

The science of law and legal studies

Concepts, Methods and Values

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Introduction

This paper attempts to clarify some of the logical and conceptual issues in the philosophical dispute about law that has pitted the legal positivists against the adherents of natural law. The first part looks at the basic concepts that are relevant to that discussion and at the methodological implications of studying law either as an order of natural persons (natural law) or as a system of rules or an order of rule-defined artificial persons (legal order). Thus, we find that the material and formal objects of natural law studies and legal science are different, and only touch one another because of the contingent fact that most of the positions in the legal orders studied by positivists are occupied by natural persons. Consequently, from both the logical and the methodological points of view, natural law studies and legal studies are not rivals. The two can exist side by side and have done so for centuries.

One question that emerges from analysis in the first part is why positivists have embraced the study of legal orders while heaping nothing but scorn on the study of natural law. Their attitude suggests hatred and contempt rather than a mere difference of intellectual interests. Could it be that the positivists' attitude has little to do with logic and methodology and much with ideological issues involving fundamental values? In the second part, we look for an answer to this question in a comparison of the two major and radically opposed religious worldviews that have made their mark on Western intellectual history, the Judaeo-Christian tradition and the Gnostic tradition.

The positivists' rejection of natural law fits the latter tradition, which also has no appreciation at all for natural law, natural persons and the skills or virtue of justice. Thus, we can explain the vehemence with which positivists have rejected arguments based on natural law as irrelevant to the study of law.

The appendix addresses the question how the peculiar economic conditions of the Western world made it possible for the Gnostic mindset (which until the twentieth century had always been confined to small intellectual circles) to emerge as a new popular religion of the welfare state. If, as seems likely, the welfare state soon will go the way of all the other great twentieth-century experiments in utopian social engineering then that popular religion may turn out to be unsustainable—and so will its academic offshoots, including positivistic legal studies.

Basic concepts and methods

Terminology

In the sense in which we shall use the term 'law', law is an order of persons.¹ We shall distinguish between natural and artificial orders and also between natural persons and artificial persons. As we shall see, the study of natural law is the study of the natural order among natural persons. The study of positive law is the study of artificial persons that are artificial orders of artificial persons. The study of international law (in the classical, pre-twentieth century sense of the term) is the study of an artificial order that is an order of artificial persons but is not itself an artificial person. The study of 'classical' criminal law is a subdivision of the study of natural law. Today, the label 'criminal law' also, misleadingly, applies to many things that do not belong to the study of law but rather to managerial studies, in particular, human resources management. A similar remark

¹ **For a formal logical analysis of the concept of an order of persons, see *The Logic of Law (...)*; a shorter informal presentation can be found in *Natural Law: A logical Analysis (...)***

applies to other domains that customarily are presented under the label 'positive law'.

The general meaning of 'law' is order. The opposite of law is disorder. 'Disorder' connotes confusion, chaos, and, in connection with the human world, conflict or war. Hence 'law' connotes clear boundaries and distinctions, and, in connection with the human world, friendly and peaceful relations. If a distinction is made between 'law' and 'order', it is that 'law' connotes respectability: law is a respectable order, one that people ought to respect. Between order and disorder, only order can be respectable per se, but there may well be orders that are not respectable at all. As respectable order, law stands in opposition to both disorder and order that is not respectable.

'Natural' denotes what is by nature, grown, or, in a wider sense, what is selected in the course of an evolutionary process. In short, it denotes what is not by design. Its opposite is 'artificial', which refers to what is made, organised, designed or planned. Hence, 'natural law' means natural order, and in particular respectable natural order. The radical opposite of natural law is planned chaos, confusion by design, or the organisation of war.

This categorisation evidently is anthropocentric. It crucially depends on the presupposition that human beings are purposive agents, capable of acting according to a plan to bring forth a desired or intended outcome. The natural is what is not by human design; the artificial is what is by human design.

Because of their genetic constitution or an accident that happened to them, some human beings are not persons in any meaningful sense. However, the overwhelming majority of humans are natural persons, individually capable of purposive action, speech, and thought, and of communicating arguments and thoughts to other human persons. An artificial person obviously is not a natural person. However, natural persons can represent an artificial person, provided they act under the authority and according to the rules that define it. If that proviso is met then the rules of the artificial person ascribe the words and actions of the representatives to the artificial person itself. In short, natural persons are capable of self-representation and they must act as representatives of artificial persons if these are to partake of the quality of being a person.

In a sense, artificial persons are like purposive agents in that they have a purpose. Indeed, they exist for a purpose, which is set for them by natural persons. Unlike those of natural persons, the purposes of artificial persons are not states of mind. Rather, they are statutory purposes, stipulated in the rules that define the artificial person.

In ordinary speech, we commonly personify many things that are neither natural nor artificial persons. For example, journalists often personify an economic process by calling it ‘the market’ and ascribing certain goals, wishes, preferences or actions to it. However, the market is not a natural person. Moreover, because the market has no rules that designate who may represent the market or what one would have to say or do as a representative of the market, it is not an artificial person either. Nevertheless, the rules of an artificial order may make it possible to give the status of an artificial person to almost any conceivable kind of thing—animals, plants, cells, buildings, landscapes, or whatever. Obviously, if that is the case, such things are persons only in the artificial order in which natural persons are authorised to represent them. It is only by rule-defined representation that a thing that is not a natural person can be considered as a person at all.

Natural persons are individuals or atoms. One cannot cut them up to obtain two or more natural persons—and neither can one merge two or more natural persons into one new specimen. Artificial persons obviously are not individuals. They can be split up and merged (that is to say, rearranged) at will, as none of those operations affects the capacity of natural persons to represent them.

Natural order

With respect to the human world, the natural order is the fact that there are many physically separate human persons, each of them capable of purposive action, speech, and thought. Human agency involves having some measure of control over means of action, which primarily are physical resources. At the very least, human agency involves a measure of control over one’s own body. A person’s means of action usually are called his property or rights. If a distinction is made between a person’s means of

action and his property or rights, it is that property and rights are a person's respectable or lawful means of action. If a distinction is made between property and rights, it is that property is a person's stock of means of action while rights are the uses he can make of it. A person's natural property or natural rights are the means of action that are naturally, 'by nature', under his control—parts of his body and its faculties. Obviously, an artificial person has, and can have, no natural property and no natural rights.

The natural order of the human world thus appears in the form of objective, natural or physical boundaries that separate one human person from another; one person's words, deeds, works, and property (or rights) from another's; and any human person from other things. Although those boundaries are real and objective, it is by no means always easy to discern them. The reason is that words and actions are historical events, the evidence of which may disappear, or be destroyed.

Natural law

A theory of natural law holds that the natural order is respectable, hence that human persons ought to respect the boundaries that separate any human person from other things, one human person from another, and one person's property (or rights) from another's. It is a central task of the philosophy of law to evaluate arguments to the effect that the natural order is respectable—but I shall not consider that philosophical task here.

If the natural order is respectable then people ought to abstain from doing anything that shows disrespect for or sows confusion about the nature and identity of persons or the authority ('authorship') of their actions, words, works or property. To treat a person as a non-person (a 'mere thing'); to treat one person as if he were another; or to treat one person's words, actions or property as if they were another's—all of these are primary examples of injurious actions ('iniuria'). Similarly, to make it appear that a person is a non-person or that one person is another is to sow confusion in the human world. Such actions and words tend to derange our moral compass by making it difficult, perhaps even impossible to distinguish properly

between the guilty and the innocent, the debtor and the creditor, the criminal, his victim and a mere bystander, the agent and the patient, and so on. Consequently, they render it difficult, perhaps even impossible appropriately to assign blame, praise, punishment and reward, or to condemn or exonerate.

