which does justice to neither of its sources. Thus, the proto-liberal tradition of the Sophists was very nearly eclipsed by the influence of philosophical heavyweights such as Plato and Aristotle and their Christian admirers.

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. In the famous fifth chapter of his *Second Treatise of Government*: Locke wrote:

> §26. Though the earth and all inferior creatures be common to all men, yet every man has a "property" in his own "person." This nobody has any right to but himself. The "labour" of his body and the "work" of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it that excludes the common right of other men. For this "labour" being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.[68]
>
> §30. […] As much as any one can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in.[69] Whatever is beyond this is more than his share,

[68] Much has been made of this so-called Lockean proviso. Note, however, that it merely qualifies 'unquestionable property'. The text suggests that where the proviso is not met the title to the property may not be as self-evident as where there still is enough and as good for others. There is no suggestion that where the proviso is not met there is no property. There is only the suggestion that in that case there may be need for further argument.

[69] This seems to be the true Lockean proviso. It rules out merely symbolic or pre-emptive appropriation, regardless of whether is sanctioned by a legal system or not. Lawful appropriation requires 'homesteading' (Murray Rothbard's term, see his *The Ethics of Liberty*); it is not achieved merely by the ability of denying others access to unused land or resources (for example by shooting them or extorting payment from them).

> and belongs to others. Nothing was made by God for man to spoil or destroy.

Understandably, a person's property—the manifestation of his being, life or work in the natural order of the human world—was seen as a direct consequence of his primary natural right as a person, which reason could not but acknowledge as eminently respectable. 'Property' took on its classical liberal guise. Unfortunately, without any theoretical justification or logical argument, Locke slid into the argument that the protection of person and property requires a political monopoly of rule making and enforcement in a contiguous territory. Thus, as Locke developed his political theory, Property appeared less as an authentic principle of order and more as a mere check on the competence of the state.

Nearly a century after Locke, Adam Smith completed the resurrection of liberal thought with his explanations of how, in a regime based on the natural rights of property and contract, co-ordination and co-operation come about without central direction.

Ranking solutions

Which of the 'ideal type'-solutions one prefers obviously depends not only on one's valuation of plurality, diversity, scarcity and free access but also on one's views on the feasibility of eliminating or at least reducing any one of these conditions. Most people see scarcity as a burden and value to a greater or lesser degree plurality, diversity and free access. However, few people believe that it is possible to do much about scarcity whereas many profess to believe that unity, consensus and property are feasible objectives. Thus, most differences of opinion concerning the proper way to eliminate or reduce interpersonal conflict have to do with the relative merits of Unity, Consensus and Property. Nevertheless, there are and always have been 'radical' thinkers who assume that the problem of conflict can be solved only by eliminating personal scarcity—and that it is feasible to do so.

As we have seen, Abundance and Property tackle scarcity in different ways. Abundance refers to the elimination of scarcity in the fundamental sense of personal scarcity. Property leaves personal scarcity intact but removes free access. If true Abundance were

possible, it would have nothing to fear from plurality, diversity or free access. The disappearance of personal scarcity also takes the sting out of those other causes of conflict. However, merely imagining a world without scarcity is no mean matter.

Compared to Abundance, the other solutions, Unity, Consensus and Property, place less fantastic demands on our imagination. 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. On the one hand, 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 as a result of his making the wrong decisions.

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 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, a consensus on the wrong values or opinions 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. 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 personal 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 on page 111). 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 is true. It requires little tampering with the natural 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.[70] While Hobbes is rarely charged with utopianism, there is a strong utopian undertone in his work. His definition of war as consisting 'not in actuall fighting; but in the known disposition thereto, during all the time there is no assurance to the contrary',[71] leaves us with a definition of peace that is distinctly utopian.[72] His Commonwealth—'a reall

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70 See the quotation from *The Laws*, Book 5, on page 96 above.

71 Hobbes, *Leviathan*, Part I, chapter 13.

72 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)

Unity of them all, in one and the same Person'[73]—is supposed to be the necessary and sufficient condition of that utopian peace.[74]

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. 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 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,[75] 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.

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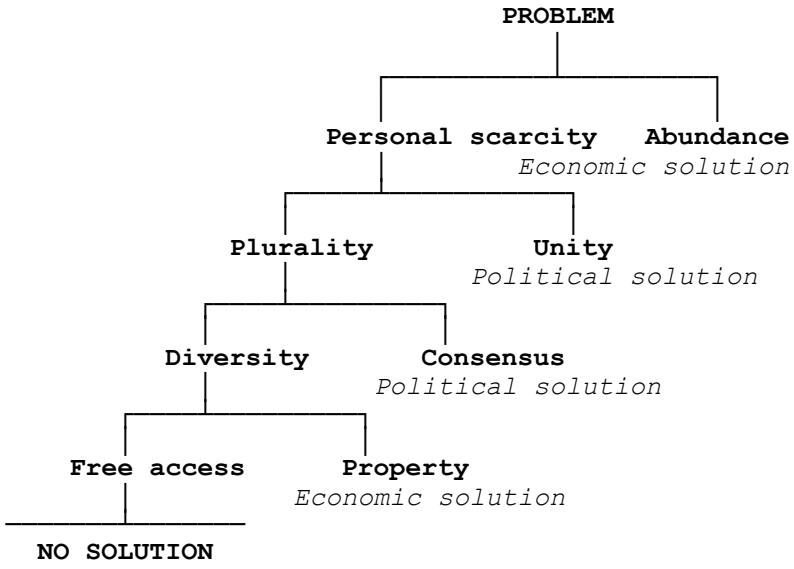
73 Hobbes, *Leviathan,* Part 2, chapter17.

74 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.

75 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).

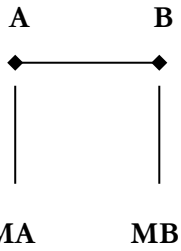


Arguably, Property is immune to the charge of utopianism. Neither the Sophists nor those in the modern Lockean tradition are prominent figures in the literature on utopian thought. Descriptions of what a liberal or libertarian world might be under ideal conditions fail to give an impression of utopianism. 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.

Unity and Consensus require organisation, hierarchy and legal order to control the human world for Plurality or Diversity. As long as there is no worldwide unitary or consensus-based organisation, a World State, they can only provide local solutions to the problem of interpersonal conflict: solutions *within* a particular society. They are at best types of order in the world; neither of them fits the bill of an order of the human world. Moreover, as 'political' solutions, they are primarily means of controlling people either by force, indoctrination or propaganda—means at the service of some ruling individual, group or class.

Abundance and Property do not refer to local circumstances, do not require particular forms of social organisation, and do not need to

control the natural conditions of Plurality or Diversity. However, Abundance is completely at odds with everything that we know about the physical structures of the universe and the human species in particular. That leaves Property as the only plausible candidate for the order of the human world. Formally, it is the same concept of order as the one we identified in terms of the ius-relation.



We shall now proceed to a formal analysis of the relationships that constitute this concept of the order of persons and their property.

III. THE LOGIC OF LAW

1. Persons and their property

For the moment, we shall disregard the distinction between natural and artificial persons. We now focus on the general notion of law as an order of persons. What follows is an informal presentation of a formal theory of law in that sense.[76] For the sake of simplicity we first consider only persons and the means of action that belong to them. A full analysis needs to consider also the actions of persons. As we shall see, even our simplified discussion will bring to light many patterns of order that are familiar from the philosophical and theoretical literature on law.

Our starting point is the figure representing the basic form of law (see pages 56 and 112), which depicts the ius-relation between two persons (natural or artificial), each with the means of action that he commands either via rex-relations or via lex-relations. As a general expression for referring to the two latter relations we shall use the formula 'X lawfully belongs to y'.[77] It is the basic relation in our conceptualisation of law. It is a relation between a means of action ('x') and a person ('y'). As a synonym for 'the means of action that lawfully belong to a person', we shall occasionally use the term 'property'. Alternatively, we shall occasionally say that if a means of action lawfully belongs to a person then that person is responsible or answerable for that means.

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[76] For a more technical exposition using the full apparatus of the first order predicate calculus with identity, see my "The Logic of Law" (in the Samples section of my website http://allserv.UGent.be/~frvandun/ welcome.html). Some paragraphs of this section are taken almost verbatim from that paper. Consulting it may prove helpful in proving the theorems of the theory. Here, we only refer to the theorems without giving proofs. In any case, the proofs are for the most part so simple and straightforward that the reader probably will be able to grasp intuitively that the theorems indeed follow from the axioms of the theory.

[77] 'X belongs to Y' literally means that Y has an interest in X, in particular a vested interest (an investment). In Dutch and German translations, it means that X listens to Y: toebehoren, zugehören; in French that Y holds X as a part of himself: appartenir.

An axiomatic approach to persons and relations

We introduce two axioms that restrict the set of possible interpretations of the relation 'x lawfully belongs to y' (which we henceforth shall write simply as 'x belongs to y').

Axiom I.1. Every person belongs to at least one person.
Axiom I.2. If person P belongs to person Q then P's property also belongs to Q

The first axiom recognizes that it is appropriate to ask, with respect to any person, to whom that person belongs. Possible answers to that question are that the person belongs to himself and to no other person; that he belongs to himself and possibly also to other persons; or that he belongs only to one or more other persons. Only the answer 'he belongs to no person' is excluded. Thus, our axiom stipulates that in law there is no person for whom no one is responsible or answerable. It is an implication of the first axiom that every person is at the same time a means of action for some person or persons—himself or one or more others. For example, a corporate person is a means of action of its owners; a slave is a means of action of its master, whether the slave is considered a person or not.

The second axiom makes persons the central elements of law. Means of action follow the persons to whom they belong. Thus, what lawfully belongs to a person comes to belong lawfully to another when the former becomes the slave of the latter person (assuming that there is such a thing as lawful slavery).

Obviously, the axioms allow us to define different sorts of persons in terms of the relation 'x belongs to y'. For example, we can define the concepts of a real person (as against an imaginary one) and a free person (as against an unfree one) as follows:

Definition I.1. A real person belongs to himself.
Definition I.2. An imaginary person does not belong to himself.
Definition I.3. A free person belongs to himself and only to himself.
Definition I.4. An unfree person either does not belong to himself or belongs to at least one other person.

Obviously, only real persons can be free. An imaginary person, therefore, is not free. On the other hand, a real person who is not

free must belong to some other person(s). Indeed, a real person is not free if and only if he belongs to some other persons.

We also can define the concepts of sovereign, autonomous, and heteronomous persons:

Definition I.5. A sovereign person belongs only to himself.
Definition I.6. An autonomous person belongs to no person who does not belong to him.
Definition I.7. A heteronomous person is not autonomous.

It follows that free persons are sovereign. In fact, because of Axiom 1, it also follows that sovereign persons are free. Although the definitions of 'free person' and 'sovereign person' differ, the two concepts are logically equivalent within the formal theory of law. Moreover, only real persons can be autonomous. Consequently, imaginary persons must be heteronomous. Also, heteronomous persons are not free.

This is a good place to introduce the distinction between the relations among 'masters' and 'serfs' on the one hand and among 'rulers' and 'subjects' on the other hand. If S is a heteronomous person who belongs to another person M, then S is a serf of M, his master. However, if S belongs to R, who is an autonomous person, then S is a subject of ruler R. Clearly, a master need not be a ruler because the concept of a master does not, whereas the concept of a ruler does, imply autonomy. Also, a subject is not necessarily a serf because an autonomous person can be the subject of a ruler, although he cannot be a serf. If the concept of autonomous subject strikes one as odd, one should bear in mind that at least one historically influential theory—Rousseau's theory of citizenship—was centred on the notion that, in a legitimate state, subjects and rulers are the same persons. Rousseau's 'citizens' were said to be free because they lived under a law that they somehow had made themselves. They ruled themselves and were their own subjects, although no individual in the state was a sovereign person. According to Rousseau's conception of the legitimate state, every citizen should rule himself and every other citizen while being under the rule of himself and every other citizen of the state.

From definitions 5 and 6 it immediately follows that sovereign persons are autonomous. It does not follow that all autonomous persons are sovereign. Thus, while every person is either autonomous

or heteronomous, it is not the case that only heteronomous persons lack sovereignty. Persons (for example, Rousseau's citizens) may be autonomous yet not sovereign. If that is the case for a particular person, we shall say that he is strictly autonomous.

Definition I.8. A strictly autonomous person is one who is autonomous but not sovereign.

Obviously, an autonomous person is either sovereign or strictly autonomous. If he is sovereign then he is free and belongs to himself and only to himself. However, if he is strictly autonomous then he is not free because he then necessarily belongs to some other person or persons. In that case, the latter must in turn belong to him (otherwise he would not be autonomous but heteronomous).

Our definitions imply that every person either is sovereign or else either strictly autonomous or heteronomous. Thus, in law, the class of persons is partitioned exhaustively in three mutually exclusive subclasses of sovereign, strictly autonomous or heteronomous persons. About the number of persons (if any) in any of those sets, our formal theory has nothing to say. However, some general quantitative results can be derived. For example, we know that every non-sovereign person belongs to at least one other person. Consequently, strict autonomy and heteronomy appear only in a world with at least two persons. Conversely, if there is only one person in the world, then the concept of law implies that he must be sovereign. Also, if only one person is autonomous then he must be sovereign. Moreover, we can use a process of inductive generalisation to arrive at the result that all persons can be heteronomous only in a world with an infinite number of persons. In other words, only in such an infinite world can there be serfs who are not subjects, or masters who are not rulers. Conversely, in a world with a finite number of persons at least one person must be autonomous and all serfs must be subjects of some ruler.

Autonomous collectives

A strictly autonomous person always belongs to another strictly autonomous person, who in turn belongs to him. Thus, he is always 'in community' with at least one other strictly autonomous person. Both of them, we shall say, are members of the same autonomous

collective. Obviously, every strictly autonomous person is a member of an autonomous collective. Indeed, while there may be any number of autonomous collectives (subject, of course, to the condition that such a collective must have at least two members), a strictly autonomous person is a member of one and only one autonomous collective. That is so because every member of an autonomous collective belongs to every one of its members. Consequently, if a person is a member of autonomous collectives C1 and C2, he belongs to every member of both collectives, every member belongs to him, and therefore (by Axiom 2) every member of C1 belongs to every member of C2, and vice versa. Then the members of C1 and C2 are members of the same autonomous collective, and C1 and C2, having the same members, are one and the same collective.[78]

Also by Axiom 2, whatever belongs to a member of an autonomous collective belongs to every one of its members. An autonomous collective, therefore, is a perfect community, exhibiting a perfect communism of persons and their means of action.

The members of an autonomous collective may be masters and rulers of other persons. The latter are the serfs and subjects of each of the members. The members, of course, are rulers and subjects of one another. However, as autonomous persons, they cannot be serfs of any master. Nor can they be the subjects of any ruler who is not a member.

Autonomous collectives are well known in the history of the philosophy of law and rights. For example, we may represent Hobbes' natural condition of mankind as an autonomous collective. In the natural condition, Hobbes wrote, there is no distinction between 'mine' and 'thine' as every person has a right to everything, including "one another's body". Consequently, there is no distinction between justice and injustice.[79] His argument was that the

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[78] Obviously, the proof relies on the fact that the same relation 'x [lawfully] belongs to y' is used throughout. Nothing follows if we combine 'x lawfully belongs to y' with, say, 'y *morally* belongs to z' or 'y *legally* belongs to z'.

