Introduction

This course is about elements of reality that are of interest to economists and lawyers alike: elements that constitute the common ground of their studies, theories and professional activities. After all, both law and economics are concerned with human beings and how they interact. The many differences between their respective approaches (methods, theories) to their common "material object" certainly warrant the claim that law studies and economic studies have different "formal objects", but they should not obscure the fact that there is a common material object. Thus, ultimately, there can be no contradiction between what is true "in law" and what is true "in economics". This should not be understood in the trivial sense in which a statement about one thing cannot contradict a statement about another thing. It should be understood in the non-trivial sense in which no two true statements about the same thing can contradict one another. It follows that a true theory of law cannot presuppose or imply a false theory of economics, and vice versa.

Just as there are obvious differences between the approaches of law and economics to their common material object, just so there are significant differences among schools of law as well as among schools of economics. In this context, a school refers to a group of students, scholars and researchers with a shared commitment to particular theoretical presuppositions, assumptions and methods of research and theory-construction. In other words, a school refers to a particular "formal object" (defined in terms of its theoretical and methodological approaches) as the relevant representation of the reality it purports to study.

The separation into distinct schools is a dynamic process, as differences arise among their adherents that may develop into diverging tendencies and perhaps lead to the formation of distinct schools. Occasionally, a school may disappear or merge into another. In the field of law, the top-division is generally taken to be the split between natural law theorists and so-called legal positivists, neither of them constituting a monolithic bloc. In economics, a similar pervasive line of division exists between natural law economists and positivist economists. In both cases, the main division appears to be between those who see the object of the study of law, respectively economics, as a manifestation of human nature and those who see it as a "given" system of incentives (stimuli) to which human beings react (respond) more or less predictably because of some innate or acquired disposition. Thus, the natural law approach is concerned with the problems of order and disorder in human affairs on the assumption that an understanding of human nature reveals principles of order that are valid universally for all human actions and interactions. In contrast, the positivist approach is primarily concerned with analysing existing systems of incentives and considering ways to modify them so as to make people behave in one way rather than another.

As they are stated here, it would seem that both approaches are complementary rather than mutually exclusive. Indeed, natural law theorists in law or economics have never denied that there is a place for considering and tinkering with systems of incentives, as long as this is done with due regard to the natural-law principles of law and economics. However, beginning at the latest in the eighteenth century but mainly in the nineteenth century, as far as the study of human affairs was concerned, positivism became virtually synonymous with a denial of the relevance, even the existence, of natural law. It embraced the stance that there is no human nature to consider, as it supposed that, for all practical purposes, man and human society can be made into anything one wants them to be, either by wholesale revolutionary, or by gradual piecemeal social engineering and education. The question, whose wants ("ideals") should guide the process of reconstructing man and human society, was deemed to have no scientific relevance.[1] That question was left to politics, which in tandem with the rise of the modern "sovereign" state and its cult of democracy ("collective self-government") came to embody the notion that humanity can control the conditions that define its own existence.[2]

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[1] 'Positivism' is sometimes linked to 'positive', i.e. 'non-normative', 'descriptive'. However, natural law theories are also descriptive in that they attempt to describe the laws of nature. To what use we ought to put our knowledge of the laws of nature is a separate question. In our discussion, 'positivism' refers to the idea that science is not concerned with the nature of things but only with "data" about things.

[2] This development was partly a consequence of attempts to define the formal objects of the study of man and society as epistemologically akin to the formal objects of the physical sciences (see further down in the text). It was also partly a consequence of the decline of the traditional Christian religion (with its intense focus on persons and their relations) and the rise of the religion of Man or Humanity (which regarded the species rather than the individuals that compose it). In effect, 'positivism' and the 'Religion of Humanity' were closely connected in the thought of Auguste Comte (1798-1857), the self-styled inventor of "sociology" (which he presented as the current master-science, and which would find its completion in

With respect to law and economics, differences among schools are the primary occasion for doing philosophy of law, respectively philosophy of economics. In the former, we look at the differences among theories of law[3] to arrive at an informed judgement on which of them provides the better understanding of law as it really is. The same goes, mutatis mutandis, for the philosophy of economics. The whole point of doing philosophy is to supply a reality check on thought and theoretical ingenuity, and hence to keep "education in science" from falling into the trap of dogmatic indoctrination.