The elementary relation of order in the natural law is the ius-relation. 'Ius' refers to the action of solemn speech (iurare). A ius is what is concluded in solemn speech between two or more natural persons, when they make a commitment and thereby become obligated to one another. Typically, a ius involves the redrawing by mutual consent of the boundaries between one person and another, for example by way of a transfer of property.

Clearly, the ius-relation holds only between human persons who speak independently relative to one another. According to the traditional formula, it is a relation between 'free and equal persons'. Because of the constitutive factor of speech (ratio, logos), the ius-relation is the rational or logical element of natural law. The natural law is the order of natural rational agents. Because the 'free and equal' condition is merely a way to speak of the real and objective boundaries that distinguish and separate one person from another, the ius-relation is implied in the order of natural persons itself. Respect for the natural order of persons implies respect for ius. In other words, justice ('iustitia') is a necessary condition of respect for the natural law.

Another relation in the natural law is the rights- or rex-relation. A rex is one who controls or steers (regere) a thing or person; rights (recta) are the things (or persons) that are controlled or steered. Unlike the ius-relation, which relies on speech, the rex-relation may exist between one person and another as well as between one person and a thing, animal, plant or whatever. A rex typically controls by means of force, threats, incentives, or by relying on habits or reflexes that are themselves the result of his previous control over a thing (or person).

The rex-relation is the physical element of natural law. It defines a person's means of action, hence his property or rights. However, from the perspective of the natural law, mere physical control or power over a thing or person is not always lawful or respectable. That is because it may involve disregarding,

obfuscating or overstepping the boundaries between persons, whose separate existence defines the natural law itself. Conversely, respect for natural law implies respect not only for natural rights but also for lawful rights or lawful property, that is, for property obtained without injustice. A person's natural property and natural rights are lawful within the natural law, but not all lawful property or lawful rights need be natural property or natural rights.

Obviously, when the rex-relation exists between one person and another, it cannot at the same time co-exist with a ius-relation between the same persons. Two persons cannot be free and equal speakers, when one of them is controlling, managing, threatening, blackmailing or extorting the other.

Artificial orders

In the human world there also is also a great variety of artificial orders, some of which may respect more or less the natural boundaries between persons (and between persons and other things) while others go to relatively great length to obfuscate those boundaries.

Artificial orders correspond to a design. Strictly speaking, however, only the design itself is an artificial order. In a wider sense, the implementation of a design also is called an artificial order, although to the extent that the implementation makes use of existing natural or other things or materials it necessarily will have or over time develop properties that were not part of the design. An example is the present shape of an old building, which may no longer resemble the design of the original architect because of the impact of wear and tear, the natural elements, and accidents. Acts of vandalism, and alterations and renovations made by successive owners and occupants, who adapted the building to their own purposes, using the means and talents at their disposal, also are relevant factors. As it is now, the building was not designed, yet it is only the implementation of the original design that has changed—that design itself is still what it was. The present owner may design further changes to the building as he found it, but once he implements them, they too will be exposed to forces that were not part of his design.

An instructive example of an artificial order is the game of

chess. It is really only a set of rules. It defines a number of artificial persons (Black, White), each of which is composed of other artificial persons (King, Queen, Knights, Bishops, Rooks, and Pawns). The rules define what each of those persons is and can do—and also the purpose for which they are supposed to act. To actually play the game, one usually counts on having at one's disposal a number of objects or processes that can serve as physical representations of the game board and the various artificial persons defined by the rules. Obviously, one must also be prepared to play by the rules of chess. Note that the physical representations of chess figures can take a variety of forms and be made of a variety of materials, from configurations of pixels on a computer screen to carved or marked pieces of wood, marble, glass, metal, plastic, or paper, to human actors dressed in fancy costumes. However, although some materials—for example, droplets of water on a spongy surface—are not suitable at all, the rules of the game or the powers and immunities of the rule-defined artificial persons are not affected by the implementation. At the limit, the players could announce their moves and rely on their memories (and perhaps the memory of an umpire) to keep track of the changing positions on the game board (which also might exist only as a mental image). In that case, the artificial order of chess exists in the mind and in the mind only. Its material implementations are no more than an aide-mémoire. Nevertheless, to the extent that a physical implementation is used and relied on, precautions may be necessary to ensure that the properties of the materials do not interfere with the playing of the game. It is not a good idea to use ice-cubes to play chess in a tropical climate.

In any case, as the example of chess makes clear, an artificial order is unlike a natural order. The elements of the former are rule-defined positions (artificial persons); the elements of the latter are natural things or natural persons.

Games are not the only artificial orders. The artificial orders that are most relevant for our discussion are organisations, for example political, religious, educational, financial, industrial and commercial corporations. All of these we often refer to as 'societies'. Such social orders not only often are complex, comprising many, usually personified, positions ('Citizen', 'Treasurer', 'Voter', 'Mayor', 'Director', 'Dean'); they are

themselves artificial persons ('the Corporation', 'the Society', 'the State').

Not all artificial orders are artificial persons. Chess is an artificial order but is not an artificial person. There are no rules designating a natural person who is authorised to speak for the game of chess or whose actions are taken to be the actions of chess. Similarly, while States are artificial persons (like Black and White in chess), the international law, at least in its classical form, is an order of States but not an artificial person. It has no purpose that *it* pursues and no rules that define what *it* can, or cannot, do—and no rules stipulating who speaks or acts as its representative. Moreover, it is unlike chess in that it does not prescribe the goals that States are supposed to pursue. The game is antecedent to the Kings, Queens, Pawns and so on that it defines. It is the whole of which they merely are parts. Moreover, the parts have meaning and significance only within the whole—they exist only as parts of the whole.

Classical international law is an artificial order because it is an order of artificial persons, but it is not antecedent to those persons. States exist independently of any international law. In that sense, classical international law is somewhat like the natural law of the human world, which also does not define what its constituent elements (natural persons) are or what they can or cannot do. The natural law consists of the conditions of order that can be discovered in the co-existence of any number of 'free and equal' natural persons. Classical international law likewise consists of the conditions of order that can be discovered in the co-existence of any number of 'free and equal' autonomous or sovereign entities—only here those entities are artificial persons, organisations of a particular type ('States'). In fact, classical natural law basically is an analogy of natural law, obtained by substituting 'State' for 'natural person'.

Respect for the 'free and equal'-condition obviously is incompatible with the desire for power over others. Hence, many modern intellectuals, who want power to recreate the world in their own image or to rule it 'for its own good', have turned away from natural law and classical international law. Wittingly or unwittingly, they have embraced a philosophy that debunks either freedom or equality or both as delusions or else as dangerous causes of 'anarchy'.

As with artificial orders generally, it is necessary to distinguish between the artificial order (the design, or legal order) of an organisation or society and its implementation. The main source of problems here is that the implementation typically involves the use of human beings, although that need not be so. According to a popular legend, Caligula made his horse a consul of the Empire. That was perhaps an act of madness or arrogance, but it did not change one iota in the social or legal definition of the position of 'Consul'.

In most organisations or societies the human factor is strong enough to create a significant discrepancy between 'the rules' and their implementation. To the extent that the organisers wish to minimise that discrepancy, they have reason to demand that other people in the organisation identify as completely as possible with their position, role or function in the organisation. Socialisation of the work force or members of the organisation means that they are made to internalise its rules and goals and to have little or no motives for doing anything else than the organisation (or its leadership) requires or permits them to do.