[79] Thomas Hobbes, *Leviathan*; Book I, Chapter 13, "Of the Naturall Condition of Mankind, as Concerning Their Felicity, and Misery". Note the contrast with Locke's 'state of nature', which is an order of sovereign persons for whom the distinction between justice and injustice is crucial. We shall examine the formal contrasts between the 'rights' of strictly autonomous and sovereign persons in the next section. The implications for human beings

autonomous collective of the natural condition was an impractical, indeed life-threatening state of affairs. For him it was a dictate of reason that men should abandon the condition of the autonomous collective and should reorganise in one or more 'commonwealths'. Each of those would be defined by the relationship between a free person (ruler-master) and a multitude of subjects (who are also serfs).

No less famously, Rousseau's conception of the State is one of an autonomous collective. The social contract requires every human person who enters into the contract to give all of his possessions, all of his rights, indeed himself, to all the others. In this case, the members of the autonomous collective give up the distinctions between 'mine' and 'thine' and between justice and injustice. Unlike Hobbes' men in the natural condition, however, the members of Rousseau's civil autonomous collective are not supposed to act according to their particular 'natural will' (their human nature). They are supposed to act as 'citizens', according to the statutory 'general will' of the collective itself. We have to suppose that the general will is the same for all citizens qua citizens, because by definition a citizen qua citizen is animated by nothing else than the statutory purpose of the association. Rousseau's citizens, therefore, are committed to act according to the legal rules that express the determinations of the 'general will' in particular circumstances. Rousseau set out to prove to his own satisfaction that an autonomous collective could be a viable option, at least in theory, if certain conditions were met. The essential condition was that a political genius should succeed in turning natural men and women into artificial citizens of the right kind.

Rousseau and Hobbes, then, were in agreement on the thesis that natural law — the principle of freedom among likes (natural persons of the same kind) — had to be replaced by positive legislation. Rousseau, however, thought that it was theoretically possible to reproduce the 'freedom among likes' of natural law formally as 'liberty and equality' for the members of an autonomous collective. That was the basis of his claim to have 'squared the political circle', that is, to have proven that the state could be legitimate, in accordance with the formal requirements of justice. Formally, his solution requires that we distinguish sharply between natural persons and citizens. We have to suppose that for every Jean and Jacques,

(natural persons) are spelled out thereafter.

members of the same autonomous collective, there is a person that is different from both, a *citizen Jean* and a *citizen Jacques*. We also have to suppose that the latter 'civic personae' are merely numerically different manifestations of the same person, the Citizen. We can express those suppositions formally as follows:

> ** For every member of an autonomous collective there is another person who is his civic persona.*
> ** The civic personae of any two members of the same autonomous collective are identical.*

The relation between a natural person and his legal or civic personality (in Rousseau's theory) should be represented as

> ** A member of an autonomous collective* legally *belongs to his own civic persona but the latter does not* legally *belong to him.*
> ** Whatever belongs to a member of an autonomous collective* legally *belongs to his civic persona.*

Thus, as natural persons, A and B may be members of the same autonomous collective ('the People'), and then they are strictly autonomous in their dealings with one another. On the other hand, as natural persons they also legally and heteronomously belong to their own civic persona, the Citizen. They are subjects and serfs of the Citizen, who legally is a sovereign person. Hence, the Citizen legally may use force against them to free them from their own human nature and to make them into what they presumably want, and by entering into the social contract have committed themselves, to be: citizens. That, of course, is Rousseau's 'paradox of liberty'.[80] It is not really a paradox within his system: there is no place for free natural men in the state, as they would immediately destroy the unity that is the necessary condition of the sovereignty (hence the liberty) of the citizen.

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[80] "In order then that the social compact may not be an empty formula, it tacitly includes the undertaking, which alone can give force to the rest, that whoever refuses to obey the general will shall be compelled to do so by the whole body. This means nothing less than that he will be forced to be free…." J.-J. Rousseau, *The Social Contract* (Everyman's Library, E.P. Dutton & Co.; translated by G.D.H. Cole), Book I, chapter 7.

Note that we had to introduce a modal notion of belonging, namely 'to belong legally'. The way in which one natural person belongs to another natural person cannot be the same way in which one such person belongs to some artificial persona. Indeed, if A is a natural member of an autonomous collective and A belongs to his civic persona c(A) in the same way in which he belongs to the natural members of the collective, then c(A) would be just another member of the collective — a strictly autonomous person. Rousseau's theory of the state then would be simply Hobbes' theory of the natural condition of mankind with an additional number of ghostly fictions participating in the war of all against all. Thus, we see that it is necessary to distinguish sharply between lawful and legal phenomena to make sense of Rousseau's theory of citizenship.

Hobbes' theory of the social contract, by the way, also had to introduce a 'legal' notion of belonging. *Politically*, in the state, the subjects belong to the ruler. However, the latter *legally* belongs to the citizens, who supposedly have 'authorised' him to do what he wants.[81] Thus, the Sovereign legally is the 'actor' or agent, of whose actions the citizens are legally supposed to be the 'authors'. Consequently, he rules them by their own authority. Politically, he is their master and they are his serfs; legally, they are his superiors and he is no more than their agent. Legally, the people are responsible for the Sovereign's acts; politically, they are bound to obey his commands because he is their *rex*. Thus, Hobbes gave definite form to the modern concept of the state as an emperor dressed up in legal attire, force disguised as 'law'. Without the legal dressing-up, the Hobbesian state would be no more than an exercise in *regere*.

We should also note that Rousseau's 'solution' to the problem of the legitimate state rests crucially on his inversion of the natural order of things. While the common aspect-person (the Citizen) is the product of the human imagination, the theory elevates him to the status of a sovereign person for whom his creators are merely subjects and serfs. It takes 'L'imagination au pouvoir!' very literally indeed. Rousseau's theory redefines the perspective on order among persons in terms of a 'legal' notion of belonging that requires a reference to the common aspect-person, the Citizen. That Citizen is the civic persona c(P) of every human member of the autonomous

[81] Leviathen, Chapter XVII, quoted above on page 89.

collective created by the social contract. If it were not for the inversion of the natural order of things, the notion of an aspect-person would be unobjectionable. For example, assuming that

> * *Aspect-persons are the serfs of the persons from whom they were abstracted,*

aspect-persons simply would be heteronomous (artificial or imaginary) persons under the responsibility of their human masters. Then, Jacques' rights-as-a-citizen could never supersede his personal rights. Thus, article 2 of the Declaration of the rights of Man and Citizen (1789) asserted that the protection of natural rights is the sole function of political association. In other words, the citizen was to be no more than a tool or instrument for safeguarding the natural rights of natural persons, all of which 'are born and remain free and equal in rights' (article 1 of the Declaration). In Rousseau's conception of the state, the natural person and his natural rights were subordinated to the artificial person of the Citizen and his legal rights.

Rights

In this section we introduce 'rights talk', without adding anything to the theoretical apparatus we have used so far. We reduce the notion 'right to do' fully to the notion of 'belonging'. First, we define the notion of a right to deny a person the use of some means.

> *Definition I.9.* P has right to deny Q the use of X =: X or Q belongs to P, and P does not belong to Q.

Note that this definition merely states the truth-conditions of statements of the form specified in the definiendum. Thus, to refute the claim that P has right to deny Q the use of X, one may point out that neither X nor Q belongs to P or that P is a serf or subject of Q.

As an immediate consequence we have the theorem that no person has right to deny himself the use of himself. Indeed, according to definition 9, the statement that a person has right to deny himself the use of himself is true if and only if that person belongs to himself and does not belong to himself—but that is a contradiction, which cannot be true. Another consequence is that a person has right to deny himself the use of any means only if it belongs to him. The right to

deny the use of a means to a person does not belong to one to whom that means does not belong. Making use of definition 9, we now define the notion of a right to use some means (or person) without the consent of some person.[82]

Definition I.10. P has right to the use of X without the consent of Q =: X belongs to P and Q has no right to deny P the use of X.

Obviously, if a person P has right to the use of some means X without the consent of person Q, then Q has no right to deny P the use of X. It also follows that all real, and only real, persons have right to the use of themselves without their own consent. An imaginary person does not have that right because he does not belong to himself.

Definition I.11. P has absolute right to the use of X =: P has right to the use of X without the consent of any person.

Not surprisingly, all autonomous, in particular sovereign, persons have the absolute right to the use of themselves.

No person has right to the use of a means that belongs to an independent other person (that is, one that does not belong to him) without the latter's consent. Because a sovereign person is independent of any other person, it also follows that no person has the right to the use of a sovereign person's property without his consent.

On the other hand, if person P belongs to person Q then Q has right to the use of P and what belongs to P without the latter's consent. For example, a master has the right to the use of his serfs and their belongings without their consent. For heteronomous persons (serfs) we have the following theorems. For every heteronomous person P there is a person Q who has right to the use of P without the latter's consent. If P is a heteronomous person then there is another person Q who has right to the use of P's means without the latter's consent. Also, if a means belongs to a heteronomous person P then there is a person Q without whose consent P has no right to the use of that means.

[82] Obviously, we can define slightly different notions of right in terms of our fundamental relation 'x belongs to y'. However, it is not our aim to give a list of all possible concepts that we can define.

Concerning autonomous collectives, we see that a member of an autonomous collective has right to the use of any other member's means without the latter's consent. This is the property of an autonomous collective that Hobbes seized upon to declare the arrangement a war of all against all. We have seen how Rousseau avoided that conclusion by insisting that an autonomous collective can be made to work by a transformation of the human nature of the members of the collective person that is the state. That transformation makes all citizens into merely numerically different manifestations of the one legal person that is the Citizen. Thus, he could arrive at the conclusion that in the autonomous collective of the state every citizen has right to the use of every citizen as well as all the property that was transferred to the People on the occasion of the social contract. Citizenship is a perfect unity of sovereignty and subjection—and this unity is Rousseau's solution of the problem of how one can be free while being subject to legal rules.

In our discussion so far, we have used the expression 'x is property of p' as synonymous with 'x belongs to p'. We easily can define other and stronger notions of property. For example, we can define ownership as follows:

> *Definition I.12.* P owns X =: X belongs to P and to no person that does not belong to P.

Thus, a master owns what belongs to his serfs, if neither his serfs nor their belongings are the property of another, independent person. Clearly, self-owners are autonomous persons. Indeed, substituting 'P owns P' for 'P owns X' in definition 12 and making appropriate substitutions in its definiens, we find that 'P owns P' turns out to be equivalent to 'P is an autonomous person'. Consequently, autonomous persons are self-owners. On the other hand, only self-owners can be sovereign, but not all self-owners need be sovereign. It also follows that an imaginary person cannot own what belongs to him, for what belongs to an imaginary person necessarily belongs to some other person who does not belong to him. To put this differently, an owner must be a real person.

Again, it is worth noting the essential implication of definition 12 for autonomous collectives. If a member of an autonomous collective owns X then every member of that collective owns X—which is

simply another expression of the perfect community and communism of such collectives.

Of course, we could define other types of property—for example, common property, communal property—but we shall not overburden this presentation of the logic of law with too many definitions. In any case, it should be clear that the relation 'x belongs to y' as delimited by the axioms 1 and 2 allows us to define quite a number of concepts that are familiar from the theoretical and philosophical literature on law.

2. Persons and their actions

An interesting extension of the logical analysis results if we introduce the concept of action by means of an appropriate set of axioms. Then we can consider law as an order persons, their means and actions, and include in our analysis the right to do something as well as freedoms, liberties, obligations, inalienable rights, and harms that are relevant from the point of view of law.

An action is a purposive use of means. Thus, every action involves the use of some means. Most material theories of law in one way or another make the distinction between 'a means being used' and 'a means being affected' by some action. We shall incorporate that distinction in our formal theory. However, whether and how to distinguish cases where an action uses or affects some means or person, are not matters that we can decide with the formal apparatus.

The use of the added primitive predicators 'use' an 'affect' is constrained by four axioms:

> *Axiom II.1.* Every action that uses a means affects it.
> *Axiom II.2.* Every action uses at least one means.
> *Axiom II.3.* For every means there is an action that uses it.
> *Axiom II.4.* An action that affects a means that belongs to a person, affects that person.

The first axiom requires us to interpret '[action] *a* uses [means] *x*' and '*a* affects x' in such a way that the former logically implies the latter. However, it allows us to consider cases in which an action affects a means without using it. The second and the third axioms ensure that

there is always some connection between an element in the domain of means and some element in the domain of actions, and vice versa. The fourth axiom stipulates that an action that affects a means (in a way that is relevant from the point of view of law) also affects the person(s) to whom that means belongs. Thus, the mere fact that an action produces some physical effect in another thing that happens to be some person's means of action may not be enough to say that the action affects that means in the relevant sense of the law.

Note that we take the word 'action', in this context, to stand for an individual action—for example, 'this particular act of using M'. There is no reference to kinds of actions, such as 'killing', 'eating', 'extending a loan', and the like. According to the axioms, the particulars of any action include the means (and the persons) that it affects or uses—or that it would affect or use if it were performed.

From the perspective of a theory of law, the primary purpose of introducing the concept of action is to answer questions about what sort of things a person has, or does not have, the right to do. To achieve that purpose, we first define with respect to actions some concepts that are analogous to those that we introduced earlier:

> *Definition II.1.* P has right to deny Q to do *a* =: P has right to deny Q the use of some means that *a* affects.
> *Definition II.2.* P has right to do *a* without the consent of Q =: P has right to the use, without the consent of Q, of all means that are affected by *a*.[83]

The following definitions extend concepts of property and ownership to actions:

> *Definition II.3.* Action *a* belongs to P =: All the means that *a* affects belong to P.

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[83] A weaker notion of 'P having the right to do *a* without the consent of Q' would be: Q has no right to deny P the use of a means that *a* affects. We can define similar but slightly different concepts by substituting 'uses a means' for 'affects a means' in the defining formulas of definitions 1 and 2. However, in this presentation we shall not consider such variants. Nevertheless, we should bear in mind that there might well be material theories of law that presuppose one or another of those variants.

> *Definition II.4.* P owns action *a* =: P owns all the means that *a* affects.

As one can see, the definitions are close analogues of the corresponding definitions in the previous section. Consequently, the theorems relating to a person's rights of action will mirror those relating to his rights to the use of means. Among the theorems that we can prove, we note the following: If action *a* affects property of Q then P has right to do *a* without the consent of Q only if Q belongs to P. Thus, there is no right to act in a way that affects the means of another *independent* person without his consent. Obviously, it is not a merely formal matter to decide just at which point an action crosses the line between 'affecting' and 'not affecting' a means. Different material theories of law are likely to have different conceptions of where one should draw that line. Moreover, many theories do not even try to do so but leave the matter to the judgement of practical men, judges or administrators.

Concerning the property of actions, we may note these theorems: If action *a* belongs to sovereign person P then no other person has right to do *a* without the consent of P. Indeed, if the action belongs to a sovereign person then all the means that it affects belong to him; so do all the means that it uses (axioms 1 and 2). However, no other person has the right to the use of a means that belongs to a sovereign person without his consent. Clearly, if P owns action *a* then P has the right to do *a* without the consent of any person. On the other hand, no heteronomous person owns any action. This is where the legal fiction of Hobbes' theory of the state comes into view: the citizens legally own the actions of their agent (the 'Sovereign') but materially those actions are the Sovereign's own: his subjects do not own any action.[84]

Again, we have theorems that illustrate the perfect communism of autonomous collectives. If one member of an autonomous collective has the right to do an action without the consent of a person P, then so does every other member. Moreover, if any member of an autonomous collective owns an action, then so does every other

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[84] Hobbes graciously makes an exception when a subject's life is clearly and immediately threatened; then he may take his chances, avoiding immediate death at the risk of being punished later.

member. Consequently, no member of an autonomous collective has right to deny any action to any other member.

By means of the fourth action-axiom we can prove that P has the right to do action *a* without consent of Q if and only if 1) the action belongs to P and 2) if either *a* or P belongs to Q then Q belongs to P. Thus, one's right to perform an action without the consent of a person Q turns out to be formally analogous to one's right to the use of a means without the consent of Q.