Every science endeavours to know the truth about the real world and needs theories and methods to arrive at the truth. However, theories and methods are only means to the end of true knowledge, not ends in themselves—a fact that should be reflected in the curricula of institutions of higher education, especially the universities. In its classical "catholic" conception, the university was indeed supposed to provide a scientific education that prepares the mind for a study of the real world as "the work of God", i.e. as something that can only be discovered, not made or made up, by the human intellect. It was not supposed merely to multiply the number of people who accept the theories of this or that professor or author or school, no matter how fashionable or "authoritative" they may be. Hence, philosophy was seen as a necessary part of the curriculum in every one of its faculties and departments.

That classical aim has always, but perhaps never more so than in recent times, been compromised by "practical considerations". For one thing, where large numbers of students are involved, it is easier to teach theories, which are readily reduced to sets of questions-plus-the-correct-answers, than to induce the elusive spirit of critical scientific inquiry.[4] This carries the risk that a university class becomes a place where students come to study and absorb particular theories rather than to learn how to acquire knowledge of the particular aspects of reality that the theories profess to deal with. The means of understanding risk becoming its end.

For another thing, the demands of the labour market for academically trained students favour the production and reproduction of skills that meet the requirements of existing arrangements in government, social services, industry, commerce, the media, and formal schooling itself. Inevitably, formal schooling at the university level can and does serve other interests than fostering science and philosophy. There is therefore a permanent risk that these other interests overshadow the interests of science and philosophy to which the institution of the university was supposedly specifically dedicated. The risk is especially great in the fields of law and economics, where formal schooling is nowadays more often than not seen as a requirement for entering a labour market centred on large established organizations (the state's court system and legislative and administrative branches, local government, political parties and interest groups, international bureaucracies, corporations and professional associations). In such an environment, it is to be expected that prevailing prejudices and preconceptions, especially those that are widely shared among social elites, influence or even determine the curricula of schools and universities. It is not surprising that in the Soviet Union only Marxist economics and the principles of socialist legality were taught. Nor is it surprising that when Marxist economics was introduced in the 1960s as a formal subject at western universities, it quickly lost ground again to the mixture of Keynesian macroeconomics and neo-classical or "mainstream" microeconomics. It had little to offer to those out to make a career in the political and economic institutions of the so-called mixed economies in the Western world.

One is therefore entitled to ask whether or to what extent prevalent theories of economics in the modern western (or to a large extent "westernised") world owe their widespread acceptance

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"anthropology", the true science of Man). His emphasis on statistical analysis and on rational decision-making as the application of quantitative, mathematical methods combined easily with empiricist (especially utilitarian) approaches to practical problems. The main theme of the religion of Humanity (which existed also in other versions, e.g., in Marxism) was "the liberation of Man" from the shackles of religion, metaphysics, and history. It subverted the traditional idea that there are absolute limitations on human knowledge and power because human nature and the natural world that man inhabits are "gifts of God" or "givens" of reality, not human creations. According to the Humanist religion, Man (i.e., the present or at the latest the next generation) can and will escape from history and take command of his own future (i.e., of all later generations), thereby becoming the God-Creator of a New Order. Shortly after Comte's death, his vision of a scientifically enlighted, harmonious humanity, solidified by universal "altruism", was shaken by the impact of Darwinism and its emphasis on rivalry and natural selection in a universal "struggle for life". This further radicalized positivist tendencies in that it was taken as proving that universal norms and values (including altruism) are irrelevant: only the particular norms and values that prove advantageous in the struggle of one group against all others can make a difference.

[3] For an overview, see the chapter Theories of Law.