Socialisation, as already Plato made clear, involves robbing natural persons of their natural personality and turning them into living implementations of the artificial persons defined by the rules of their society. To the extent that it succeeds, socialisation conditions them to full solidarity with their society, and to stand ready to bear whatever burdens its leaders' actions impose on them. Obviously, socialisation should not be—but often wilfully is—confused with education, which consists in preparing a person to live as an independent adult.²

In some cases, the problem of socialising human beings can be avoided by assigning social roles to other things. Animals might be trained or computers and robots used to occupy particular social positions and to perform the associated functions. Presumably, if it were at all possible, organisers would prefer to use robots all the time rather than the notoriously fickle human factor. Because that is not always feasible, they must resort to

² **Woodrow Wilson's dictum that 'the purpose of education is to make a person as unlike his father as possible', is a clear example of the confusion of education and socialisation. Socialisers always have looked upon the family, especially the parents, as great obstacles to social control.**

force, incentive structures, propaganda and indoctrination to 'educate' or 'socialise' the human resources that are at their disposal. Because of this, the legal order of a society usually is supported by a system of disciplinary measures. The significance of that system is positively related to the discrepancy between the social demands and the natural inclinations or interests of the society's human resources.

Organisations or societies make a point of distinguishing between an organisational or social position and the person who occupies that position. Often the point of that distinction is to deflect responsibility and liability from the actual human decision-maker or agent to an artificial person (for example, 'the Director') and hence to the artificial person of the organisation as a whole ('the Company'). In some cases, the deflection is such that responsibility and liability simply evaporate, there being no effective way to get to the actual decision-makers or agents or to the other members or subjects of the corporation.

For example in modern mass-democracy, the politicians supposedly merely represent the voters, who in turn supposedly represent all the citizens and subjects of the state. Thus, the citizens and subjects of the state supposedly are ultimately responsible for the politicians' actions. However, there is no way to get at the voters, let alone the other citizens and subjects, and to hold them liable for what has been done legally under their 'mandate', in their name or on their behalf. The politicians in turn are held to be merely 'politically responsible'—but that is a symbolic responsibility that entails no liability whatsoever. They run the risk of not being re-elected, or of being dismissed from their post, but that risk is not specifically related to what they do while in office. In any case, they are not personally liable for their actions or their effects. Those who have been victimised, perhaps ruined by the politicians' actions simply must take their loss. At best, they can strive to form 'a new majority' and use their power or influence to get some sort of compensation at the expense of other citizens, or even foreigners, who also had no role in the politicians' policies or legislative work.

In a weakened form, the same holds true for modern business and non-profit corporations. Especially in the large publicly traded corporation, the actual decision-makers (who play the

role of Director or Manager) supposedly are under contract to, or employed by, the corporation. As such, they are legally protected from any particular responsibility or liability for as long as there is a reasonable connection between their actions and the legal purpose of their corporation. The shareholders, in turn, enjoy the legal privilege of ‘limited liability’, which really means that they are not liable at all for what their supposed agents in the corporation do.

Such corporate social structures use the ‘corporate veil’ to obfuscate the authority (‘authorship’) of human actions. The veil shields the authors of an action or statement by deflecting their responsibility and liability to an artificial person and letting the associated burdens fall where they may, on other natural persons. Not surprisingly, because of their radical de-coupling of decision and action, on the one hand, and responsibility and liability, on the other hand, large political, business and other corporations often are sources of ‘planned chaos’ and moral confusion in the human world.

Artificial law

A theory of artificial law holds that only a particular [type of] artificial order is respectable. The artificial orders that are relevant for our discussion are the social orders of organisations or societies, and especially the rules that define them—in short, their legal orders.

The distinctions that define the elements of a social order may be compatible with those that define the natural law. If that is the case, respect for the relevant social order does not imply disrespect for natural law—the social order itself is lawful. However, in other cases, it is impossible to respect the relevant artificial order without failing to respect the natural law—the social order is not lawful. For example, the organisers of a slave-plantation obviously violate the natural law, no matter how scrupulously they apply and abide by the rules and regulations that define the organisation of the plantation. The same is true of legislators who make and order the enforcement of tax laws, and the tax officials who execute them.

The elementary relation of order in artificial law is the lex-relation. ‘Lex’ refers to the action of choosing or picking

(legere) a thing or person for a particular purpose. It is the action by means of which a person unilaterally obliges one or more things or persons to perform a service. A lex typically is a command or rule, which requires that the thing that is being commanded or ruled is capable of understanding language. Thus, the lex-relation typically involves two or more persons.

In so far as commands and rules are ways in which to exert control or to steer, the lex-relation resembles the rex-relation. In so far as it involves the use of language (though not necessarily speech), it resembles the ius-relation. Nevertheless, it is different from both in that it exists only between artificial persons, that is to say, between different positions in a hierarchical rule-defined organisation. We do not say that it exists between a man and his dog, or between the kidnapper and his victim (rex-relations), nor that it exists between two contracting parties (ius-relation). It is, as some say, an institutional relation—it presupposes an organisational setting.

For example, while ‘the Director’ may legally command ‘the Secretary’, it does not follow that the person who occupies the position of ‘Director’ has legal authority over the person who occupies the position of ‘Secretary’. Indeed, the one has no legal authority over the other because the lex-relation exists only between artificial persons. This fact has far-reaching implications. For instance, it is trivially true—by definition—that the Secretary ‘ought’ to obey the commands of the Director if the legal system of the organisation defines the former position in such a way that obeying the Director is part of its function in the organisation.

We see that legal obligation touches a natural person only indirectly, namely if and in so far as he or she occupies a legally defined position within the organisation. That is why we say that, although a legal rule has ‘normative’ or ‘prescriptive’ meaning, it does not necessarily have normative significance for a person. Whether the legal obligation that attaches to the position that a person occupies in an organisation obligates him personally depends on the manner in which he came into that position. He may have obligated himself to occupy it and to perform its functions or he may have been put or forced in that position without his consent. In the first case, the rules that define his position are normatively significant for him, as he has

undertaken the obligation to obey them. In the other case, they have no normative significance for him, even if other rules of the organisation authorise the occupants of other positions to oblige (force, coerce) him to obey, or to dismiss him from his position for disobedience. In short, a natural person's subjection to the legal system or rules of an artificial order may be ius-based or rex-based.

The science of law; jurists and justice

Note that whereas there is only one natural order of the human world, there is no limit to the number of artificial orders. Thus, whether an artificial order in the human world (a society or social order) is wholly or partly compatible with its natural order, is a matter that we have to look into on a case-by-case basis. Usually, there is little point, and at best an academic interest, in trying to find out whether the distinctions that define one particular legal order are compatible with those that define another. In some cases, however, the enterprise is meaningful, for example when one is considering the possibility of merging two or more legal orders into one, or of transplanting a copy of a subsystem of one legal order into another.

With the possible exception of the organisers themselves, people participate in a society ('maatschappij') only as occupants of one social position or another. Here lies a significant difference with the convivial order ('samenleving') in which people live together as human beings, regardless of their position (if any) in this or that society or social order. Conviviality is the condition of co-existence that prevails among human persons that respect the natural order or law of the human world in their mutual dealings and interactions. It disappears when some or all of those people start to cause injury to the others or when their interactions become warlike. Thus, the order of conviviality is nothing else than the phenomenological aspect of the natural law.