Generic actions

So far we have treated actions only as fully specified action-events, except that the specification does not mention who performs the action. Normally, of course, we refer only to kinds of actions, such as going to the hospital, reading a book, etc. Many theoretical discussions are exclusively in terms of generic actions.

Generic actions typically can be instantiated in many ways, each of which may be different from other instantiations with respect to the means it uses or affects. To accommodate references to generic actions, we can use action-predicates such as 'action *a* is of kind Z'. One advantage of introducing general action-predicates is that we can negate and logically combine them: '*a* is of kind Z_1 but not of kind Z_2'. The basic structure of the logic of rights to do actions of some kind or other then comes into view.

Rights, obligations, freedoms. We should now be able to define such concepts as having right to do some kind of action, or having right to deny some kind of action to a person, having obligations, being free, and so on. However, because of the high level of abstraction of such definitions, there may be no intuitively straightforward way to do that. For example, with respect to 'having the right to do some generic action', we could define

> *Definition II.5.* P has [weak] right to Z without the consent of Q =: There is at least one action *a* of kind Z such that P has right to do *a* without consent of Q.

Alternatively, we could define

> *Definition II.6.* P has a [strong] right to Z without the consent of Q =: P has right to do any action of kind Z without consent of Q

Because the concept defined in definition 6 is 'stronger' than the concept defined in definition 5, its negation is 'weaker' than the negation of the latter. To have a strong right to Z is to have a weak right Z; he who has not even a weak right obviously has no strong right to Z either. The reverse is not always true. However, it is a peculiar consequence of the definitions is that no person has a weak right, but every person has a strong right to do any action of an impossible kind or a kind that has no instantiation. For example, any action of the kind '*Za* & -*Za*' would be impossible; an action of the kind 'transporting the planet Jupiter', which presumably is logically possible, does not at present exist. That there is a strong but not a weak right to do an action that has no instantiation is a consequence of the different logical structures in the definitions of those concepts.[85]

In their use of the expression 'has right to do some kind of action' some material theories may exhibit a preference for one of those notions over the other. Perhaps the same theory uses that expression now in one sense, then in another. There is nothing intrinsically wrong with that, but the indiscriminate use of the same expression to convey different logical structures may be utterly confusing.

We note that if P has the weak right to Z without anybody's consent, then P is an autonomous person. Consequently, a heteronomous person, a fortiori an imaginary person, does not even have a weak right to do any sort of possible or feasible action. Nevertheless, such a person has the strong but inconsequential right to do any action of an impossible kind.

We already have used a few action-predicates: 'action of the kind that uses some means x' and 'action of the kind that affects x'. Thus, under the conventions adopted in this section, we can consider expressions such as 'P has a weak right to affect x without consent of

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85 The 'strong right' is defined in terms of a so-called material implication, a structure of the form 'if *p* then *q*', which is true if *p* is false. The 'weak right' is defined in terms of a so-called 'existential statement', a structure of the form 'there is at least one *x* such that *p*', which is false if there is or can be no instantiation of *x* for which *p* is true.

Q' and 'P has a strong right to use x without consent of Q'. We can prove that P has a weak right to use X without consent of Q if and only if P has right to the use of X without Q's consent (cf. definition I.10). Also, if P has a weak right to use X without anybody's consent then P owns X. In other words, ownership is a necessary (but it is not a sufficient) condition for the right to use a means without anybody's consent. It is not a sufficient condition because there may be no action that uses the means one owns that does not have significant side effects on other means (and other persons). Obviously, actions of the kind 'using one's brain' ('thinking') presumably have no such side effects on others.

Consider now the following theorem, which is an immediate consequence of definition 5: P does not have the weak right to do something else than Z without consent of Q, if and only if P has right to do any action without consent of Q only if it is of kind Z. The part before 'if and only if' captures at least one sense of 'P is under an obligation to Q to Z'. However, the same is true for the following theorem: P does not have the strong right to Z without consent of Q, if and only if there is an action of kind not-Z that P does not have the right to do without consent of Q. Clearly, the ambiguity of the natural language formula 'P is under an obligation to Q to Z' reflects the ambiguity of 'P has right to Z without consent of Q'. Thus, we should at least distinguish a 'strong' and a 'weak' form of obligation, the first defined in terms of 'weak right' and the latter in terms of 'strong right'. Moreover, in some instances, 'P is under an obligation to Q to Z' may mean something along the lines of 'P is not free not to Z without the consent of Q'.

Similar complications attend the interpretation of 'freedom to do some generic action'. We could trace it back to definition I.9 (one's right deny the use of some means to another without one's consent). Then, we should note at least the following possibilities for defining 'P is free to Z': 1) There is at least one action of kind Z, such that no other person has right to deny P to do it; 2) For every other person Q, there is an action of kind Z such that Q has no right to deny P to do it; 3) No other person has right to deny P to do any action of kind Z. Obviously, the latter concept of freedom is much stronger either the first or the second. Compare: P is free to read books means either 1) there is at least one book and one place such that no person has right to deny P the reading of that book in that place; 2) for every

person Q there is at least one book and one place such that Q has no right to deny P the reading of that book at that place; or 3) no person has right to deny P the reading of any book at any place.

Alternatively, we may have in mind the sort of freedom that one positively would call a right rather than the mere absence of another's right. Here, too, we have a stronger and a weaker formulation: 1) There is an action *a* of kind Z, such that P has right to do *a* without the consent of any other person; 2) For every other person Q, there is an action of kind Z such that P has right to do it without consent of Q. According to the first formulation, P is free to Z if and only if there is an action *a* that is of the kind Z and that is such that he has right to do it (that is, *a*) without the consent of anybody. Thus, one might say that P is free to smoke merely bcause there is, say, one particular cigarette that he has the right to smoke in one particular set of circumstances. According to the second formulation, P is free to Z if and only if with respect to any person there is an instance of Z-ing that P has right to do without that particular person's consent. However, in this case it may well be that P is free to Z even though for every instantiation of Z-ing that he might contemplate there is always one or another *other* person without whose consent he has no right to do it. For example, P may be free to smoke; however, he may find himself in a world in which every square foot is owned by one or another other person, each of them having a no-smoking sign on his property.

Obviously, even with the rather simple formalisation used so far, we can identify numerous logical structures that arguably are hard to keep apart in natural languages, or even in the 'technical language' of lawyers, moralists, and philosophers. This complexity logically is an immediate consequence of the fact that we actually cannot perform *kinds* of actions; we can only perform particular, individual actions that may be of one kind or another—and usually are of many different kinds at the same time.

Relevant harms and wrongs. Kinds of actions are often identified in terms of the effects of actions. Let us introduce binary predicates of the form 'action *a* produces a state of affairs of the kind S'. Then we can say such things as that P has a weak right to produce S without consent of Q'.

Let us consider a state of affairs Φ such that any action that puts a means (or a person) in that state affects that means (or person) in a way that is significant or relevant from the point of view of the law. If that condition holds for a means *x* then we shall say that Φ is a **V**-state for *x*. We may think of a **V**-state as a harm that is relevant from the point of view of the law. An example of a **V**-state of a means X could be one in which Φ stands for 'is destroyed'. In other words, being destroyed is a **V**-state for X. We then can prove: No person has right to destroy what belongs to an independent person without that person's consent. Also, no one has right to destroy an independent person without his consent. To take another example: suppose that Φ stands for 'is not innocent' and that not being innocent is a **V**-state for P; then every action that puts P in a condition where P is not innocent relevantly affects P; moreover, with the possible exception of P's masters or rulers, no one has liberty to make it happen that P loses his innocence without his consent. No one lawfully can make an independent person lose his innocence without his consent. Also, no other person has right to put a free or sovereign person in V-state Φ without his consent. For example, if 'is not a free person' is a **V**-state for a free person Q, then every other person is under a strong obligation to Q not make him lose his freedom. Consequently, an action that makes Q lose his freedom must be undertaken with the consent of Q himself. No free person can lose his freedom against his will. Of course, which if any states of a means or a person are **V**-states, is not a question that can be decided by formal reasoning alone.

Let us now consider a state of affairs Ψ such that any action that puts a means (or person) in that state is one that no person has right to do except possibly with the consent of every person. To put this differently: if action *a* produces Ψ, then there is no person Q without whose consent P has right to do *a*. We may call Ψ an excluded or **X**-state of a means or person. We may think of an **X**-state as a wrong that is relevant from the point of view of the law. Obviously, no person has right to put any means or person in an **X**-state unless, perhaps, he does so with the consent of every person.

Let us assume that 'no innocence' is an **X**-state for any person. Then, there is no person without whose consent P has right to deprive a person Q of his innocence (as if every person has a right to Q being innocent). Also, there is no person Q without whose consent

P has right to deprive himself of his innocence. If we assume further that every action that puts a free person in a condition where he is no longer free makes him lose his innocence, then—given that we still assume that 'not innocent' is an **X**-state for any person—it follows that there is no person without whose consent a free person P has right to deprive himself of his freedom. The same result follows immediately from the alternative assumption that 'no freedom' is an **X**-state for a free person. Presumably, the assumption essentially captures the thesis that freedom is an inalienable right. By analogy, the assumption that 'no innocence' is an **X**-state for any person would represent the thesis that 'innocence' is an inalienable right. Of course, whether a particular theory of law does or should consider innocence, freedom or any other condition an **X**-state of a person, is not a matter that can be decided on formal grounds. However, if a material theory of law asserts that there are inalienable rights, it must also assert that there are actions that no person can own.

Under the systematisation that we develop here, we can give plausible definitions of concepts such as freedom and obligation in terms of the fundamental relations 'x belongs to p', '[action] a uses [means] x' and 'a affects x'. We can easily add more definitions and derive more theorems but we shall not do so. In any case, it should be clear that the logic of law as an order of persons, their means of action and their actions are useful tools for formalising significant parts of our thinking about law.

The general principle of justice

Theories of law may differ significantly in their stipulations regarding the material conditions of innocence. Nevertheless, the distinction between innocent persons and persons that are not innocent is of the first importance in any theory of law. In fact, it is difficult to see in what way a theory of law can be practically relevant if it does not differentiate between innocent persons and others. In the context of the formal theory of law, we use the concept of an innocent person to formulate a general principle of personal justice.

> *General principle of justice.* In justice, only innocent persons are free.

Thus, a person who is not innocent cannot be considered in justice to

be a free person and to belong only to himself. He must have done something or something must have happened that gave some other person a lawful claim to his person or deprived him of his standing as a person in the law (perhaps making him an outlaw that anybody can capture at will). If he belongs to any person at all, a non-innocent person must in any case also belong to some *other* person, if not to his victim or their successors then to some artificial person such as 'society', who derive their right to punish him from the fact that he now belongs to them. While this fact does not exclude him from being a member of an autonomous collective, it does rule out that he is a sovereign person. Notice that the principle does not say that all innocent persons are free. For example, we may have a material theory of law that allows innocent persons to be slaves or serfs. Alternatively, we may have a theory that allows corporations or other artificial persons to be innocent and yet insists that artificial persons cannot be autonomous. Whatever we might think of such theories, they are neither necessarily inconsistent in themselves nor formally inconsistent with the concept of justice.

From the general principle of justice it follows that if no person is innocent, then no person is sovereign. It also follows that if there is only one person, he must be innocent. The existence of a non-innocent person indicates the existence of at least two persons. Remembering what we deduced concerning autonomous collectives, we also see that, in a world with a finite number of persons, if none of them is innocent then there must be at least one autonomous collective (with at least two members). In such a finite world without innocent persons, there are, therefore, some strictly autonomous persons and perhaps also heteronomous persons, but no sovereign persons. For example, if one should interpret the doctrine of 'original sin' to mean that no human persons are innocent in the sense of law, then no human can be a free or sovereign person. In that case, autonomous collectives and master-serf relations are the only conditions of mankind that are consistent with the general principle of justice.

3. Natural Persons and Natural Law

So far we have discussed law without making the distinction between natural law and artificial law that we introduced earlier. It is time to return to that distinction and to extend our analytical apparatus by introducing another primitive concept: 'x naturally belongs to y' or 'x belongs to y by nature'. How we should interpret that expression is not our concern here. Our interest is solely in making the distinction between natural and artificial law, not in analysing or proposing any particular material or substantive theory of natural law.

Natural law, as noted before, is the order of natural persons. We define the concept of a natural person as follows.

Definition III.1. A natural person belongs to himself by nature.

Thus, whereas a real person lawfully belongs to himself, a natural person naturally belongs to himself. Whereas the opposite of a real person is an imaginary person, the opposite of a natural person is an artificial person, one who does not naturally belong to himself.

The relation 'x naturally belongs to y' is logically independent of 'x lawfully belongs to y'. Therefore, the axioms I.1 and I.2 do not apply to it. To constrain the permissible interpretations of 'x naturally belongs to y', we introduce the following axioms.

Axiom III.1. Only to a natural person can any means belong naturally.
Axiom III.2. No person belongs naturally to any other person.
Axiom III.3. No means belongs naturally to more than one person.

It follows from the definition and axiom 2 that a natural person naturally belongs to himself and only to himself. Noting the analogy between that consequence and the definition of a [lawfully] free person, we can say that a natural person is naturally free. Of course, nothing follows from this with regard to the question whether a natural person is lawfully free or not.

Clearly, for every natural person, there is some means that naturally belongs to him, for example, in the case of a human natural person, his brain or another part of his body. Also, for every pair of natural persons, there is a means that naturally belongs to one of the pair but

not to the other. It is out of the question that one person by nature is a serf or subject of another. We can say also that an action naturally belongs to a person if all the means that the action affects belong to him by nature.

The definition and the axioms obviously make sense when applied to human persons. A human person naturally belongs to himself and himself alone. He has an immediate and indeed natural control of many parts, powers and faculties of his body, which he shares with no other person. To make my arm rise, I simply raise it. Other persons would have to grab my arm and force it to move upwards or they would have to make me raise it by making threats or promises. The same is true for other movements of the body and for thinking and speaking. A human body, as a means of action, belongs naturally to one person and one person only.

However, the concept of a natural person, as it is defined here, is purely formal. We are not defining what a *human* person is. Natural law theorists focus on natural persons (in an ordinary sense of the word 'natural') as the persons whose existence is necessary to make sense of law as an order of persons. If there were no natural persons then there would be no artificial persons either. However, although we may believe that human persons are natural persons, and perhaps the only natural persons, we cannot charge a purely formal theory with these beliefs. Some theories of the natural law presuppose the existence of non-human persons. For example, Christian natural law theory posits the existence of [the biblical] God. There is no objection to treating God as a natural person within the meaning of the definition and the axioms that we have given here. Formally, there is no objection to saying that some means belong to God by his nature. 'By nature' need not be restricted to 'by human nature'.

A legal positivist, for example, might apply the definition of a natural person and the axioms III.1-3 to 'states' or to 'legal systems'. Of course, he would not use 'by nature' or 'naturally' but an expression such as 'legally necessary' or perhaps 'by the fundamental presupposition of legal science'. Disdaining talk about natural persons and their natural rights, he nevertheless assumes that the whole conceptual edifice of law rests on the existence of a collection of basic entities—states, legal systems—and their rights. In the terminology of this section, they are his 'natural persons'. However, positivism clearly involves a misappropriation of the form of natural

law. It is an attempt to base the theoretical edifice of law on a personification of certain theoretical constructs. In taking these as the primary data for defining the concept of law, it turns a blind eye to the fact that those theoretical constructs merely are descriptions of patterns of human actions from which any reference to the actual human agents that produce those patterns has been eliminated.[86]

The postulates of natural law

The concept of a natural person that we defined in the previous section is independent of the general concept of a 'person in law' that we introduced earlier. We now have to establish some connection between the two, a logical link between, on the one hand, the concepts of a natural person and what naturally belongs to him and, on the other hand, the general theory of law as an order of persons and their means of action. To do that, we need to introduce some postulates of natural law. They are intended to capture the distinctive convictions that make up the idea of a natural order or law of persons, as far as we can express them in our formal system.