[4] It is a telltale sign when course books hide arguments and controversies behind a few references in footnotes and bibliographies and only list the main conclusions of one or a few theories.

to their scientific qualities rather than to their conformity with the interests of western political and economic institutions and the worldviews of the elites that man them. Similar questions arise with respect to established theories of law, which are almost without exception wedded to the idea that law is really only "positive law", i.e., the rules and regulations promulgated or sanctioned by the official, legal authorities of political corporations (states) or associations of such corporations. Thus, law is conceived primarily as "national law" (and international law accordingly as a consequence of the co-existence of many systems of national law). The approach of legal positivism mirrors that of economic positivism, which also tends to identify the geographical extent of "the economy" with the area controlled from a single national political centre. The international economy is accordingly discussed far more often in terms of trade among countries (states) rather than in terms of border-crossing trade among persons and business entities.

In the next chapter, we shall take a closer look at these mainstream approaches to the study of law and economics. First, however, we should consider the common reality that provides the basic reason for studying law or economics from a scientific rather than a merely practical point of view.

1. Human actions and interactions

Law and economics are concerned primarily with human actions (*actiones humanae*), which constitute a subset of the things human beings are capable of doing (*actiones hominium*). For example, sneezing, sweating, blinking, dozing off, digesting, stumbling, getting sick and the like are things human beings are capable of doing but they are not human actions—although, say, pretending to sneeze or to stumble may well be a human action. Students of law and students of economics are obviously not concerned primarily with such *actiones hominium*. They focus on human actions such as buying, selling, saving, investing, giving, stealing, respecting or violating rights, commanding, obeying, rewarding, punishing, negotiating, arguing, studying, taking care.

An action in the relevant sense of the word is a purposeful use of means for a particular goal, i.e., for achieving a particular result that is thought to be a satisfactory realization of a desired condition. It implies that the agent of the action is an actor, i.e., someone who prefers to act in one way rather than another while being aware that how he will act is a matter of choice for him. An actor can do many things but, typically, he cannot do all of them at the same time. What he can do in a particular situation depends on the means available to him, but these do not dictate what he will do. He must make a choice, in fact, several choices involving a great many factual and value judgments about the situation he is in, the means available to him, his skills in employing them; also about how the world works and the causal and means-ends relationships that characterize it. In many cases, he must also make judgments about how others are likely to perceive and react to what he does or does not do. Moreover, and not least, an actor must rely on judgments about himself, what his talents are, what makes him tick, what makes him happy or unhappy, what he really wants, what sort of person he is, what his limits are, and so on. Self-knowledge is as fallible as is knowledge of other things. It happens that an actor succeeds in achieving his goal only to discover that it does not produce the satisfaction he expected from its achievement. Conversely, it happens that an actor fails to achieve his goal only to realize that he was lucky not to have succeeded. An actor is or can be made aware of the possibility that what he wants is not necessarily good for him: want-satisfaction does not automatically translate into a satisfactory personal condition. Even from his own point of view, the fact that an actor wants something does not guarantee that trying to get it is the right thing to do.

Each of those judgments may be more or less autonomous (reflecting the actor's own deliberations) or heteronomous (accepted on the authority of others), more or less wise, competent, informed, considered, or impulsive, intuitive, habitual, tainted by unconsidered prejudices. An action may seem to be as entirely spontaneous as a sneeze or a blush, but it would still make sense to ask the actor what his motives or reasons for doing it were. It may be of interest to find out what made him sneeze or blush, but it would be odd if the answer referred to his purpose, to what he hoped to accomplish by sneezing or blushing.

Another way to make the distinction between mere *actiones hominium* and *actiones humanae* is to point out that among the things human beings are capable of doing some require a reference to the fact that [most] human beings are persons while other things require no more than a reference to the fact that [all] human beings are [biological] organisms.