Law is an order of things—in the case that is of interest to us, an order of natural persons. It is obvious that the natural law is not, and does not have, a legal system. It is useful, therefore, to restrict the application of words like 'law', 'lawful', 'lawfulness' and similar terms to the natural or convivial order

and to restrict the use of 'legal system', 'legal rule', 'legal', and 'legality' to discussions of artificial or social orders. Consequently, we can speak of 'rules of law' without implying that they are the legal rules of an organisation, association, society or other artificial order; and of 'legal rules' without implying that they are lawful.

Rules of law, or laws *stricto sensu*, are merely descriptions of conditions of conviviality or the structural characteristics of the natural order of the human world. To identify, explain and systematically present the conditions of order or conviviality in the human world, either in general or abstract terms or with reference to particular situations (cases), are the objectives of the science of law. Thus, the science of law is a science in the same sense as the sciences of other types of natural order. Obviously, this does not mean that its appropriate methods are exact copies of the methods of any other natural science.

A law, or rule of law, is not a technical rule. A statement for which it is claimed that it describes a rule of law is either true or false, depending on whether it accurately describes the natural order of the human world and the persons and their rights that are in it. A rule of law, then, has no normative meaning, although it has normative significance if the natural order of the human world is respectable.

Rules of law therefore are to be distinguished also from rules of justice. Justice (*iustitia*) is that which brings about, or is conducive to the order of *ius* or natural law. The rules of justice are technical rules that aim at maintaining, strengthening or restoring the law. They can appear as general precepts, when they deal with large classes of circumstances, or as particular precepts, when the objective is to do justice in a particular case. Justice, in a related sense, is a virtue or skill. Justice, in that sense, is particularly the virtue or skill of jurists, people skilled in finding ways to maintain, strengthen or restore the *ius*-relations of the natural law. Note that if the natural order is respectable, then the rules of justice ought to be taken into account by all natural persons. However, like all technical rules, the rules of justice are merely hypothetical statements about the relationships between means and ends. It always is possible to ask whether a proposed rule of justice actually is conducive to the order of *ius* or whether there is another rule that in the

circumstances is better suited to the purpose of justice.

Justice is not a science but an art, although it can claim to be an applied science, taking inputs from the science of law as well as from other scientific disciplines such as psychology, economics, and sociology.

Obviously, the student of the natural law is a student of reality, not of a collection of rules or books about natural law.³ He must study the real world and the real persons in it to determine what they are and can do without creating disorder in the world. Thus, the first task of the student of natural law is to find out about the boundaries between persons, their words, actions, works, and properties, and then to determine who did or did not respect those boundaries. That undertaking inevitably leads him to try to discover the iura (if any) to which the relevant persons have committed themselves. As a jurist, when he undertakes not only to know whether a set of human relations is in order (lawful) or not, but also to rectify them when they are not, he must know a lot more about persons. Then, his purpose is to discover new rules or assess old ones that are most likely to do justice with the least costs and negative side effects.

The study of legal orders; legists and legality

Persons who are skilled in the knowledge and application of the legal rules of a particular artificial order are not jurists. They are properly called legists. Logically speaking, there is no overlap between the skills of jurists and those of legists. That is because to know the law is entirely different from knowing a set of legal rules. Legists are like chess-players, who know the rules of their game and are good or bad in using them to achieve their purpose, which is to win at chess. Like chess-players, legists deal with artificial orders (which may be artificial persons) and the positions (also artificial persons) that are their analytical

³ Most positivists assume that because 'positive law' exists only in statutes, verdicts, treaties and similar sources, the natural law also must exist as text. Rightly dismissing the notion that 'nature' is a text, they wrongly settle for the nearest thing: writings about natural law. One might as well say that physicists do not study the physical world but only the works of Galileo, Newton, Einstein, Bohr, and so on.

components.

For historical and ideological reasons, legists in the Western world almost exclusively consider autonomous or sovereign political societies (States) to be worthy of consideration. However, there still is some marginal interest in the legal order of the Church and also an increasing interest in the legal orders of large political international or supranational organisations. That preference has no methodological implications, because the methodology of studying legal orders or systems of rules is indifferent to whether the order or system belongs to a political or another type of organisation or society (or even a game such as chess).

However, logically speaking, artificial orders are always merely arbitrary mental constructions, representing some people's opinion about how to organise endeavours to reach whatever goals the organisation is supposed to serve. Therefore, anybody with an opinion on the matter can construct or design his own legal order. Legists realise that, logically, a legal order merely is an idea translated in a set of rules. Hence their conviction that '[artificial] law is what one believes it is'. Rather than engage in the hopeless because impossible task of selecting among all these mental constructs the one that is 'the true legal order', they concentrate on the one that corresponds to the ruling opinion—which more often than not is the opinion of the rulers. Hence, legists are committed to the positivist criterion that only the legal system that actually is 'in force' deserves their attention. However, it was not until the State claimed a monopoly on making 'laws' that legists followed suit by interpreting 'in force' as 'enforced by the State'.

Nowadays, most legists expect to earn their living by working in, for or with the various organs and agencies of some State or other, its subsidiaries or the international organisations to which it belongs, or else by guiding uninformed laypersons through the mazes of the legal system that it imposes. Moreover, they typically receive their legal training from the State. Indeed, the great breakthrough for positivism came about only when the State, having achieved full standing as an autonomous anonymous corporation (no longer devoted to the service of the king), actively got involved in 'higher education'. It should come as no surprise that observers often liken the legal

professions to a priesthood, organising, explaining and assisting others in ‘the service of the State’.

While it is possible to describe, classify and comment on legal systems and to do so more or less skilfully, there is no such thing as a legal science. However, devising, applying and interpreting the rules of the system may be classified as an applied science. This is the case to the extent that the legal order (or some part of it) is supposed to exist for a purpose and the implementation of its rules implies that certain resources will be used in ways that are meant to achieve that purpose. Thus, conceivably, legists may engage in justice, but only when the goal to be reached is to make their organisation or society conformable to the laws of conviviality. Practically, this hardly ever is a priority because, as a rule, States are much more interested in maintaining their power over human and other resources than in letting freedom and equality prevail. It is a contingent matter whether a legal order (or any subsystem of it) is meant to do justice, enhance the State’s tax-base or military capabilities, distribute the benefits of social activities among a favoured class, buy votes, or intimidate the population into believing that unless they do as they are told the world will end.

Unlike jurists, who study natural persons, legists study artificial persons such as Citizens, Voters, Shareholders, Registered Aliens, Corporations, and similar positions defined in their legal codes. However, to know what a Citizen is or can do, one cannot proceed by studying citizens: one has to refer to the appropriate rulebook in exactly the same way as one would do if one were curious about what a King in chess is or can do. It is true that usually—though, again, that is by no means a logical necessity—the positions of Citizen, Voter, Shareholder and so on are occupied by natural persons. However, as far as the legist is concerned, the Citizen only is and can do what the appropriate rulebook says it is and can do. The rulebook defines the powers and immunities of an artificial person AP. To this definition, legists add a ‘normative interpretation’, which moves from ‘AP can do X’, to ‘the occupant of AP may do X’, and from ‘AP does [or must do] Y’ to ‘the occupant of AP should or ought to do Y’. Because the occupant typically is a natural person, there is in most legal systems a subdivision of rules that direct the occupants of some social positions to take action against the

occupants of certain other positions. Obviously, because a Citizen, as a rule-defined position in a legal system, only can obey the legal rules, it is senseless to make rules dealing with sanctions against Citizens. However, it makes sense to have such rules for dealing with the people who 'play the part of a Citizen' yet fail to identify completely with their position. Such rules belong to the category of human resources management; their application is meant to be supportive of the artificial order in which they are implemented. They obviously are not rules of justice.