Finitism. The number of natural persons is finite.

No matter what a material theory of law may say about other sorts of persons, it cannot be a theory of natural law unless it denies that there is at any time an actual infinity of natural persons.

Naturalism. Every means belongs to at least one natural person.

With the help of Naturalism, we can deduce that every person belongs to at least one natural person. Note that the postulate of naturalism says 'belongs [by law]', not 'belongs by nature'. According to Naturalism, the responsibility for any means or person, and therefore for any action, ultimately always rests with a natural person. It also follows that only natural persons are free or sovereign.

In conjunction with the postulate of finitism, Naturalism implies that not every natural person can be heteronomous. In other words, at least one natural person must be autonomous. Consequently, natural law as an order of natural persons must contain at least one

[86] This is obvious in the norm-based and rule-based expositions of positivism in the writings of Hans Kelsen (*The Pure Theory of Law*) and H.L.A. Hart (*The Concept of Law*).

sovereign natural person or else at least one autonomous collective of natural persons (with at least two strictly autonomous members).

Naturalism is the very heart of any natural law theory that takes the word 'natural' seriously. It forces any natural law theory that assigns sovereignty to a non-human person—assuming that human beings are the prime candidates for being identified as natural persons—to classify such a person as natural. That move may not be plausible when it leads to a conflation of what in other discussions would be considered distinct categories, say, the natural on the one hand and the supernatural, the artificial, the fictional, or the imaginary on the other hand.

In addition to those postulates of finitism and naturalism, which determine the basic structure of natural law, we have two postulates that determine the relations between what naturally belongs to a person and what lawfully belongs to him.

Consistency. What belongs naturally to a person belongs to him.

A natural law theory holds that whenever it is established that something belongs naturally to a person, that fact is enough to say that the thing in question is the lawful property of that person. From the postulate of consistency and axiom III.2, we deduce that only real persons are natural persons and that what belongs naturally to a person belongs lawfully to any person to whom he belongs.

Individualism. What belongs naturally to a person belongs only to those persons to whom he belongs.

There can be no claim to a person's natural property that is separate from a claim to that person himself. In short, in natural law, the natural property of a person is inseparable from the person whose natural property it is. The two are indivisibly linked.

From the postulates of individualism and consistency it follows that what belongs naturally to a person P belongs to another person Q if and only if P belongs to Q. Obviously, Q has right to deny P the use of what naturally belongs to P only if P belongs to Q. Also, Q has right to deny a natural person P the use of himself only if P belongs to Q.

The Principle of natural justice

In the previous chapter we stated a general principle of personal justice. Here we should add what I take to be the principle of personal justice in natural law.

Principle of natural justice. Innocent natural persons are free.

As we have noted, a natural person is naturally free. However, that does not mean that he is lawfully free. In the natural law, a person who is not lawfully free is either an artificial person or else not an innocent person. This is a way of saying that a justification must be given for denying freedom to a natural person—that is, for asserting that he lawfully belongs to some other person or that he lawfully belongs to no person, not even himself (which is to say that he is a *res nullius*, which anybody else can appropriate at will). That justification should consist in a proof of his guilt. Together with the general principle of justice, this gives us: A natural person is free (or sovereign) if and only if he is innocent.

Natural personal justice and Consistency entail that an innocent natural person is autonomous—in other words, that no innocent natural person is heteronomous. It also follows that no innocent natural person is strictly autonomous (a member of an autonomous collective). Thus, there is no innocent way in which a natural person can deprive himself of his freedom or sovereignty by making another person responsible for him, either as his master or as his ruler.

Other consequences of the principles of natural justice are 1) that for every pair of innocent natural persons, some means belong(s) to only one of them; 2) that for every innocent natural person, there is a means that belongs exclusively to him; 3) that what belongs naturally to an innocent person belongs to him exclusively; 4) that an innocent person owns what naturally belongs to him.

As we shall see, the combination of the concepts of innocence and justice sets the theory of natural law apart from the commoner types of political or legal ('positivistic') theories of law. The latter tend to pay little or no attention to the distinction between innocent and non-innocent people, and to focus on questions of efficacious and perhaps efficient government rather than questions of justice.

Natural Rights

We have seen that the class of persons can be partitioned in three jointly exhaustive but mutually exclusive subclasses of sovereign, heteronomous and strictly autonomous persons. In short, the status of a person in law is 'sovereignty', 'strict autonomy' or 'heteronomy'. In view of that fact, we can make an exhaustive list of all logically possible types of theories of order among natural persons (theories of natural law), subject only to a few straightforward conditions. First, we consider only theories concerning the original status in law of natural persons—in other words, their original or natural rights. Obviously, a person's status in law may change, for example as a result of some action by that person or another. Thus, a man may commit a crime and thereby lose the status he had as long as he was innocent of any crime. Also, a master or ruler may change the status of his serfs or subjects by an act of emancipation. However, such changes obviously presuppose that the person in question had a status in law to begin with. We can distinguish therefore between theories of natural rights by noting the original status they assign to a natural person — in short, the status they assign to an innocent natural person. Second, we consider only theories that refer to natural persons as individual persons, not to aspects, roles, functions or social positions of such persons.

Keeping these restrictions in mind, we see that there are only so many logically different types of theories of natural rights, which differ from one another in assigning at least one or no innocent natural person to each of the classes of persons (S, for the class of sovereign persons, A! for strictly autonomous and H for heteronomous persons). If a type of theory assigns at least one innocent natural person to a class then we write an asterix (*) in the cell defined by the row of that type of theory and the column of that class. An asterix in column M identifies a type of theory that denies personal standing to at least one innocent natural person (giving him the status of a mere means). Theories of type 0 assign no innocent natural person any status in law, neither as a person nor as a means. Such theories consider innocent natural persons as mere objects. (I shall not consider types of theories—they are not even listed in the table—that assign only some natural persons the status of a mere object).

TT	S	A!	H	M	Original status in law of natural persons
Equal original status for all					
0					All are mere objects
1	*				All sovereign (S)
2		*			All strictly autonomous (A!)
3			*		All heteronomous (H)
4				*	None is a person, all are mere means (M)
Unequal original status					
5	*	*			All autonomous (A) but only some S
6	*		*		Some S, the rest H
7	*			*	Some S, the rest mere M
8		*	*		Some A!, the rest H
9		*		*	Some A!, the rest mere M
10			*	*	Some H, the rest mere M
11	*	*	*		Some A, the rest H
12	*	*		*	Some A, the rest mere M
13	*		*	*	Some S, the rest H or mere M
14		*	*	*	Some A!, some H, the rest mere M
15	*	*	*	*	Some of every kind

Obviously, the information that a theory assigns an equal status to all natural persons does not tell us what that status is. However, the 'equal status' types of theory are philosophically speaking considerably less demanding than the 'unequal status' types. In particular, they need no justifying argument for discriminating among innocent natural persons. An argument for assigning to such persons one status rather than another is all they need to provide. Note, however, that a theory of a type that assigns the original status of a member of an autonomous collective to some or all innocent natural persons need not assign all of them to the same collective. Similarly, theories that originally assign an heteronomous status to some or all innocent natural persons need not assign them all to the same masters. Finally, theories that assign the status of a mere means to some or all innocent natural persons need not assign them to be property of the same person. Theories of types 2, 3 and 4, then, require not only an argument for justifying their pick of the original status in law of any natural person, but also an argument justifying a

particular distribution of innocent natural persons among an untold number of autonomous collectives, hegemonic collectives or non-natural persons. Only theories of type 1, which assert that every natural person originally (in his state of innocence) is a sovereign person, avoid those complications of discrimination and distribution. In fact, formally speaking, there is only one such theory, although there may still be any number of schemes for interpreting it in terms of real things and relations.

None of those observations constitute a convincing argument for the type 1 theory of natural rights or against any theory of another type. However, we should be able to check which types of theory are compatible with the postulates of natural law and the principle of natural justice.

We assume that several natural persons exist. Because we are interested only in original rights, we assume a condition in which all natural persons are innocent. We can apply directly the postulates of natural law and the principle of natural justice to the various logically possible types of natural rights theory. In that way we can eliminate the types that conflict with any of those propositions.

The postulates of natural law (Finitism and Naturalism, PNL in the table below) imply that all means and all persons (including all natural persons) belong to a finite number of natural persons. Therefore at least some natural persons must be persons in the sense of the general theory of law. This consequence rules out TT0 and TT4. Moreover, the same postulates imply that there should be at least one autonomous natural person. Therefore, the postulates of natural law rule out TT3 and TT10.

According to the postulate of consistency, every natural person is a real person and therefore a person in the sense of the general theory of law. This rules out any type of theory that holds that some innocent natural persons are not persons but mere objects or mere means. Thus, the postulate of consistency (PC in the table) eliminates TT0, TT4, TT7, TT9-10, and TT12-15.

The principle of natural personal justice (NJ in the table) states that all innocent natural persons are free and therefore sovereign. It rules out all types of theories except TT1.

Thus, we see that only TT1 is compatible with the postulates of natural law and the principle of natural justice.

TT	S	A!	H	M	PNL	PC	NJ	
0					N	N	N	
1	*							
2		*					N	V
3			*		N		N	
4				*	N	N	N	
5	*	*					N	V
6	*		*				N	V
7	*			*		N	N	
8		*	*				N	V
9		*		*		N	N	
10			*	*	N	N	N	
11	*	*	*				N	V
12	*	*		*		N	N	
13	*		*	*		N	N	
14		*	*	*		N	N	
15	*	*	*	*		N	N	

Natural law without natural justice

In the last table of the previous section, we have marked with a 'V' all types of theory that satisfy the postulates of natural law but not the principle of natural justice. They may be called types of *political* or *legal* theory of law, which separate law from justice.

TT	**S**	**A!**	**H**	**M**	**Original status in law of natural persons**
Equal original status for all					
2		*			All A!
Unequal original status					
5	*	*			All A but only some S
6	*		*		Some S, the rest H
8		*	*		Some A!, the rest H
11	*	*	*		Some A, the rest H

Each one of those theories implies that at least some innocent natural persons belong to another person. Moreover, they imply (by the postulate of naturalism) that some innocent natural persons belong to at least one other natural person. Consequently, they all imply that

some natural person has right to the use of another innocent natural person without the latter's consent: some natural persons have the right to rule other innocent natural persons without their consent — that is, to legislate for or to impose their 'will' on others. Theories of type 2 and 5 restrict this right to situations where the right to rule is mutual: it exists only within autonomous collectives. Theories of type 6 imply that at least some natural persons are sovereign and that at least some of those have the right to rule other innocent natural persons without their consent. Theories of type 8 imply that some natural persons are members (and therefore rulers and subjects) of autonomous collectives and rulers of other innocent natural persons who are merely subjects. Finally, Theories of type 11 stipulate that some innocent natural persons are subjects of others (sovereigns or members of autonomous collectives).

The common element of those theories is the idea of one or more natural persons ruling innocent others — and that idea, disguised as the power of legislation, is very much the centrepiece of most political or legal theories of law. Clearly, all attempts to justify legislation (as distinct from contractual obligation) must reject the principle of natural justice, which is that innocent natural persons are free.

4. Law and Human Persons

The place of human beings in law

We now turn our attention to the status of human beings in natural law or the order of natural persons. Several postulates can be suggested.

Anti-humanism. No human being is a natural person.

Obviously, anti-humanism has no use for the principle of natural justice in its consideration of human beings. It may acknowledge that only innocent humans can be free non-natural persons, but it does not hold that in justice an innocent human being is lawfully free. Anti-humanism is the postulate underlying modern positivism. As we have seen, although it eschews use of the term 'natural', positivism reserves natural personhood (in the sense of the law of natural persons) to legal systems or states and artificial personhood to such things as social positions, roles and functions within a legal system. People have a place in law only as holders of such positions or as performers of such roles and functions—in short, as 'social resources' or 'means of social action'. Thus, human beings have no rights of their own—or, to be more exact, they have no legal rights of their own and legal rights are the only rights a positivist recognises. Obviously, this interpretation merely begs the question of how legal systems or states can be natural persons—especially given the positivists' claim that legal systems are nothing more than systems of man-made rules. An interpretation of legal positivism takes on the quality of magic if it maintains that a product of human action can be a natural person while its creators are at most material resources that are needed to implement their creation. Hence, legal positivism makes sense only as an arbitrary stipulation to the effect that legal systems or states are natural persons (in the sense of the formal theory of the natural law) and that human persons are not.

In another incarnation, Anti-humanism may be connected to the thesis that human beings are artificial persons, created and animated by one or another non-human natural person (for example, by a god or a demon). This interpretation does not suffer from the positivists'

petitio principii because it does not involve the claim that gods and demons are man-made. Nevertheless, it taxes our credulity beyond the breaking point. Not surprisingly, sophisticated theistic religions such as Christianity and Judaism maintain that humans are persons by nature: God created the first men and women but perhaps to his surprise they proved capable of becoming persons in their own right.[87] Whether or not they accept that there are other non-human natural persons, natural law theories are committed firmly to the view that natural persons primarily are to be found among human beings,.

Weaker versions of anti-humanism imply that only some humans are not natural persons while others are. An anti-humanism of this sort could ride in on the back of the postulate of humanist naturalism.

Humanist naturalism. Every natural person is a human being.

This postulate asserts that only humans are natural persons. Consequently, it is unacceptable to those who believe the natural law comprises non-human yet natural persons (animals, gods, demons, personified historical or sociological phenomena like tribes, nations, states, or whatever). On the other hand, the postulate leaves open the possibility that some human beings are not natural persons.

An immediate consequence of Humanist naturalism is that every natural person is a human person: a natural person, which according to that postulate is a human being, obviously is a human person. In conjunction with the postulate of naturalism and the general principle of justice, the postulate of humanist naturalism implies that all free persons are innocent human beings and, indeed, human persons.

Radically opposed to anti-humanism is the postulate of naturalist humanism:

Naturalist humanism. Every human being is a natural person.

Clearly, naturalist humanism in conjunction with the principle of natural justice implies that all innocent human beings are free persons. It leaves room for the existence of natural persons other than human beings. However, Naturalist humanism appears to be too strong: a good case can be made for the thesis that infants and humans with severe mental deficiencies should not be considered as

[87] Genesis 3:22, "See! The man has become like one of us, knowing what is good and what is bad!" (New American Bible)

persons because they do not have the requisite capacities to act as purposive agents. For example, they have no capacity for understanding what it is to have or to lack a right or a lawful obligation, or to be free and to be respected as a free person. However, if we read the postulate as a presumption—all human beings must be presumed to be natural persons when there is no proof to the contrary—then we can take much of the sting out of that objection. Another but rather vague way to do that, is to construe the words 'human being' as short for 'normal human being'. Evidently, all of those difficulties disappear if we appeal to a stricter version of the postulate:

> **Naturalist humanism.* Every human person is a natural person.

The conjunction of the postulates of Humanist naturalism and Naturalist humanism gives us a general postulate of humanism.

> *Humanism.* All human beings are natural persons; nothing else is a natural person.

In conjunction with the postulates of natural law and the principles of general and natural justice, Humanism implies that all and only innocent human beings are free. Obviously, like Naturalist humanism, Humanism is too strong. However, we can formulate a stricter version:

> **Humanism.* All human persons are natural persons; nothing else is a natural person.