Redefining 'law': Positivism as ideology

Although in some areas of legal studies the tradition of studying the natural law and searching for adequate rules of justice still casts a shadow, it is safe to say that legal positivism in one form or another rules the day. This certainly is the case for modern law schools, which produce mainly legists and mention the natural law, if at all, only as an antiquarian oddity. To retain the prestige that the words 'law' and 'justice' convey positivists have redefined both terms. 'Law' now primarily means social regulation, in particular social regulation imposed by political means. 'Justice' now primarily means 'social justice', a scheme for distributing the benefits and burdens of social control, subject to the prevailing conception of the organisational or 'public' interest of the State and its society and to variable constraints of efficacy and efficiency.⁴

However, the fact that legal studies focus on *lex* rather than *ius*, on artificial rather than natural order, on artificial persons or rule-defined positions within a legal system rather than interpersonal human relations, does not obviate the distinctions made in the previous sections. Nevertheless, modern law schools have banned the science of law and the skills of justice to the outer margins of their curricula, where they are tolerated as faint echo's of a distant past as long as they do not pretend to have relevance today.

⁴ It is nothing less than an intellectual scandal that the late John Rawls got away with calling his rationalisation of precisely such a scheme 'A Theory of Justice'.

Whence comes the hostility and aversion towards natural law and justice that are such a salient features of modern positivistic legal culture?

Students of natural law never have denied the existence of ‘positive law’ (artificial legal orders) nor the possibility that [parts of] it may be compatible with natural law.⁵ They do not claim that natural law and positive law are rival systems of rules vying for control of the same relations. They recognise that convivial relations among human persons are different from legal relations between organisational or social positions even when their occupants typically are humans. However, they also recognise that human persons are real whereas the roles people play are mere constructions. In cases of conflict, therefore, legality must give way to lawfulness. That is precisely the point that modern positivists do not want to concede. They think of natural law and artificial law as rival systems of rules that provide different normative solutions to the same problems. Hence, for them, judgements based on natural law must be dismissed as ‘merely subjective expressions of opinion’, lest they expose the artificiality and ultimately the arbitrariness of the legal order. Thus, legal positivists have insulated every legal system from criticism that is not based on that system itself—even if the system is nothing else than what they say it is (if they can agree on that). This strategy of immunisation against external criticism is consistent with their view of ‘the sovereignty of the [artificial] law’ and its purpose, which is to socialise human relations by redefining them as legally defined social relations within a politically constituted society. That purpose is the very opposite of justice, which endeavours to humanise societies, not socialise human beings. If that is so then the positivists’ aversion for natural law perhaps has more to do with values than they are willing to admit.

Indeed, legal positivism is not just a legist’s methodological stance; it is an ideology. It may have cultivated an image of ‘value-free methodology’, but it is not value-free in the sense in which value-freedom is held to be a methodological requirement

⁵ **Until at least the middle of the nineteenth century, students of legal orders never questioned the existence of a natural order of human affairs. Positivism is not a necessary implication of the methodology of studying legal systems.**

of science. Nor is it committed to the values and norms that define science as a human undertaking. Science requires abstention from, and relentless critique of, prejudice. Legal positivism requires abstention from a critique of the ruling prejudices because ‘technically’ it is only concerned with transcribing these into proper legal form.⁶ However, few if any legal professionals are interested only in the technicalities of legal orders. Few are interested in ‘the law as it is’ as much as they are interested in what they can make others believe that it is. Moreover, legal positivists too like to believe they are doing something that is intrinsically worthwhile. In the next part of this essay, we shall have a look at what that might be. There we shall find reasons for the disdain and contempt that they show towards natural law and justice.

Values

There is no need here to delve into the origins and the causes for the widespread adoption of the positivist mindset. However, it is relevant to note its relation to the remarkable religious shift from the Judaeo-Christian tradition⁷ to the Gnostic attitudes⁸ that appear to have captured the imagination of Western intellectuals in recent centuries. Positivism often takes only indirect notice of the religious framework of legal studies, namely when it

⁶ **This is the so-called formal positivism of Austin, Kelsen, and Hart.**

⁷ **I use the term ‘Judaeo-Christian tradition’ in a general sense. Particular doctrines of churches, theologians and sects are not discussed. What is important is the extent to which the personalist worldview presented in the biblical myths remains the frame of reference for thinking about human and social relations.**

⁸ **Gnosticism, as I use the term here, is merely a theme or inspiration that is common to a great many modern intellectual movements. Nevertheless, the term is useful because of the thematic and inspirational similarities between those movements and the teachings of the Gnostic sects that were active at the beginning of the Christian era and continued to exert influence on intellectual life until the fourth or fifth century, when Christian ‘orthodoxy’ prevailed.**

associates the ideas of natural law and justice with the biblical religion of the Judaeo-Christian tradition. That association, reinforced with a common prejudice concerning the relation between 'faith' and 'science', is often taken to be sufficient to dismiss any mention of natural law or justice as 'unscientific'. However, positivism itself is an offshoot of the Gnostic mindset, which repudiates 'the religion of belief' but embraces the 'religion of knowledge'.

Modern positivism draws its zeal from the conviction that there is, and can be, no order among humans that is not itself a product of the power of the human imagination—that is to say, the imagination of the enlightened few (the intellectuals who know) and their power to impose it on the unenlightened many (the ordinary mortals who get by on belief). This is different from the old Hobbesian position that there can be no order in the world because everybody seeks power and consequently will be involved in a war of all against all until someone decisively wins that war. Modern positivism still clings to the view that only political power can impose order but it no longer subscribes to the notion that any politically imposed effective order thereby is justified per se. It defines the mission of politics not in negative but in positive terms. Rather than merely averting the war of all against all, which is the universal bad, political power should restore 'human dignity' by liberating humanity from the baleful consequences of its nature and its history. That liberation is supposed to be the universal good; to seek it is the hallmark of the progressive mind.

In the nineteenth century, scientism (the positivist adulation of science as the supposed opposite of faith) linked up with the Gnostic promise of the liberation of Man by Man to form a new pattern of religious speculation.⁹ Central tenets were that 'society' should be reconstructed and that the State, under the firm control of enlightened experts (technocrats, academics, intellectuals), was to be the principal agent of change.

Modern positivism thus inserts itself in the utopian project of

⁹ **Auguste Comte's once influential but now virtually defunct positivist Religion of Humanity was only one manifestation of this development. Condensed to 'Ordem e progresso', its positivist creed still is on the Brazilian flag. (Comte's Religion of Man was extremely popular in South America.)**

the State (and its politics) as a force of emancipation—and, at a deeper level, in ‘the revolt against, and liberation from, history and nature’, which is the original motive of the religious movement called Gnosticism.¹⁰

However, to understand Gnosticism and its influence on modern positivism, we first must look at the Judaeo-Christian worldview and its conception of the human person. Indeed, Gnosticism defined itself by its opposition to that worldview, which it claimed to be not merely mistaken but the exact reversal of the truth. Its central concern was to restore Man to his rightful dignity, which in its view, was usurped by the false God of the bible. It is in the fundamentally and radically different conceptions of the human person of these traditions that we find the most relevant clues for understanding the implications of shift from natural law theory to legal positivism that has occurred in recent times.

Please note that the following remarks are intended merely to establish the logical grounds for the irreconcilable conflict between the two traditions. There is no need here to go into the vagaries and complexities of their histories over a period of several thousand years.

The Judaeo-Christian worldview

The fundamental proposition of the Judaeo-Christian worldview is that no human being is God, or that God is no human being. As long as the expression ‘by God’ was understood to mean ‘not by man’, natural order could be ascribed to God. ‘By God’ primarily meant that humanity lived in a world, and was itself of

¹⁰ Many modern social and political movements have adopted the basic tenets of Gnosticism, even if they have preferred to call themselves by such names as liberalism, socialism, progressivism, post-modernism and multiculturalism—all of which insist on making individuals serve some imagined ‘rational’ or even ‘universal’ society that is itself supposed to be a tool of human self-realisation (or self-satisfaction). That view implies that everything else is merely relative and therefore disposable. For example, every historical culture is held to be as good as any other, but no historical culture can give any person a valid claim to resist the imposition of whatever it is that the so-called ‘dignity of Man’ requires.

a kind, that was not created by human beings.

In the biblical account, that no-man is presented as a person, God. In dealing with other persons, he is bound to respect their otherness, their freedom and equal standing in the law of persons. As he spontaneously acknowledged, immediately after Adam and Eve had eaten from the Tree of Knowledge of Good and Evil and so had acquired a moral sense, 'Behold, the man is become as one of us, to know good and evil' (Genesis 3:22). From that moment on, he could not be pictured as a ruler of men—there is no justice in ruling an equal—but only as a party to the original and fundamental ius-relation (the Covenant) by which the Earth was given to man and the Garden of Eden reserved to God.

In mythological form, this is the story of virtually every individual human being. One is born and starts out as a child, growing up in one's parents' household, where one is fed and cared for, learning about their world (with which they seem to be familiar because they know the names and the distinctive characteristics of everything in it, and which they can master to some degree). Eventually, however, one grows up to live one's own life, make one's own decisions, express one's own opinions. Then it is time to leave home and face one's responsibility as an adult, still owing respect to one's parents but no longer obedience. However, growing up also entails discovering that being an adult is far from being everything. Becoming like, even surpassing one's parents still leaves one in a world that to an overwhelming degree is no man's work.

Thus, the myth of creation is primarily an account of how the world of persons, agents with a moral sense, is constituted. It is no wonder that the Judaeo-Christian tradition always laid great stress on law and justice, leaving the discovery of the material world to those who are especially qualified to study nature.

Outside the Garden, man finds himself separated from the Tree of Life, facing the problem of survival in a world not of his own making or choosing. Having to find their way in the world, humans are thrown back on their own ingenuity. Each individual has to live with the realisation that his choices make a difference. Consequently, humans have to come to hold some option as better than another, to see the good and the bad that lurks in every situation, and to acknowledge the possibility of

evil. They survive by more often than not correctly evaluating their options and making their choices compatible with those of others.

Choices matter because the natural order, although it is intelligible, is contingent. It is not a rational or logical necessity without logically possible alternatives or mutually exclusive potentialities. Because no man (that is, only God) is in a position to know everything, order in the human world can exist only if every person has the opportunity to take responsibility for and assume the risk of his own life—and leaves others free to do the same.

With this worldview, it makes sense to want to know the design of which the world would be an implementation. The quest to know what is not man's creation (God's plan) engenders the scientific investigation of nature—the quest for its laws. Because the natural order of the world is a contingent order, it does not make sense to try to get knowledge of it by any other means than diligent observation and intelligent combination of experience and hypotheses concerning 'the design' underlying the whole of the natural order.

As this view of the world took root in the Middle Ages, the seeds were sown for what later would become known as the scientific attitude. An important characteristic of science so conceived is humility, the awareness that truth is out there, to be found; it cannot be produced by human fiat. It belongs to no man.

For all its artistic splendour, the Renaissance muddied the waters of the emerging scientific attitude towards the world and the human beings that live in it. Intellectually, the Renaissance was marked by a return to classical mysticism, the idea that the world is not only intelligible but that its design can be known independently of experience, 'by reason alone'. This notion presupposes that whatever our experience may tell us only one world is conceivable, because only that which is necessary can exist truly. Hence, wisdom resigns one to the passive role of a spectator ('theoros') and a life devoted to theory. Foolishness marks the attempt to resist the will of the gods.

The Gnostic worldview

However, the Renaissance was not just a reprise of classical thought. The Gnostic Religion of Man or Humanism was a decisive influence. This Humanism should not be confused with the Christian humanism that was its contemporary. Christian humanism remained faithful in the sense of keeping its worldview firmly rooted in the notion that man is not God, that next to the artificial things produced by man there is also an intelligible order that is not the work of man. In contrast, Gnostic Humanism subscribed to the myth of creation, only it saw Man as the true creative force. Unfortunately humanity had become estranged or alienated from the true essence of Man.¹¹ In fact, the world it had inhabited for so long was a prison in which humanity suffered a ‘false existence’, unable to realise its own infinite potential. Hence the Gnostic mission is to recapture the world and make it conformable to the essential dignity of Man—that is, to make it into a tool rather than an obstacle of Man’s self-realisation.

In its primitive mythological form, the Gnostic religion of Man ascribed to the biblical God the role of a fallen angel, a devious, mad demiurge (artisan, artificer) out to do the impossible, namely to capture the infinite divine or spiritual essence of Man in a finite material construction.¹² Hence, the work of the biblical God is the artificial order (the material world and the physical persons in it), whereas the truly ‘real world’ is an emanation of Man’s essence, purely spiritual, infinite, not confined by the finiteness of matter. To the Gnostic, the idea that Man is the product of anything else than Man himself is anathema. In the order of things Man stands far above the ‘false

¹¹ **In the Gnostic view, Man is an essence; natural man (with his material human nature) has an apparent existence, but it is impossible to infer the essence of Man from the existence of the natural man and his physical or material characteristics.**

¹² **Here we see the mythological version of the Gnostic insistence on total revolution (turning the biblical worldview upside down), especially in questions of ethics: The biblical God is the devil, and the serpent that incites to rebellion against that demiurge is the true redeemer. What to the common mind appears to be evil really is good, and vice versa.**

God of Moses'. In short, the 'true God' is Man himself.

Eventually, Gnosticism transcended its mythological elements and made the biblical God into the product of the false consciousness of unenlightened men who had forgotten or repudiated their own divine essence. Thus, Gnosticism set up a confrontation between those who know (the Gnostics, who have true consciousness of their divine, spiritual, infinite essence) and those who do not know (for example, believers, like the Christians, who take their confinement in the dark world of matter for an inescapable limitation).

The Gnostic knows himself to be Man—consequently, he knows himself to be everything. According to the central formula of Gnosticism, he knows that to know oneself is to know everything. The truth is not out there; it is in here—that is to say, in the true or objective consciousness of Man, not, of course, in the false or merely subjective consciousness of mere mortals. Whatever is out there is 'appearance', not 'reality'. What is in here, the thought or idea, is the only reality.¹³ As Hegel expressed it, 'the rational is the real'.

In the perspective of Gnosticism, the biblical God and the natural world are mere delusions caused by a human failing in the field of knowledge or self-consciousness. Hence, 'by God' came to mean 'by human superstition'. Thus, the opposition between 'existence' and 'essence', 'mere appearance' and 'reality', 'common sense' and 'knowledge',¹⁴ or 'false' and 'true consciousness', displaces the opposition between 'artificial' ('by man') and 'natural' ('not by man', 'by God'). The Gnostic tradition holds that most human beings live in a condition of false consciousness. That which is common appearance—and, according to the common sense of the majority, exists—is

¹³ in fact, according to one etymology, 'reality' is related to 'thinking', 'calculating', 'ratiocinating'.