Leaving aside merely fanciful, nominally possible interpretations of the concept of a natural person, we have to make do with Humanist naturalism ('All natural persons are human beings and therefore human persons') or strict Humanism. If we are very liberal in our ontology of the world of natural persons, the postulate of naturalist humanism might enter as a possible candidate. However, it would bring in its wake controversies about what non-human natural persons there could be, which we could not decide by any rational method. In any case, natural justice obtains only if innocent human persons are left to be free or to belong to themselves and only to themselves.

The law of the human world

We started our analysis from the figure (see page 56) representing the basic structure of law as a ius-based interpersonal order. The persons represented there could be separate, mutually independent natural persons or non-natural persons, each of them exercising legislative or regal power over his property—the means of action, which may be material things or non-autonomous persons, that belong to him. If we assume the existence of only one independent person, the formal structure of law is reduced to a lex-based order (cf. the figure on page 54). Simple as it is, the schematic representation of the ius-based interpersonal order has many interesting properties. They are revealed in the theorems of the formal theory, which we can interpret as descriptions of patterns of order in the law of persons.

With the introduction of the concept of a natural person and the postulates of natural law, we could derive the theorem that ultimately every means of action and every person belongs to one or another natural person, whether a human person or not. From the postulate of finitism we could deduce that at least one natural person must be autonomous, either sovereign or a member of some autonomous collective. Moreover, under the principle of natural personal justice, innocent natural persons must be considered free persons, each of whom belongs to himself and himself alone.

From a philosophical point of view, the analysis is of interest primarily when we consider how human persons fit into the scheme. Discarding without further ado the postulate of anti-humanism, we have to make up our mind with respect to the questions whether all human persons are natural persons and whether there are non-human natural persons. A negative answer to the first question would imply that at least some human persons are not natural persons—that is to say, that at least some human persons do not naturally belong to themselves. Now, a human person who does not by nature belong to himself does not by nature belongs to any other person either. He can be a person (in the law) only if some other human or non-human natural persons declare him to be an artificial or imaginary person. However, then he is a person by stipulation only—as far as he himself is concerned, he really is a human non-person. A positive answer to the second question, whether there are non-human natural persons, takes us out of the realm of scientific investigation into the

domain of belief. We cannot prove a negative such as that there is no non-human natural person; but then as a matter of fact there is no objective proof of the existence of such a person. Thus, leaving aside all kinds of supernatural persons and piercing through the 'corporate veil' of social constructions, we have to embrace the postulate of strict humanism.

As noted above, the postulates of humanism imply that all innocent human persons are lawfully free. In other words, they imply that 'sovereignty' is the status in natural law of an innocent human person. Thus, all the propositions that we have derived about the rights of sovereign persons apply without restriction to innocent human persons. They state the natural rights of a human person, at least in so far as he is innocent. An innocent human person has right to the use of what he owns—in particular, what belongs naturally to him, for instance his own body—without the consent of any other human or non-human person. Also, no natural or artificial person has right to the use of what belongs to an innocent human person without the latter's consent.

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, 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.[88] In terms of a once current definition of law, it is a relation characterised by freedom and equality.

If we accept the postulate of humanism and the principles of justice, then the concept of natural human law is formally unambiguous. 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

[88] '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.

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 have 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 or excommunication, if that option has not been foreclosed at the constitutional level. The concept of the natural law of the human world does not leave any room for an original right of legislation, only for contractual obligation. Most societies can live with those limitations, but political societies, states in particular, obviously do not. In that sense, the natural law has decidedly anarchistic implications, as indeed we should expect from any order that has the freedom and the likeness ('equality') of human beings as its defining conditions. Consequently, there is the problem of justifying the very existence of lex-based political societies.

Natural law and its politically motivated denial

Not surprisingly, at all times major political and social thinkers have attempted to provide a justification of politics by denying the validity of the concept of the natural law of the human world. They endeavoured to replace it with a conception of a social law in which all or some human beings merely represent artificial persons, defined by imposed rules. They did so by attacking either the thesis that innocent natural human persons are free or the thesis that they are all alike and so have equal standing in the order of the human world. Each of those theses states a necessary condition of natural law. Such rejections have been based on either one of two arguments: one is that the targeted condition (freedom or likeness) is a true but undesirable and possibly dangerous state of affairs; the other is that the condition is no more than an illusion.

For example, Plato insisted that politics must resort to what he called 'a shameful lie' (later it became known as 'a noble lie'). Although they are as a matter of fact 'children of the land' (and therefore, like brothers and sisters, of equal standing in the order of the world), all citizens must be taught that divine ordinance

predetermines them for unequal social ranks.[89] They must be convinced that their souls are made of different stuff (gold, silver, bronze) to make them accept the inequality imposed by the structure of the *polis*. 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 even though equality is a natural fact of human existence, it nevertheless is the root of all the evils of the 'natural condition of mankind'[90] and that only an absolute political inequality[91] offered any hope of peaceful co-existence.

Aristotle, on the other hand, did not believe that human equality was true. Whether or not it was dangerous, it was in any case no more than an illusion. He 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 him, 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 on the one hand and subjects and serfs on the other.

The denial of equality, which implied that natural freedom could be at most the privilege (that is, the 'liberty') of a social or political elite, dominated in attacks on natural law until the eighteenth century. At that time, the attack began to aim at the concept of freedom, making 'equality' quasi-sacrosanct. However, that 'equality' no longer was the natural likeness of human beings (as members of the same species), but an equality of social position. To become socially equal human beings had to renounce their freedom. Rousseau maintained that he could justify the fact that, although they are born free, people everywhere are in chains.[92] Natural freedom, though a fact, is a not respectable because under conditions of scarcity, plurality and diversity it poses a threat to human existence; therefore, it should be replaced with civil liberty, which is obtained when every citizen

89 Plato, *The Republic*, Book 3, 413c-415c.

90 Hobbes, *Leviathan*, Part 1, chapter 13.

91 Hobbes, *op.cit.*, Part 2, chapter 17.

92 Rousseau, *Du Contrat Social*, Book 1, chapter 1.

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.[93] A person's natural freedom, his capacity for independent action and thought, must be eliminated if a state is to be legitimate and social equality instituted.

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 (and the rest of the universe as well). Only then human society will become a universal society without differentiation of class or rank—a society of equals—while at the same time it will liberate every human individual from the limitations imposed by the existence of other persons (and, indeed, anything other than his universal ego).

The vigorous currents of egalitarian and collectivist thought in the twentieth century and the strident rhetoric of 'solidarity' indicate the enduring popularity of the mereological conception of the human person as an integral and dependent part of a larger whole.[94] 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.

The denial of equality implied that at least some innocent individuals lacked the natural right of freedom or had the status of a heteronomous person. It implied a distinction between rulers and masters, on the one hand, and others who, although they are

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[93] Rousseau, *op.cit.*, Book 2, chapter 7.

[94] 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

innocent, are subjects and serfs. This distinction introduces the monarchical notion of lawful political rule or legislation 'of one man over another' or the aristocratic notion of rule 'of the few over the many'.

The denial of freedom by theories that nevertheless assign an original status of strict autonomy to all or some human persons allows the introduction of the notion of lawful political rule or legislation of a 'republican' kind. Indeed, as we have seen, within an autonomous collective every member has right to the use of every other member as well as of all means that do not belong to any one outside the collective. In other words, every member has right to impose his will or rule on the other members while being himself subject to the rule of every other member. In its crude form such a collective is what Hobbes called 'the natural condition of mankind' and Marx 'raw communism'.[95] In its civic form, it is the republic of Rousseau in which human beings have no status except as means of action or serfs of the artificial person that is the Citizen. In its present form, it is the 'multi-level governance' of an ochlocracy masquerading as 'participatory democracy'.

Among lawyers of a positivistic persuasion, the common denial of natural law and justice now takes the form of a denial of the postulate that human beings are natural persons. In this they make use of Rousseau's strategy of substituting particular aspect-persons as the primary subjects of law. We have seen that Rousseau considered natural persons under a certain aspect, as citizens, and assumed that they accordingly have rights only as citizens. Thus, in the legal order of the state, neither Jean nor Jacques has any rights; only the aspect-persons citizen(Jean) and citizen(Jacques) have rights. Under the influence first of Rousseau, later of Marxism, feminism, third-worldism and other 'progressive ideologies' and 'new social movements', many more aspect-persons have gained standing in modern legal thinking. However, the aspects under which we can consider natural persons are innumerable and do not form a closed set. Therefore it is pointless to try to list all possible 'aspect-persons' *a*(P), *b*(P), *c*(P), … that we might associate with any particular natural person. A theory of law that took aspect-persons as its starting point

[95] See the essay "Private Property and Communism", in K. Marx, *Economic and Philosophical Manuscripts* (1844; Progress Publishers, Moscow, 1959, tr. M.Milligan)

would be indeterminate. It would allow us to say that P is one person but also that, from the point of view of law, *w*(P), for example P-as-a-woman, is a different person with a different set of rights. Similar constructions are possible, as the case may be, for P's rights as a member of some 'minority' or other, a worker, a child, a pensioner, a veteran, an obese person, and so on and so forth. The multiplication of persons would apply to every natural person P. It is then all too tempting to dismiss P altogether and simply add P-as-a-human-being, say *b*(P), to the list of aspect-persons. As soon as we admit aspect-persons as persons in their own right—and not simply as heteronomous serfs of a natural person—then we can assign a different status in law to each aspect. Consequently, a being P, whose capacities make him fit to be a natural person, considered under one aspect, say *a*(P), might be sovereign and at the same time, considered under another aspect, say *b*(P), heteronomous or a member of this or that autonomous collective—yet P himself need not have a status in law. In short, as far as positive law is concerned, P is no person and has no rights unless someone classifies him as a member of some relevant group or category. Arguably, that is very nearly the ruling conception of persons and rights in fashionable opinion today. However, it is indicative of a complete dissociation of the concepts of 'person' and 'rights' from any reality. With the suggestion that a natural person is simply a 'theoretical construct', the result of assembling apparently pre-existing different aspect-persons, it is also a denial of the proposition that a natural person *is* indivisibly a person —in short, an individual.

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1. A Controversial Concept

'The natural law of the human world' is a controversial notion. However, most of the controversies surrounding it have little to do with the idea of the natural order of the human world that is the subject of our analysis. Therefore, we need not discuss them in detail. The following paragraphs accordingly are intended only to give a quick and incomplete overview of the sorts of things one might encounter when delving into the literature on the natural law. In addition they will allow us to introduce some concepts that we shall use in the rest of the book.

Natural law: rule or order?

Nowadays, under the influence of a variety of doctrines, known collectively as legal positivism, many people take the word 'law', in so far as it relates to human affairs, for a full or near-synonym of 'legal system of a society'.[96] Hence, the popular conception of the natural law is not that it is the natural order of the human world or the order of natural persons but a legal system of an unusual and perhaps rather mysterious kind. Such a legalistic conception assimilates the natural law of the human world both in form and subject matter to the familiar legal systems of our societies and states. It spawns understandable misgivings about rules or commands that we ought to obey or follow because they supposedly are 'given by nature' or

[96] Hans Kelsen, the standard bearer of legal positivism during most of the twentieth century, at one point claimed that his formal analysis of the concept of a legal system also covered all systems of natural law. Thus, if we are to believe him, his *Reine Rechtslehere* dealt not only with the form of positive law but also with the form of natural law—it was a formal theory of natural law ('formales Naturrecht') as well as a formal theory of positive law. The claim is preposterous. Kelsen was merely begging the question: in his view, to the extent that natural law is law it *must* have the structure of a legal system, otherwise there would be no point in calling it 'law'!

'found in nature'. Obviously, rules and commands are not natural things; there are no natural legal systems. However, that does not mean there is no natural law of the human world. It means that the conception of natural law as some sort of legal system is false. Other critics say that even if the natural law is not a legal system of sorts it nevertheless is a system of rules of conduct (say, a system of moral rules). They make the same mistake: the natural law is not a system of rules of conduct.

Rules and prescriptions enter natural law theory only when one raises the question, why one should respect the natural order of the human world. Rules that indicate how people should act if they want to respect the natural order properly may be called 'rules of law': they are neither the natural law itself nor its elements nor patterns of order (natural laws) that we can discern in it. To identify rules of law and the conditions of their application are problems that belong to such disciplines as the ethics and the jurisprudence of natural law. Because these are far from exact sciences it often is debatable whether a rule is a rule of law and, if it is, in just what circumstances it will achieve its purpose. However, the primary task of natural law theory in the strict sense is merely to describe the natural law and the patterns of order or natural laws that its study and analysis reveal.

If the natural law were a system of rules of conduct then it would be something the meaning of which is that it ought to be obeyed or followed (as one would obey or follow a commander or a teacher). A rule or a system of rules of conduct necessarily has a normative or prescriptive *meaning*. However, it need not have normative *significance* (importance or validity): it may be irrelevant, unimportant or just plain wrong. Indeed, there may be rules that one ought *not* to follow or obey. 'Drop dead!' has a clear normative meaning; few people think it is normatively significant.

Obviously, the assumption that 'law' refers to a rule or system of rules must be rejected if we think of law as an order of things. It makes no sense to say that an order of things ought to be obeyed or followed; it makes no sense to say that the meaning of an order of things is that it ought to be obeyed or followed. However, it does make sense to ask whether we ought to *respect* it. We can respect an order of things just as we can respect another person or, say, a thing of beauty—and we can do so without obeying or following them and without assuming that they have a meaning or that 'we ought to be

respected' is what they mean. That something has no normative meaning does not preclude it from being normatively significant. The natural law may be—and, as I shall argue in due course, is—respectable and therefore normatively significant without having a normative meaning.

Some positivists argue that the concept of natural law must be rejected because a rule is not something that can be true or false. Yet, natural law theorists claim that natural laws are true. To repeat, natural laws are not rules of conduct but patterns of order in nature. Hence, the claim that this or that relationship is, or is not, a pattern of order in nature (a natural law) is verifiable or falsifiable, at least in principle. The accurate description of a natural law is a true statement. However, unlike the natural laws, rules of law are not objects of study for the science of natural law; they are the gist of the art of respecting and making people respect the natural law. The rules that the ethics and the jurisprudence of the natural law propose for respecting the natural law (for example, 'Do this!', 'Do not do that!') obviously are not true or false. However, the claim that some rule is a rule of law—that, if followed, it leads to greater respect for the natural order—is true or false and in principle can be shown to be either true or false.

A similar distinction can be made with respect to other sorts of order. For example, it is one thing to make a scientific study of the order of the human body; it is another thing to devise practical rules for keeping the body in order or restoring its order when it has been disturbed. Throughout the history of the human world we find many different practices of caring for and healing the sick, some of them ineffective or even worse than the disease or affliction they are supposed to treat. Yet, for all their differences in scientific knowledge and technological skill, they all presuppose the same objective distinction between health and sickness, between order and disorder. The prescriptions of a doctor, healer or medicine man are neither true nor false, but their claims that by following their prescriptions the patients will improve their condition are true, or false.

Likewise, a lawyer may say to his client 'Do this!'—a statement that is neither true nor false—but if he tells the client 'If you do this then you respect the legal order (or do not risk arrest or a fine)' then he is saying something that may well be true, or false. The rules that a lawyer proposes to his client are not rules of the legal system the client seeks to respect (or to contravene with impunity). Of course, a

lawyer advising clients about a legal order has a much easier job than a doctor advising patients or one who seeks to advise people on how to respect the natural law. It does not take much if any scientific knowledge or insight into the real relations in the world to give such advice on questions of legality—no more than it does to advise a youngster on how to play chess. Presumably the simplest way to respect a legal order is to follow or obey the rules of the legal system that define it. That is not an option where the order of the human body or the human world is concerned: these orders are not *defined* by systems of rules that one can obey or follow.