¹⁴ Gnosticism has capitalised on a few cases where modern science proved common sense to be false: the sun does not revolve around the Earth; solid matter is mostly empty space between tiny particles; etcetera. It has generalised these findings into an across-the-board condemnation of common sense, even in matters of daily life, in which, according to evolutionary epistemology, gross mistakes would not have been possible for long.

without merit or value. In contrast, only that which is truly real—even if it exists only in the mind of the enlightened few—has merit or value.

Here we see the fundamental divide between the ‘common sense’ of Judaeo-Christian ethics and the ‘true knowledge’ of Gnostic intellectuals. The former assumes that the natural order ought to be respected because it is not ‘made by man’ (but ‘by God’); it defines (that is, sets objective limits to) human life and action. Although the natural order has no normative meaning, it has normative significance. Hence, the artificial creations of man ought to be made compatible with the natural order of things.

Common sense morality assumes that what is not by man is as it must be and therefore, in a trivial sense, as it ought to be. ‘Ought’ and ‘ought not’ meaningfully apply only to the work of human beings—to artificial things. There is a logical gap between ‘Person X does Y’ and ‘Person X ought to do Y’, but no ontological abyss between what is and what ought to be. There always is a bridge because people ought to respect what is not their work, just as a person ought to respect another person and his work. Ethics is concerned with adapting to and finding one’s place in an environment that is not one’s own creation.

In contrast, the Gnostic assumes that only the work and ideas of the true Man deserve respect. Everything else, whether it is the result of the work or action of human beings or not, is without normative significance. To the extent that the world is the product of unenlightened or false consciousness, it is not respectable at all. Thus, the Gnostic intellectual feels free to change the world according to his own designs, irrespective of the designs of others. His ethics is concerned with changing the world—including the people in it. It is not dependent on what is but only on his conception of what ought to be.

It is no wonder, then, that Gnosticism’s aversion to the biblical no-man (God, the Demiurge) extended to contempt for the laws of the world-not-created-by-Man and in particular for the idea that the human world is a world of free and equal moral persons. For the Gnostic, the Judaeo-Christian emphasis on law and justice is an anathema.

In the nineteenth century, Gnostic doctrines, which had formerly been passed on in small sectarian and secret societies,

began to exert influence on large secular movements and ideologies, in particular via Marxist socialism, which quickly supplanted earlier forms of Christian or millenarian socialism.¹⁵ Not surprisingly, in the original socialist texts, 'law' and 'justice' were objects of scorn and derision, destined to perish together with the world of false consciousness in the coming Revolution.

Man and society

In the Gnostic perspective, Man is the one and only true reality and therefore the one and only thing that has value, worth or dignity. Everything else exists for the sake of Man or else is worthless. However, this Man is not any individual human person. An individual either is or is not a manifestation of Man. If he is then he no longer is a 'particular' (limited, unenlightened) but a 'universal' (infinite, enlightened) individual. If he is not then he is merely human matter, which Gnostic Man has right to reclaim and use for his own purposes. Thus, Gnosticism easily could engender a materialist interpretation of the ordinary run of unenlightened people as merely material contraptions, subject, like all matter, to the laws of physics, amenable to statistical processing and to social engineering and conditioning. This interpretation eminently suits the modern intellectual's conception of himself as distinct from the ordinary men and women. They are things that he can talk about but has no desire to talk to, for which he can and must speak because they are too dumb to speak for themselves. Because they exist on the same plane as all other matter, he can study them with the same tools of measurement and statistical inference that have proven themselves so powerful in the study of material things and non-intelligent forms of life.

To bring the mass of humanity to order, what is needed is not law or justice but socialisation through regulation, training and indoctrination ('education'), to control their 'natural instincts' and to eradicate their particular individualities. This theme was

¹⁵ **Millenarian socialism was premised on the Apocalyptic vision of a restoration of the Kingdom of God (Paradise) on Earth. Gnosticism presaged the restoration of the Kingdom of Man.**

already in evidence in the utopian literature that was one of the most popular and successful early vehicles for disseminating Gnostic ideas. Utopianism, ‘the religion of the non-believers’, spawned one scheme of social reconstruction after another, each one promising a world where law and justice no longer would be relevant. Indeed, in the typical Utopia, there no longer are independent individuals; there is only an anonymous and docile population whose life is regulated in minute detail.¹⁶ Equally irrelevant in Utopia are other personal virtues like charity, compassion and sympathy—stalwarts all of Judaeo-Christian morality. Their place is taken by socially engineered solidarity.

In the Gnostic view, everything that is not Man or that is not by Man is a restriction or source of frustration and therefore an affront to human dignity. Man—the true Man, that is—is destined to be free. That means that it is his right to have absolute control of everything, in particular the material (‘natural’) and social conditions that contrary to his essence still affect his existence. For this reason, all other human beings should be put into the service of Man. They should be made to identify themselves as completely as possible with their position as servants in Society, which thereby is transformed into a tool or instrument for Man. Society only ceases to be a threat to Man when it is no longer an external force made up of largely uncontrollable other persons, but simply a manifestation of Man’s control over the conditions of his own existence. As the young Marx put it, ‘I can do what I want, while society takes care of general production.’

That idea makes sense if one assumes the classical notion of an aristocratic republic where the many are supposed to be content with ‘knowing their place’ and to work dutifully to enable the elite to enjoy the higher dimensions of human life. It does not fit the democratic age and its cult of ‘equality’. However, some sort of solution is available in the form of part-time liberation. It involves a fusion of Gnostic ideas and formal politico-economic functionalism that amounts to a radical decoupling of every person’s productive and consumptive

¹⁶ In the literature, the introduction of even one independent individual reveals the apparent Utopia to be really a dystopia (for example, *We*, 1984, *Brave New World*).

capacities.

The Gnostic's particular individual now appears as a mere factor of production—a human resource, human capital—to be used, taxed and managed by Society. On the other hand, the modern representations of the Gnostic's true Man are the Sovereign Consumer and the Sovereign Voter, whom Society should shield from any source of frustration. Indeed, in today's world, man has two immaterial means of power, money and the vote, by means of which he can direct, and therefore take control of, the activities of others. Both money and the vote are subject to manipulation by the State. However, the vote is a creation of the State. It is a purer means of social control than money, the use of which on anything other than private consumption implies personal responsibility and liability and therefore still symbolises constraints imposed by others. The vote, on the other hand, is pure absolute power: one can vote anyway one wants and one will not be held responsible or liable at all.

Thus, one's work and productive activities are owed to Society, which uses them to satisfy consumers and voters. On the other hand, consumption (the satisfaction of desire) and power (the faculty of imposing one's way on others) are 'social rights', claims against Society and claims on the 'social product'—in effect, claims on the lives and works of others. By the middle of the twentieth century, these rights were sanctified as 'human rights'. Unlike natural rights, 'human rights' basically empower the rulers of Society to engage in vast programs of social regulation and manipulation to satisfy the desires of the unaccountable consumers and voters.