Legal positivists claim that the objective of legal science is merely to describe the legal system or positive law of a society as it is, not to suggest what its positive law ought to be. Sometimes they add that a suggestion as to what the positive law ought to be belongs to some extra-legal field such as ethics, political ideology or, indeed, [the theory of] natural law. However, because these are extra-legal sources they should not enter into the description of the positive law of a society—unless, of course, ethical or political or natural law arguments have been absorbed in the positive law, for then they are part of what the positive law is. This makes sense. In a similar way, natural law theory aims to describe the natural law, not to make suggestions about what the natural law ought to be. In this case, such suggestions would be absurd. The natural law is what it ought to be, and vice versa, because it is what it is and, as far as human action is concerned[97], cannot be anything else. In contrast, the positive law of a society always, by definition, can be made different from what it is. The distinction between 'as it is' and 'as it ought to be' applies only to positive law, not to natural law. However, that does not mean that natural law is 'positive law as it ought to be'. The natural law is not an *ideal* legal system.

To assume, as some positivists do, that the concepts of the positive law and the natural law stand to one another in the same relation as 'the law as it is' and 'the law as it ought to be' is misleading, to say the least. Admittedly, a normative theory of the natural law insists that the positive law of any society should respect or conform to the natural law. However, that does not mean that for every legal rule of

[97] Of course, the natural law might have been different if the Big Bang had been different or, to use the terminology of an older language, if God had willed to create another universe.

positive law there is a corresponding rule of law such that one can check whether the two are identical, whether the 'positive' rule is as it ought to be. The point of referring to the natural law in a critique of a legal system is to find out whether it contains legal rules that are not lawful (that is to say, contrary to the aim of respecting the natural law) and to explicate why they are not rules of law. Apart from its insistence that a system of positive law ought to respect the natural law, a normative theory of the natural law is agnostic about what the positive law ought to be in any particular case. There usually are many alternative but equally lawful ways in which one can do something; hence they are all acceptable from the point of view of a normative theory of natural law. However, whether one or another of these ways ought to be included in the positive law of a particular society at a given moment of its history, is of little or no interest to such a theory. In the same way, a logician will insist that an argument should respect the laws of logic; he has nothing to say about which propositions ought to be used in the argument. It is not as if logic stands to an actual argument as 'the argument as it ought to be' stands to 'the argument as it actually is'. Just as from a logical point of view an illogical argument is not an argument at all, just so from the point of view of a natural law theory an unlawful legal rule is not a rule of law at all.[98] It is immaterial whether there are people who accept as argument what in logic is not an argument; likewise it is immaterial whether there are people who believe that a legal rule is a rule of law when it is not lawful. What people accept or believe may be relevant from a psychological point of view; it is not relevant for the study of either logic or [natural] law. Legal positivism, however, is concerned neither with logic nor with law: the legal systems that it intends to describe and analyse are particular systems of beliefs or opinions. That legal positivism prefers to describe such systems without mentioning whose beliefs and opinions they reflect—in a way that 'de-psychologises' the positive law—does not change that fact.

Related to the controversy about the 'is' and the 'ought' of legal systems is the idea that natural law theory confuses 'law' and 'morality'. Some critics have opposed natural law theory on the ground that it is a more or less cleverly disguised attempt to push a

[98] In Saint Augustine's rather unfortunate formulation: 'Lex iniusta non est lex.'—an unjust legal rule is not a rule of law.

program for enforcing a particular morality or lifestyle. However, this objection again rests on the confusion of the notions of order and rule as well as of different notions of order. Rules of law aim to instil respect for the natural order of persons, which is not a system of rules. Likewise, rules of morality aim to instil respect for the moral order of persons, which also is not a system of rules. Obviously, it does not follow that the natural order is the same thing as the moral order, or that the distinctions between lawful and unlawful things on the one hand and moral and immoral things on the other are congruent. According to a venerable formula, 'the law is no respecter of persons'.[99] It concerns the distinction between persons and non-persons and between one person and another; it does not concern either the physical, intellectual or moral qualities or the social position of any person. In contrast, morality is concerned with personal qualities and, in the case of a social morality, with social positions.

In fact, the confusion of law and morality is the critics' own. First, they subsume both the concept of law and the concept of a moral order under the concept of a system of rules, thereby obliterating in one go the logical distinctions between the lawful, the legal and the moral. Then they try to explicate the difference between 'law' and 'morality' in terms of some logically irrelevant characteristic such as the manner of enforcement of rules. Thus, they arrive at the conclusion, say, that while 'law' is an officially or legally recognised, applied and enforced system of rules, 'morality' is a system of rules without official or legal recognition, application or enforcement. That conclusion will not do. It implies that a morality can become law overnight merely by being embraced and imposed by the powers that be—and that hardly is a solid basis for insisting on the difference between law and morality. On top of that, the critics also confuse 'natural law' and 'un-enforced morality', ending up with the proposition that natural law theories fail to distinguish between law (officially enforced rules of conduct) and morality (rules of conduct without official backing).

Others have dismissed natural law theory as a perhaps well-intentioned effort of moralistic sermonising without much effect on the actual behaviour of people. Of course, lawyers, judges and state-officials too spend an enormous amount of their time sermonising—

[99] Hence the blindfolded 'Lady Iusitia'.

we may well ask, to what effect? As one frustrated tax-collector, hoping to get a sympathetic hearing, once complained to me: 'You would not believe how difficult it is to convince people that it is their moral duty to declare all of their income and wealth and pay the taxes levied on them.' Moreover, to a significant degree legal education consists of sermonising to students about how they should function in the legal system of their society.

The distinction between law and morality is of primary importance to the theory of natural law. Indeed, the great medieval theologian, moralist and natural law theorist Saint Thomas Aquinas denied that legal authorities had any business enforcing morality: only vices that are destructive of society should be countered with legislative measures, not vices that only the most virtuous of men would avoid.[100] Yet, Thomas Aquinas is a favourite target for those who charge natural law theory with confusing law and morality. With its gradual elucidation of the concept of natural rights, the natural law tradition gave rise to the ideas of the 'rule of law' (respect for the natural law) and the *Rechtsstaat* by insisting that legal authority of the state should be restricted to the enforcement of law (not morality). Within the context of a political regime that owed a significant part of its sense of legitimacy to those ideas it was possible and plausible for a positivist such as H.L.A. Hart to advocate the separation of law (that is, legislation) and morals (mainly, it seems, sexual morals[101]). Of course, his positivism alone would not have allowed him to do that. It would have led him only to the recognition of the legal validity of prevailing legal rules, whether they deal with matters of law, morality, religion, economics or what not. The fact that 'sin taxes', 'sodomy laws' and 'sumptuary laws' raise questions of morality has noting to do with their being legally valid 'positive law' or not. Notwithstanding that this is all too obvious, many students and faculty in law schools give the separation of law and morals as an important—indeed, often the only—reason for supporting legal positivism. Not surprisingly,

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100 Thomas Aquinas, *Summa Theologiae*, …

101 H.L.A. Hart, 'Positivism and the separation of law and morality/morals'… and his polemic with Lord Patrick Devlin (…) The restriction to sexual morals left the field wide open to untrammelled legislative and judicial interference in other domains of morality. For example, the separation of law and morality did not apply to economic morality. Apparently, as long as the law stayed out of your pants, it could do as it listed with your wallet.

they compound their mistake with the fallacious argument that 'since positivism implies the separation of law and morals, its opponent, natural law theory, must stand for the legal enforcement of morality.'

If 'law' is taken to refer to a legal system of rules of conduct the question arises who made or chose those rules. With respect to legal systems the obvious answer nowadays would be that behind every legal system there are some legislative authorities that choose, make, modify or scrap rules—or perhaps that every legal system has a subsystem that defines its own legislative authorities and regulates their conduct. Obviously, speculations about the legislative authority behind or within the natural law presuppose the notion that the natural law is a sort of legal system. They may lead to such claims as that in nature or beyond nature there is an immanent, transcendent, supernatural or other non-human person, quasi-person or personified power that is the legislative authority of the natural law: God, the gods, Nature, History, Reason, Humanity. Such speculations and claims have no scientific value. If the natural law is understood to be an order of things then there is no reason to look for a legislator of the natural law. Even one who believes that God created the natural order of the human world will appreciate this: creation does not imply legislation; the Ten Commandments were given long after God had finished his creation. A creator probably wants others to respect his work but that does not mean that what he has created is a system of rules for respecting his work. Moreover, the fact that a creator wants his work to be respected does not by itself make it a respectable work. Were Lenin's, Stalin's, Hitler's, Mao's or Pol Pot's social creations in any way respectable?

Obviously, if 'law' were to mean 'legal system of a society' then 'natural law' would be an oxymoron and to speak of natural law would entangle one in a web of logical fallacies and epistemological conundrums. There are no legal systems in nature. However, there are natural orders aplenty. Scientists who study, say, atoms, molecules or living organisms hope to discover the patterns of order (natural laws) that characterise such things and to arrive at a comprehensive understanding of the natural law of the things in their field of study. They are not looking for a legal system. Similarly, while it makes sense to speak of the law or order of the human world, we cannot speak sensibly of the legal system of the human world. We can speak meaningfully of the legal system of one society or another, in

particular of a politically organised society such as the Republic of France, the People's Republic of China, the Kingdom of Belgium or the United Kingdom. No such politically organised society, and arguably no society whatsoever beyond the level of the familial household, comes anywhere near to being a natural entity or phenomenon. There are no natural laws of IBM, Microsoft, General Motors, the Catholic Church, the World Wildlife Fund, the International Red Cross, Austria, The Netherlands, Argentina, the Camorra or whatever other society one might care to mention. A society is an artificial order, an implementation of a legal system. It has its statutes or constitution, its system of government or administration, its conditions of membership and status. Of course, as time goes by and parents, educators or instructors teach children or new members the legal rules of their society, the older parts of a legal system may take on the appearance of 'customary law'. To the children, these rules may appear as rules that simply are there, like so many other things in the world into which one is born. As far as the younger generation is concerned, they might just as well have been there from time immemorial. Nevertheless, such rules are legal rules in form and content, if not in origin.[102]

Another positivist conception is that no rule can be law unless there is some mechanism or arrangement for enforcing it on those to whom it is addressed. Thus, positivists raise questions about the mechanism or arrangement that more or less effectively would enforce the natural law of the human world on individual human beings. One might suppose that human enforcers, rulers, governments and states, would qualify but that supposition flies in the face of the facts: they are not known for their respect for the natural law and are in any case more interested in enforcing their own legal systems or 'positive law'. Apart from that, positivists note that the natural law of the human world apparently is not self-enforcing in the way that the natural laws of organic or inorganic matter supposedly are. It is said that everything in nature happens according to some natural law or combination of laws—that nothing in nature

[102] Obviously, not all customary rules have a legal origin. Some customary rules may well be genuine rules of law that reflect respect for the natural order of the human world, not habitual obedience to some long forgotten legal authority. Other customary rules may reflect respect for the natural or the social order (see below in the text).

ever is contrary to natural law. It is as if nature were a perfectly self-enforcing system of rules. Thus it is alleged that if there is a natural law of the human world nothing that happens in the human world, no matter how revolting it might be, can be in violation of that law. Alternatively, it is alleged that if there is a natural law of the human world any action that is in violation of it entails prohibitive costs for the agent who performs it; hence, an action of that kind should be counterproductive or even lead to destruction of the offending agent. However, proponents of theories of the natural law of the human world readily admit that people can break or violate that law and be no worse off merely for having transgressed the natural law.[103] Indeed, there is ample evidence that disrespecting the natural law may be very profitable for those who do so. Apparently, the natural law of the human world is not self-enforcing, least of all where individual persons are concerned. From this many commentators conclude that there is no such thing as a natural law of the human world. However, this inference from the non-enforcement of the natural law at the individual level to the non-existence of the natural law is fallacious. Let us see why.

We recognise the difference between, say, orderly growth, which follows the laws of growth or development of a particular type of organism, organ or tissue, and disorderly (for example, cancerous) growth, which departs from those laws and creates disorder in the affected organism, organ or tissue. Thus, we can and do distinguish between lawful and unlawful forms of growth or development. The fact that there are causal explanations of cancerous growth does not render the distinction irrelevant. Events that are lawful at the level of molecules, single cells or tissues may turn out to disrupt order at the level of an organ or an organism. The fact that some specimens of tissue of a particular type are in disorder does not signify that we cannot meaningfully speak of the natural order or law of that type of

[103] Some theories of natural law as a sort of legal system try to get around this difficulty by postulating the existence of a supernatural realm where individuals eternally are rewarded (heaven) or punished (hell) for their actions. Other theories identify evolutionary selection as the enforcing mechanism. Societies that respect the natural law will flourish; those that do not will languish, decay or become extinct. The problem here is that it is not the transgressing individual that will suffer; other members of his society and most likely those of a later generation will take the rap.

tissue. The same is true when we consider machines or processes of production. Doctors of medicine, veterinarians, engineers and managers would be at loss if they could not discriminate between the order *of* an organ, organism, machine or production process and the various forms of disorder that may appear *in* those things. They would be even more at a loss if the events that caused the disorder were not following a law-like pattern at some level of existence: in that case they would not even be able to know what to do to keep the organism or machine in order or to put it back in order. It is only with reference to the order of the world that we meaningfully can discuss whether any event or occurrence is a symptom of disorder or not.

Here is another illustration of the fallacy of the inference from non-enforcement to non-existence. Some animals live in groups; some species are called social animals. We can study animal groups and perhaps discover their characteristic patterns of order, the natural laws of their group life. Occasionally we may observe a dysfunctional group or society or an individual animal that 'goes mad' and upsets the order of the group. An observation of that kind does not lead us to revise our views on the natural laws of the group life of a particular species. It is quite consistent with the view that although the theory of evolution leads us to expect that by far the most specimens of the species will be adapted to the requirements of their social existence, it has nothing to say about any particular specimen or set of specimens of a species. Indeed, the theory of evolution presupposes that some specimens will be 'out of order'; otherwise there will be no evolution, only reproduction. For example, the 'world of the gorilla' has its natural law. That does not mean that there is some mechanism or arrangement for enforcing that law on every individual gorilla. Nor does it mean that no gorilla can act unlawfully, contrary to that law, and disrupt the order of gorilla group life. Similarly, the hypothesis that there is a natural law of the human world is not disproved by the fact that there are people who do not conform to it. To say that there is an order *of* the human world is not to say that there can be no disorder *in* the human world; the fact that there is and always has been some degree of disorder *in* the world does not signify that the concept of the order or law *of* the world is meaningless.

Nature: culture, matter or supernature?

Many commentators apparently find it difficult to take the word 'natural' seriously when it is used in combination with 'law of the human world'. They think of the human world in terms of this or that society and know that there are other societies with different legal rules and customs. The law of the human world, they say, is cultural, not natural. There is only one nature, but there are many cultures, many societies, and many systems of rules, customs and practices. However, the claim that there is a natural law *of* the human world is consistent with the fact that there are many different sorts of order, and different sorts of disorder, *in* the human world.

In some cases the difficulty about the word 'natural' stems from the adoption of a particular sort of metaphysical theory called 'reductionist materialism', the view that only matter and material things exist. Thus, it is alleged that it makes sense to speak of the natural law only if one is referring to the laws of matter, say the laws of nature as they have been or one day will be discovered by such sciences as physics, chemistry and molecular biology. Obviously, that is not what natural law theorists have in mind. Hence, the materialist critique is that the natural law theorists' conception of the natural law simply is wrong. However, materialism itself is hard to take seriously.

It is possible, of course, at least in principle, to give a description of all the things that happen in a person's brain and body when he is thinking about ways to reduce his tax liabilities. Such a description might satisfy all the requirements of accuracy and completeness a materialist could reasonably impose but it would not give us a clue as to what the person was thinking. In a similar way, we can have a complete and accurate materialistic description of a painting without being able to infer anything about its subject or artistic quality.

Materialism would entail that the fact that a person believes materialism to be true is itself merely a condition of matter that one should be able to explain solely in terms of other conditions of matter and the laws of physics, chemistry, molecular biology or any other science of mere mindless, senseless, matter. Similarly, one should be able to explain a person's belief that materialism is false as just another condition of matter with different causal antecedents. Thus, a person's belief that something is true, or false, never depends on his reasoning or judgements but always and only on material conditions

that cause him to have that belief. Also, a person's endeavours to convince others of the truth of his views have nothing to do with his reasons for believing them to be true; they are caused by certain physical events in the realm of ultimate matter. Whether that person is devoted to materialism or not, does not matter. For all we know about matter, the causes of his devotion to materialism may be materially unrelated to the causes of his argumentative behaviour. Similarly, whether his endeavours to convince others are successful or not does not depend on the force of his arguments or on their powers of reasoning and judgement but only on causal connections between various physical states of matter. Obviously, the fact that a belief is caused does not imply that it is not or cannot be true, but neither does it imply that it is or must be true. From the fact that a belief is caused nothing follows with respect to its truth or falsity, its logical relationships with other beliefs. Indeed, mere matter, particles, molecules and the like, are not interested in logic, truth or falsity. Particles, molecules and other merely material things just behave as they do or are caused to do, blindly. So how does a materialist explain that people try to spot logical inconsistencies in their own views as well as those of others and often go to extraordinary lengths to get to the truth of the matter? He explains it away: they are not trying to do anything; they just go through whatever motions they are caused to go through while having the beliefs they are caused to have. Logical relations are not in the picture. Indeed, it is mere coincidence, if not a miracle, that the fact that a person is caused to give a proof of the Pythagorean theorem in front of a class of youngsters is not the cause of one of them having the belief that he now can prove that an automobile is an edible fruit. Thus, the materialist who believes he has a compelling argument for the truth of materialism is merely going through a mindless process, like water running off a roof. As C.S. Lewis once remarked, materialism 'does not even rise to the dignity of error'.[104]

It is a common charge against natural law theory that it presents law not as something natural or even human but as something beyond nature. Indeed, natural law theories often are derided for being metaphysical or wedded to a particular theology or a theory of the supernatural. It cannot be denied that there are many theories of the

104 C.S. Lewis, *The Abolition of Man*, …

natural law that obviously and self-consciously are metaphysical or theological. However, that does not imply that there can be no theory of the natural law that is not metaphysical or theological. Moreover, the fact that some theories of natural law are metaphysical or theological does not mean that they assume that the natural law is something metaphysical or theological. A theory of mice and men can be metaphysical without assuming that either mice or men are metaphysical or supernatural things.

Natural law: fact or theory?

Some commentators assume that natural law *is* a theory, a theoretical construct. It is not. This is one respect in which the concept of the natural law differs from the concept of a legal system. There is an obvious sense in which a legal system is a theory of a legal system—as I once heard a legal theorist put it: 'The object of legal science is legal science itself.' Very true! A legal system is what some people want it to be; it is a product of some theory or theories about what the legal system should be or ought to be. Thus, a major aim of legal science is to formulate the theory that supposedly is implicit in the legal system; its goal is, so to speak, to reveal the system's theoretical coherence and unity. Obviously, natural law theories also are products of the human mind. However, whereas legal systems are theoretical constructs, the natural law is not. Although human minds are essential elements of the natural law, the natural law is not a product of anybody's mind. It is not a theory about what the natural law ought to be. The object of the science of law is law, not the science of law.

Those that assume that natural law is a theory are likely to conclude that a sound critique of that theory invalidates the concept of the natural law itself. Hence, they tend to view the fact that there are many controversies about natural law theories as a strong indication, if not a proof, that the natural law is no more than a theoretical construct, a product of some theoretician's imagination with no objective validity whatsoever. Even the natural law theorists themselves, they say, cannot agree on what the natural law is. However, this is at best an exaggeration. The degree of agreement among natural law theorists arguably dwarfs their differences. In fact, most traditional moralities and their theoretical formulations

recognise that people ought to respect the natural order of the human world[105] as it is known by common sense and experience, even if their conceptions of it vary enormously in scientific sophistication or analytical precision. Most of them agree that one has to be moral and make the best of things *within* the order of the world as it is.[106]

The differences among natural law theories mostly concern questions in the margin of those theories. There is overwhelming agreement on the lawful relations between one individual human person and another, but disagreements arise in connection with questions such as whether and how other sorts of persons—for example, supernatural or artificial persons—can be constituent elements of the human world. A Christian, Jew or Muslim includes God among the persons that constitute the order of the human world. An agnostic or an atheist does not. Differences of opinion about God will then be reflected in different natural law theories where the relations of God are concerned. Similarly, there are differences of opinion about the definition of a human person: when is a human being a human person; when does a human person cease to be a person? For different reasons, controversies about God or other supernatural persons and controversies about the limits of human personhood may not be decidable unequivocally. However, they do not affect the core of the natural law, which is the order of human persons in their relations with one another. If there are differences in that respect, they should be decidable by rational methods. Whether only men, only women, only Eskimo's, Australian aboriginals, or ethnic Germans, or on the contrary all men and

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105 See for example the Appendix to C.S. Lewis, The Abolition of Man, …

106 Notable exceptions can be found in Western academic moral theories which in many cases are based on the Gnostic notion that historical experience and received wisdom merely reflect the alleged 'false consciousness' of historical man. Consequently, only 'enlightened reason' can grasp the (as far as history is concerned, utopian) condition of 'true humanity' and deduce the 'rights of man' from it as well as specify the code of conduct most likely to achieve it. Unfortunately, with their references to the 'true nature of man', a lot of those theories (for example those of Mably, Morelly and some 'utopian socialists') used to masquerade as natural law theories. Although those exercises in rationalist constructivism were incompatible with the classical-medieval tradition of natural law theory, which took the real man to be the historical man, many critics assumed that their criticism of the utopian schemes brought down the classical-medieval tradition as well.

women can be human persons is a genuine question that presumably has an objectively valid answer, independently of anybody's say-so. Questions like that may lead us to discover the reasons why one particular theory of natural law is false and therefore ought to be rejected. They do not cast doubt on but presuppose the validity of the concept of the natural law.

The critics are on more solid ground when they point to theories that claim to be natural law theories while at the same time claiming that the persons that really constitute the natural order of the human world are not natural but artificial persons: organisations, states, societies, their members, officials or characteristic institutions (for example, concerning marriage, paternal, maternal or political power, slavery). Here we encounter ideologues who advocate a scheme of social, economic or political organisation on the alleged ground that it is dictated by nature. From that scheme they then derive the 'natural rights' and the 'natural obligations' of men. Pick one: the natural order of the human world is a constitutional or an absolutist monarchy, an aristocracy, a technocracy, a parliamentary democracy; it is a federal or a unitary state, an interlocking system of corporations, a centrally planned economy, a mixed economy cum welfare state, or an egalitarian commune. It is disingenuous to lump such ideological ranting together with serious theories of the natural law and then to dismiss the latter together with the former. Are the natural sciences invalidated merely because esoteric bookshops supply the market for 'alternative theories of the universe'? Unfortunately, the standard positivist critiques of natural law theories, for example in introductory handbooks for law students, usually do not care to distinguish the one from the other type of theory.

It is undeniable that there is far more academic discussion of natural law theories than there are studies of the natural law. There apparently is great interest in theories of why some people produce one theory and others another, and explanations of how and why two theorists agree or disagree. There is always the risk that academics end up discussing each other rather than some aspect of the real world out there. Then the object of academic pursuit becomes academic pursuit itself; the real world, no more than a pretext for an academic career, slides into the background. The literature on natural law theories is as good an example of these phenomena as any other. I am not denying, of course, that a lot of it is of high quality. Erudite

scholarship on natural law theories abounds. There are a great many fine studies of the historical contexts in which they were formulated or abandoned and in-depth discussions of their philosophical presuppositions and methods. Nevertheless, interesting and illuminating as it may be, one should not take the study of natural law theories for the study of the natural law itself. Command of the literature is not the primary concern of the study of the natural law.

Natural law theory and legal positivism

As should be clear already, legal positivism and natural law theory are not rival approaches to the study of the same thing. Legal positivism studies legal systems; natural law theory is concerned with the natural law of the human world. No natural law theorist has ever denied that there are legal systems in the world or that they are important phenomena of culture and civilisation. The interest of natural law theory in legal systems is precisely to find out whether or to what extent they are lawful. Not having the same object of study, legal positivism and natural law cannot ever contradict one another. 'Legal but not lawful' does not contradict 'legal'. For a natural law theorist, that goes without saying.

However, legal positivists would not settle for that. They were eager to deny the existence of [natural] law or to minimise its relevance to immunise their favourite legal system from the criticism that it would draw on account of its usually all too obvious departures from the natural law. However, they did not want to lose the prestige that came with the claim to know the law. Hence, they sought to redefine the use of the word 'law' so that it covered only artificial legal orders, implementations of arbitrary rules and decisions made by or agreeable to the rulers of states (or the states' legal officers, magistrates and other officials). They would have none of this 'legal but not lawful' stuff that the natural law theorists were airing. Nothing would do except 'legal and therefore lawful'.

As far as influencing the curriculum of the law schools and the opinion of their students were concerned, positivism was remarkably successful. Rising on the wings of an increasingly virulent nationalism, which made nationalisation of the curricula of higher education in social, economic, cultural and political disciplines a top priority, legal positivism all but conquered the universities towards the end of the

nineteenth century. Not long after that, its deficiencies became too obvious to ignore. Two World Wars and some massive and gruesome experiments in utopian social engineering exposed the dangers of nationalism and its academic cognate, positivism. Legal positivism retreated to an arid formalism (Kelsen, Hart) that sought to entrench the legal profession close to the heart of the political power structures while instructing it not to pay heed to any argument that was not rooted in a restricted set of officially recognised 'legal sources', approved by the profession and collected in its 'law libraries': hear no evil, see no evil—leave that to the unscientific vaporising of politicians, journalists and moralists. That position proved indefensible. For all the formal legal positivists' attempts to 'de-psychologise' the law, approval and recognition are psychological concepts; they do not define a closed set of 'legal sources'. It was easy to argue that national traditions, public opinion, indeed strong if fleeting fashions were equally valid sources on which individuals could make legal claims and state-appointed judges (representatives of the regime) could base their verdicts. Dworkin[107] made that argument with considerable popular success, especially but not only in the legal culture of the United States of America, where participatory mass-democracy, the politics of opinion polls and intensive lobbying—in short ochlocracy—had redefined the conditions of political legitimacy. It was a sign of the unravelling of the positivistic paradigm of legal studies as a methodologically strict discipline and, at the same time, the fulfilment of the positivists' claim that the ultimate standard of legality is politically relevant opinion. However, the need to adapt their conception of legality and legitimacy to rapidly changing configurations of political power and its bases in politically relevant opinion did not entice positivism to open the door to the study of natural law. Why should it? Natural law, in their book, was just another opinion that might be accommodated effortlessly among the legal sources if it ever were to become insistent enough to vindicate a judge's decision in the forum of politically relevant public opinion. No matter how amorphous and pluralistic positivists might allow their conception of a legal system to become, they could not acknowledge that there might be an order of the human world that is independent of any legal system.

[107] R. Dworkin, Taking Rights Seriously, …

Calling a human society a 'spontaneous order'[108] creates the risk of confusion with the phenomena of 'natural evolution' or of spontaneous co-ordination. The latter can be observed in the movements of herds, flocks or crowds, and at a different time-scale also in the waxing and waning of conventions, fashions and customs of various kinds. Such phenomena are indeed a part of the history of many societies, but they are not the determinants of social structure. There was nothing spontaneous about the Soviet Union at any time in its history,[109] but then there was nothing spontaneous about the United States of America either. The Federalists *and* the Anti-Federalists were well aware that their debates were about political constructions that would condition the fate of many a generation to come. Their debates were not about one 'system of rules' having a better chance of surviving the competition of other 'systems'; they were not about spontaneity versus constructivism either.[110] There is of course an immense difference between the Founding Fathers and Lenin and his consorts. The former derived their view of human nature from experience and the study of history. The latter's source of inspiration was the gnostic mysticism Marx had peddled as 'scientific socialism'. The Americans set out to devise a system of government that would fit human nature as it is; the Russian Marxists wanted to change human nature to make it fit their social fantasies.[111]

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[108] Hayek, …

[109] Hayek called socialism a fatal conceit, not a quirk of nature or spontaneous development that happened not to fit the conditions for survival at the particular time and place it in which it arose. F.A. Hayek, *The Fatal Conceit* (……).

[110] The Roman society of Antiquity was for at least half a millennium the living proof that crime on a grand scale actually pays on a grand scale, but it was never a 'spontaneous order'. The American Founding Fathers were well aware of that. They were not emulating the in historical terms astoundingly successful political system of the European States; they were repudiating it.

[111] See …., *Cogs in the Wheel* (…….)

Nowadays, under the influence of a set of vague but influential doctrines, collectively known as legal positivism, many people take the word 'law' for a full or near-synonym of 'legal system'. However, a moment's reflection will inform us that the concept of law is not the same as the concept of a legal system. For example, it makes sense to speak of the law or order of the human world but we cannot speak sensibly of the legal system of the human world. We can speak meaningfully of the legal system of one society or another, in particular of a politically organised society such as France, the People's Republic of China, Argentina, Belgium or the United Kingdom. No such political organised society, and arguably no society whatsoever beyond the familial household, comes anywhere near to being a natural entity or phenomenon. Thus, there are no natural laws of France, Belgium, Argentina or whatever other politically organised society one might care to mention.

It would be ridiculous to suggest that a legal system is a natural order. If 'law' means 'legal system' then 'natural law' is an oxymoron and to speak of natural law is to entangle oneself in a host of logical fallacies and epistemological conundrums. However, 'law' does not mean 'legal system'; it means 'order'. While there are artificial orders —and legal systems are artificial orders—there also are natural orders, orders of natural things and natural phenomena.

If legal positivism were merely a semantic position, a declaration of the intention to use the word 'law' as a synonym for 'legal system', it would be unobjectionable from a logical point of view. Nevertheless, one might still object that it is unnecessarily confusing to speak in code if one already has a suitable word ('legal system') and therefore has no need to hijack another word ('law') with an entirely different meaning. Of course, legal positivism is not just about semantics: it is a political ideology that seeks to divert people's attention away from the natural order of the human world to the artificial orders of the societies of which they are political subjects. Occasionally, the ideology is buttressed with extravagant claims such as that

- 'positive law' (another codeword for a legal system) is the only law there is;
- if there is law outside the legal system then we cannot know what it is: opinions about it are merely subjective, not objective, and therefore irrelevant from a scientific point of view;
- to speak of natural law is to speak of an non-existent ideal (or 'higher') legal system that some may want to exist or believe ought to exist;
- to speak of natural law is to confuse legal argument with moral argument or normative propositions about human behaviour with descriptive propositions about causal relationships;
- the term 'natural law' is itself a codeword for a legal system that some naïve people suppose has been promulgated by God, or by Reason, or some other glorified imaginary person.

None of those claims carries much weight against the concept of the natural law of the human world. They all come down to the idea that scientific study of nature will only reveal 'what is' and never 'what ought to be'. That is true but not relevant. Positivists simply beg the question. They presuppose that law is a legal system; therefore they claim that to describe law one must give a list of normative or prescriptive propositions expressing rules, commands, prohibitions, permissions, norms, standards of good behaviour and the like. That is how they describe a legal system; and those are the things that a legal system contains. Assuredly, no study or investigation of the natural order of the human world will yield a description of that type. However, that only signifies that the natural law is not a legal system but an order of things that one can discover and describe more or less correctly.