In this scheme—aptly called 'consumer democracy'—an ordinary individual is deprived of his freedom in natural law, losing control of his own life and work. At the same time, as a consumer and a voter, he accumulates claims against others—who are in the same position as he is. Indeed, the scheme formally conforms to a requirement of 'liberty and equality'—or, as Bastiat called it, 'the illusion that everybody can live at the expense of everybody else'. Nevertheless, there inevitably are winners and losers, because there simply is no way in which one can equalise the burdens and benefits of the various interlocking distributive fiscal and regulatory schemes among the population. More importantly, the scheme piously keeps

silent about the obvious winners. They are the ruling classes of politicians and bureaucrats, most of whom see themselves as enlightened intellectuals capable of organising the grand project of human emancipation through social regulation, and entitled by their intellectual superiority to take control of society and the lives of everyone in it. What use do they have for that other worldview that would have confined their talents to maintaining law and doing justice?

Appendix

The economic foundations of consumer democracy

It is not amiss to see in the Western welfare states, as they developed from the nineteen thirties onwards but especially after World War II, a large-scale implementation of the Gnostic worldview—or, rather, an adaptation of it to the political realities of mass-democracy. However, before we draw any conclusion from the remarkably quick and severe eclipse of the Judaeo-Christian worldview that had been dominant for more than a millennium, we should note the extraordinary state of the world in the larger part of the twentieth century. It may explain why for a few generations consumer democracy seemed a viable arrangement.

Historically, the concentration of capital in the West had been the result of the industrial ‘bourgeois’ civilisation of the nineteenth century. Until the beginning of the First World War, this capital had found its way to different parts of the Earth, where it acted as a tide that raises all boats. It was the engine of universal though far from even progress—the first spectacular rise of a truly global economy. It gave economic growth to other parts of the world, leading there to higher incomes, and provided cheap imports that raised real wages in the West—thereby paying for itself by compensating for the export of capital.

From the nineteen-thirties onwards, protectionism of the most virulent kind halted international trade and investment. At the same time, the rise of the Soviet Union, later also of Communist China, closed large parts of the globe for Western investments. After the Second World War, de-colonisation rapidly led to a flood of Third World regimes, most of which adopted socialist and protectionist economic policies or degenerated into

dictatorships. This condition lasted at least until the mid-eighties of the century, when international trade and investment revived.

Thus, from the nineteen thirties on, Western capital could no longer be invested elsewhere, at least on a significant scale. It kept circulating in a relatively small area. For Western entrepreneurs, investors and workers, neither the Socialist Utopias nor the Third World dictatorships offered an attractive alternative. Especially after World War II, the Western world experienced rapid growth as a result of unprecedented high levels of internal investment and also of the attempts of other countries to earn foreign exchange by sending cheap exports to the West. Thus, in the West, real wages rose rapidly, while in other parts of the world lack of capital and inefficient (even criminal) regimes caused wages to stagnate or even to fall.

With the wage level rising so dramatically, it seemed for a while that the West could concentrate on re-distribution (as demanded by socialist ideologies and the Gnostic worldview that underpinned them) without jeopardising economic growth. People accepted high levels of taxation and regulation because there was no place else to go and also because the standard of living appeared to keep rising anyway. However, the economic emphasis shifted from saving, investment, and production to consumption. This shift occurred in part because of the ideological reorientation that we noted earlier, in part because between the hammers of taxation and regulation and the anvils of high labour costs and sharp competition, investment became a less attractive way of using income. Thus, the economy came to rely on ever-stronger fiscal and monetary stimuli to produce the appearance of vitality ('bubbles'), while the real effect of those stimuli often was no more than a random distribution of burdens and benefits.

Over the whole period, but especially since WW II, the West developed a pressure-cooker economics. The pressure was kept inside not so much by Western protectionism as by protectionism, socialism and kleptocracy in the rest of the world. When during the late eighties and the nineties socialism crumbled and some of the former Third World countries began to put their house in order, the valve of the pressure-cooker was unlocked. Global investment accelerated, reaching enormous reserves of cheap yet relatively disciplined labour. However,

rather than creating additional production facilities, these investments merely relocated production from the West to the new markets. This led to cheaper imports—which raised the standard of living in the West—but also to a loss of jobs and new investments in industrial sectors in the West—which diminished the standard of living.

Unless Western economies can specialise in new activities and are willing to make the transition, there is little hope that cheaper imports can offset the loss of income-generating activities. If the transition from agriculture to industry is irreversible, new activities in the post-industrial society must be in the services sector. However, even if the transition to services can be made, there is no reason to believe that it will be equally wealth enhancing as the transition to industry was.

The shift from an industry-based economy to one that is based primarily on services will be of no avail, if, as is likely, the growth of the services sector in the West takes place primarily at the consumption end of the structure of production. Unless they are prepared to emigrate to the new markets, Western populations will need local doctors, nurses, waiters, hairdressers, teachers, accountants, lawyers, interior decorators, sports instructors, civil servants, police constables, and so on. Those are the professions that will make up the bulk of the ‘service economy’. The local production and consumption of such services may create ‘value’ but they do not produce food or any other material good—and they do not pay for imported goods.

While people working in the services sector can make good money, they must be paid ultimately either out of current income (a healthy condition) or out of the consumption of capital (an unsustainable condition).

There lies the problem. Especially in view of the ageing populations in the West, and of the enormous unfunded liabilities of its so-called ‘social security systems’, capital consumption on a large scale appears to be inevitable.¹⁷ It is far

¹⁷ The economic apologists of the welfare state never took the possibility of capital consumption seriously. For example, Paul Samuelson held the view that Social Security really was secure because it rested on ‘the miracle of compound interest’. That view corresponded to John Maynard Keynes’ conviction that ‘the economic problem’ soon would disappear. Arguably, one would

from certain that one soon can find new productive internationally tradable services that will generate sufficient current income to keep living standards stable let alone growing; meet the accumulated liabilities of the welfare state; and add to the formation of new capital. To be sure, Western capitalists may continue to reap handsome profits from ‘outsourcing’ and relocating industrial (and related service-) activities. Similarly, a number of highly trained specialists may continue to earn good income from supplying services (‘knowledge’) and high-tech tools to producers in the new markets. However, it is somewhat naïve to believe that those Westerners whose services and goods remain internationally tradable will simply sit around while the welfare state increases its taxes and regulations to keep its sovereign consumers and voters happy. In any case, whether they sit tight or not, the outlook for the masses is not rosy—and that means that we are no longer talking mere economics but politics.

It is difficult for small, rapidly ageing populations to compete with enormous masses of cheap labour. Investments in high-tech and advanced knowledge may seem like a good idea, but technology and knowledge are among the most mobile factors of production. The West has no monopoly on brains. Moreover, funding such investments out of taxes is merely another grand scheme of distributing wealth from the many to the few.

Strengthening already substantial protectionism is not an option for the Western societies, certainly if their economies continue to stagnate and economic growth ‘relocates’ to Asia and other continents. Adjustments will have to be made but they’d better not lead to a new interruption of global trade.

That leaves only one area for significant reform: the welfare state itself and its heavy complex of structures of taxation and social regulation. The illusion that the welfare states sustained in the recent past, namely that everybody can live at the expense of everybody else, may not be around for very long any more. When it goes, the last of the great utopian experiments of the twentieth century will be closed.

be hard put to find in non-Marxist economics clearer expressions of the Gnostic promise of total liberation from the tyranny of material needs. Obviously, Gnostic economics does not want to be the ‘dismal science’ its classical predecessor reputedly was.

The legal professions, which have fed and fed on the social structures of the welfare state, will need to do some serious thinking about their meaning and significance in the years to come. Perhaps they will turn their attention once again to the science of law.