Legal positivists argue defensively that, although their descriptions of a legal system contain propositions of the form 'X shall do Y' or 'X ought to do Y', it does not follow that they themselves believe that X ought to do Y, or that X ought to obey or follow the prescriptions of that legal system. In other words, they say that as scientists they describe a legal order without implying that one ought to respect that legal order. However, the same is true of the natural law: its description is one thing, the question whether or not it is a respectable order, one that people ought to respect, is another thing altogether. Of course, even one who says that the natural order of the

human world is respectable thereby does not imply that its elements are rules, commands, prohibitions, permissions, norms or standards of conduct. He does not say that the natural law consists of such elements with respect to which one can meaningfully say that one ought, or ought not, to obey or follow them. Similarly, one who says that we ought to respect nature is not claiming that nature is a set of normative or prescriptive elements that we ought to obey or follow. One who says that we ought to respect other persons is not claiming that other persons are bundles of rules, commands and the like that we ought to obey or follow.

On the hand, to respect a legal order one must obey or follow its prescriptive or normative elements: one must what the legal system prescribes; one must not do anything that it forbids. On the other hand, to respect nature is not a question of obeying or following it (whatever that might mean); to respect other persons is not a question of obeying or following them—and the same is true where the natural law is concerned.

Because to respect a legal order is to obey or follow its prescriptions, to find the answer to the question 'What should I do to respect the legal system?' one must look at the rules, commands and similar prescriptive elements that make up that system. The legal system prescribes. To find out how should act to respect the natural law (or nature, or other persons) one cannot simply read off the answer in the natural law. One must discover or possibly invent ways to do it. The natural law (or nature) does not prescribe anything. The rules, principles, norms or other normative and prescriptive elements that make up the answer to the question about how to respect the natural law (or nature) obviously are not natural elements themselves.

The study of law is one thing; the study of legal systems is another thing. Unfortunately, the study of law is and for a long time already has been banned almost completely from the curricula of law schools and law faculties. They concentrate all of their efforts on the study of one or at most a few legal systems, usually the national legal system of the state where the law school is located and in some cases the legal system of a more or less autonomous region within a state as well as

the legal systems of some international organisations in which the state or the region participates.

Legal studies are like learning the rules of one or more games, or the instructions for working with one or more machines or computer programs. Just as there is no such thing as *the* rules of the game or *the* rules for operating a machine, there is no such thing as *the* legal system. There are many different games and many different machines, and there are many different societies. Every society has its own legal system in the same way that every game has its own set of rules and every machine its own instructions book. Of course, some rules or variants thereof can be found in a great many games, and some games may resemble one another rather closely; some instructions for operating a machine are valid for different sorts of machines and some machines are very much like other machines. Just so different legal systems may have more or less elements in common and in some cases will be very similar to one another. However, the bottom line is that every society has its own legal system. 'French law' and 'Belgian law' are in some respects closely related, but they are different legal systems.

As a result, from the fact that some sort of action or practice or condition is legal in one society one cannot infer that it is legal in some, let alone every other society. What is legal in society A may be illegal in society B. Moreover, legal systems change, often rapidly. We cannot infer from the fact that something is legal in society A at one moment in time that the same thing, or something very much like it, is legal at another time. With respect to the modern Western States, it has been said that 'the law is that the law can change at any moment'. The same is true for many non-political societies, business corporations and non-profit organisations, many of which seem to be caught up in an almost continual process of reorganisation or restructuring—a process that involves more or less drastic changes in the legal system of the society in question.

The answers to questions of legality are relative. 'Is this legal or illegal?' and 'What are the legal consequences of doing this or that?' are meaningless questions unless there is no doubt to which legal system they refer. 'Is this legal or illegal in this society today?' and 'What are the legal consequences of doing this or that in this legal system today?' These are sensible questions. Again we may think of the analogy with games and machines. Unless we know which game

or machine is being discussed, there is no point in pondering what the rule-governed consequences of 'scoring' or 'pushing the green button' are.

All of this is so obvious as to merit no further elaboration.

Unfortunately, starting in the nineteenth century and increasingly in the twentieth century, many people implicitly or explicitly assumed that the concept of law is nothing else than the concept of a legal system—as it is usually expressed: 'The law is the positive law and nothing else.' Thus, they have introduced in the education and training of jurists, judges, prosecutors and lawyers, the notion that to be experts in the law they only have to know the rules and current practices of one or at most a few legal systems. Specifically, they have banned the question whether an action, activity, practice or institution is lawful or unlawful, regardless of what, if anything, this or that legal system has to say about it. Apparently, they believe that the categories of the lawful and the legal are identical or that to the extent that one wants to discuss law without reference to a particular legal system one is no longer engaged in an objective, scientific study of the law but, say, in ideological propaganda or moralistic sermonising.

The point of this line of thought (which generally is characterised as 'positivistic') is to get rid of the traditional conception of the study of law as a study of the natural law or the natural order of human affairs and so to discredit any attempt to evaluate the lawfulness or unlawfulness of whichever legal system those people take as 'the law'. A lawyer, according to the positivistic point of view, works within a legal system. Whatever his personal—or to use the preferred term, subjective—opinion may be, he should accept as basic axiom of his professional work that 'the law' is the legal system within which he works and nothing else. Admittedly, lawyers are human beings and 'the law' is complex, ever-changing and often contentious. There are always questions relating to parts of the legal system where there is no conclusive legal argument and where extra-legal arguments drawn from some popular or fashionable ideology, doctrine of morality or academic theory help to tilt the balance one way or another. However, this is seen as perhaps inevitable but in any case regrettable. In the background of this positivistic view there is the conception of

an ideal legal system, one that would permit us to classify unambiguously any action, practice or institution as either legal or illegal merely by looking up what the proper legal sources (containing decisions of the proper legislative, judicial and administrative authorities) say about it. Everything is to be decided by an appeal to the proper political and legal authorities and these too are to be identified by means of rules and statements in the proper legal sources.

One claim made on behalf of this positivistic view of 'the law' is that it makes legal argument independent of moral argument. Taken literally positivism makes legal argument independent of any sort of argument except legal argument. However, its independence from moral argument often is touted as specially important and valuable. The claim itself obviously involves a fallacious argument. It appeals to the justifiable desire to keep the state from using its awesome powers of enforcement, propaganda and oppression for the purpose of imposing a particular morality, way of life, religion or intellectual or cultural orthodoxy on its subjects.

[HUME
Obviously, we should not expect the modern intellectual to give up her objection to natural law merely on account of the fact that it has nothing to do with a metaphysical 'higher law', and everything with the order of persons and their property rights. With an obligatory reference to Hume,[112] she will insist that one cannot logically infer a norm from a fact. Therefore, if natural law is given a naturalistic interpretation then nothing follows from it regarding what we ought to do. In other words: even if natural law should tell us how things are, it cannot tell us why they should not be different; it is no basis for criticism of human actions in general, nor, in particular, of legislative,

[112] Hume-1740, III,1,i (*in fine*)

judicial or administrative rule- or decision-making. However, Hume also expressly noted that it is not improper to call the rules of justice *Laws of Nature* "if by natural we understand ... what is inseparable from the species".[113] Hume's remark about the gap between *is* and *ought* was meant to "subvert all the vulgar systems of morality", not to condone action in defiance of what is inseparable from human nature. For Hume, justice is "an invention [that] is obvious and absolutely necessary; it may as properly be said to be natural as any thing that proceeds immediately from original principles, without the intervention of thought or reflection."[114] Justice is not something inevitable or unavoidable, but it is indispensable, the world and the human species being what they are. Why, then, should we act within the bounds of justice? Not because we cannot do otherwise, but because so much depends on it. Our intellectual may then cynically object, that there is no proof that she ought to care about the things that depend on natural justice. There is no direct reply to this objection other than a proof of the thesis that we ought to be just.[115] If our intellectual only argues, that there is no reason for believing that aggression or warlike action is unjust, she is plainly mistaken. To bring another within one's right by warlike means is just as obviously a violation of the conditions of *ius* as defence against injurious attack is a just right. Democritus said it well: "It is needful to kill the enemy, whether a wild or creeping thing or a human being."[116]

[*** CONCEPT OF FREEDOM Move elsewhere?

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113 Hume-1740, III,2,i (*in fine*)

114 Hume-1740, III,2,i (*in fine*). In this respect, and despite his admiration for Hume (e.g. F.A. Hayek-1967), Hayek cannot be called a Humean: with his peculiar theory of "non-rational, spontaneous social evolution", Hayek almost obliterated Hume's insight into the role of "human inventiveness", or what for the ancient Sophists were the distinguishing marks of the human animal: its technical and social *skills*.

115 For an attempt to give such a proof, see Van Dun-1983, 164-176. See also Van Dun-1986b, 17-32. A similar argument in Hoppe (1989), chapter 7.

116 Diels/Kranz-1952, B259a. The "enemy" is anything, animal or man, that "does injury contrary to right", anything that does violence to another's security.

Freedom but not liberty is linked to the natural order of things and their natural or spontaneous behaviour or action in it. In fact, any thing can be said to be free or to do things freely: a molecule in a crystal has less freedom than in a gas; a dog may roam freely. It would be odd to speak of the liberty of animals or molecules.

The expression 'X is free of Y' means little more than that X is without Y, but the little more still is significant: Y must be something unnatural, improper, obnoxious, that hinders X's natural, spontaneous or proper action, movement, development or growth. We appreciate things that are dirt-free, goods that are tax-free, pets that are free of worms. Only in ironic speech can we say such things as that a madman is reason-free, a loveless marriage love-free, or an oppressed population free of freedom.

Some of the things of which a person but no other thing can be free or not are of a moral nature. A bachelor is free of the obligations of marriage, a drifter free of the obligations of regular employment. However, being free of obligations is not something most people appreciate, even if the burden of obligations occasionally may lead one to have escapist longings for a life that is as free as a bird's. Obligations that one assumes voluntarily or incurs as a consequence of one's own actions are a normal part of leading one's own life. Taking on such obligations is something only a free person can do. It is an exercise of one's freedom, not a restriction or loss of it. Nevertheless, taking on obligations obviously removes the freedom to do particular things. Because of my obligations I may say that I am not free to accompany you to the airport tomorrow. The owner of a restaurant may say that an unoccupied table is not free because it has been reserved under a prior agreement with other customers. Clearly, being a free person does not imply actually being free to do anything whatsoever. I may have so many obligations that I am no longer free to do anything else than to try to meet them—but even so I still am a free person.

Obligations restrict a person's freedom to do one thing or another; they do not restrict his freedom as a person. Being obliged unilaterally by others to do something, without having an obligation to it, is a restriction of one's freedom; it is not the same as exercising one's freedom. The same goes for being forced or coerced by another. Being obliged by another is being treated as if one were not a free person. Being forced or coerced may imply being treated as if one

were not a person at all, just another non-rational thing or animal. Here the question arises whether one's freedom is a respectable condition, one that others ought to respect. If it is, are there circumstances under which it ceases to be respectable? We shall address these questions later.

In common use 'freedom' is clearly distinguished from 'power', 'ability', 'opportunity', 'desire' and the like. I may have no obligation not to fly like a bird and there may be no one who obliges me not to fly like a bird. In that sense, I am free to fly like a bird—but, not having wings and unable to grow them, I cannot fly like a bird and the question of my being free to fly like a bird or not simply does not arise. Not having euro's in my pockets, I cannot pay in euro's even where I am free to do so.

It is meaningful to say that I am not free to go to the theatre tonight because I promised my neighbour to help him fix his car, because I promised my wife or even myself to save every penny for a new vacuum cleaner, because this morning the doctor prescribed that I stay indoors for at least three days, or because I will not be released from prison until next week. It is not meaningful to say that I am not free to go the theatre because I have no money, or no desire to go to the theatre, or because I am sick and bedridden, or immobilised in intensive care at the hospital. It may be true that I cannot do something because I am not free to do it, but there may be many other explanations of why I cannot do it.

The literature on social, economic and political questions is rife with attempt to redefine the concept of freedom. Of course, everybody is free to assign to his use of a word any meaning he wants, but talking in code is not always helpful. Stipulating that 'freedom' means the quality or condition of being healthy, rich, literate and of Caucasian origin will logically compel one to regard a statement such as 'X is not free because he is ill, poor, illiterate, or black' as a tautology. Still, one should not be surprised if other people assume that the statement could be true only if X were a member or subject of a society in which a legal rule deprives the ill, the poor, the illiterate or those who are not of Caucasian origin of their freedom.

With respect to persons, we may say that freedom is a reality (one's own being as a person, an inescapable fact beyond the reach of choice) as well as a quality of one's activity or work. *Real freedom* (or freedom as reality) is a fact of life: a person, having the capacity to

perform basic actions, is free, and remains free until he dies; to destroy a person's real freedom one has to destroy the person. Obviously, one's real freedom is coextensive with one's natural right (as defined earlier). If a person's real freedom is to be respected then so are his natural rights. One's *organic freedom* (or freedom as work)[117] is what one is free to do. Organic freedom is contingent and vulnerable. All sorts of circumstances and accidents can prevent a person from doing his work. My foot may be stuck between the roots of a tree: I cannot move it freely and in that sense I am not free to move it. However, only with respect to other persons, but certainly not with respect to the roots of a tree, is there a reason to ask whether or not they should respect my freedom.
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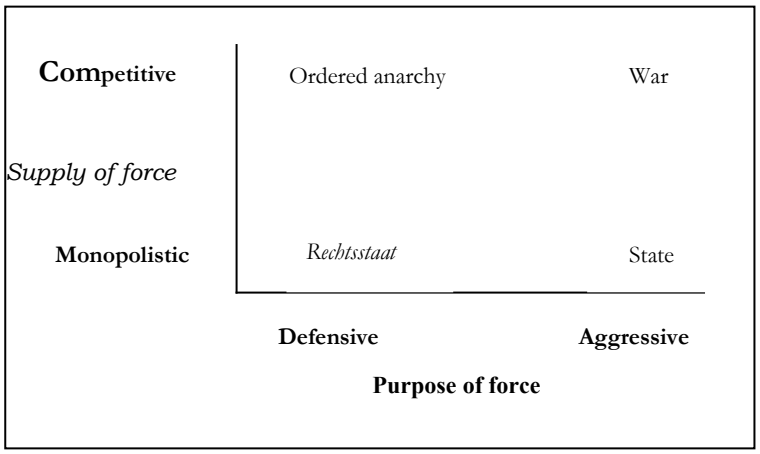
Natural order, the problem of adequate defence

The peculiar problem of the natural law theorist[118] is the vulnerability of the Property-solution that we noted earlier. To put it differently, it is the problem of the adequate defence of every person against aggression and coercion—in particular against organised aggression and coercion, against aggressive and coercive societies. Statistically, in

[117] Because there is no straightforward way to express in English the concept of what in Dutch should be called 'werkelijke vrijheid' (German: 'wirkliche Freiheit'), I have coined the expression 'organic freedom' to refer to it. In doing this, I allude to the meaning of the Greek 'organos', which is: *working*, *active*.

[118] Unfortunately, the term 'natural law' tends to be associated with a number of meta-natural ('metaphysical') 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 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.



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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.[119]

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 monopolistic 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

[119] 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.

degenerate into war, the same outcome as under a regime of competing suppliers of aggressive force.[120] 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?

The logical opposite of the rule of law is the police state.[121] 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

[120] 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.

[121] 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.

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.

END Natural order, the problem of adequate defence]