Students of law and students of economics share an overriding interest in the actions of human persons. In fact, their shared interest can be narrowed down to the interactions of human persons and to the effects one person's actions have on other persons. For example, a person who commits suicide would not be of interest to either a student of law or a student of economics if

his act did not change the situation of other persons or if it was not perceived by other persons as a reason for reacting to it in one way or another.

Of course, things and beings other than persons may enter into the study of law and the study of economics but only as objects or means or conditions of human action—not as economic agents or subjects of law or rights. From the point of view of law as well as from the point of view of economics, human persons are the primary subjects. A dog wandering into a butcher's shop and running away with a sausage would not be considered as engaging in an economic transaction unless one were of the opinion that the animal was a person, a being capable of personal action. Nor would the dog be considered a potential defendant in a court case unless one believed the beast to be a person. Note that only persons can suffer economic damages or enjoy economic profits, and that only persons can have, assert, or waive claims in law or suffer infringement of their rights.[5] Thus, in the example just given, the dog causes economic damage to the butcher, but it would not make sense to say that a beggar who steals a dog's food causes economic damage to the dog, or that the dog had a lawful claim against the beggar (again, unless one were to consider the dog a person). However, if the dog had an identifiable owner, a human person, then the incident would be of interest to a student of law or of economics, regardless of one's opinion of the dog's personhood.

Persons

In studying law or economics, then, we presuppose the concept of a person. A philosophically sound definition of that concept is a subject in itself, but for our present purpose, we need not go into great detail. Only one element needs explication: what makes a human being a human person is the capacity to speak, i.e. to have, communicate (by oral, written, or other means) and understand factual and counterfactual thoughts and arguments. *Speech* (Greek: logos, Latin: ratio) implies reason and logic. It is to be distinguished from mere *voice*, which includes the capacity to express feelings of pleasure, pain, fear, anger, anticipation and the like, and maybe even the ability to name individual things (the use of proper names) or sorts of things (the use of generic names). It does not imply the capacity to speak. There is a wide gap between being able to use expressions such as "This is a snake" correctly and being able to understand and use expressions such as "If I were built like a snake then I would not be able to walk."

The distinction between speech and voice goes back at least to the Greek philosopher Aristotle (384-322 BC). It is involved in the classical definition of man as a rational animal. It is also in evidence in discussions about a great many topics that are relevant to students of law and economics. For example, in human organizations there is usually a clear distinction between, on the one hand, the rulers, leaders, directors, governors, administrators, managers, generals or however they are called, and on the other hand, the "ordinary members" (employees, personnel, citizens, soldiers, and the like). A common feature of organizations is that the organizational (constitutional, statutory) rules reserve speech for the leadership, which is authorized to speak for the organization and to participate in argumentations and deliberations that are meant to result in decisions on and in behalf of the organization, its parts, and its members. The leadership comprises persons who represent the organization as a whole or some significant parts of it. In that sense, their speech is the speech of the organization or some part of it. They are the "known" or "notable persons" within the organization and their speech is "named"—what they say and why they say it is to be noted and known within the organization. For this reason, they are often referred to as notables or nobles (from the Latin verb *noscere*, to know, recognize).

In contrast, organizational rules often permit the lower echelons only to voice an opinion (for example, by casting a vote). Of course, this does not mean that the people in the lower echelons, the "ordinary members", lack the capacity of speech—after all, they are human persons and their speech capacities may be essential for their work in the organization. It does mean that their speech has no legal standing, no legal authority, in the decision-making or the representation of the organization. Voting, which is a common form of voice in human institutions, is often anonymous and one's reasons (if any) for voting one way or another are irrelevant to the institutional meaning of the vote.

In modern societies, we can see how the media pay homage to the distinction between speech and voice, if we take note of, on the one hand, the people they are likely to interview and, on the other hand, the people whose opinions are polled and then published in the form of anonymous statistics. This gives us an easy way to identify the nobility of a particular society—and, by implication, the mass of people who, from the point of view of the social organization, are

[5] Because it disregards the nature of things and considers only "data", positivism leads some of its practitioners to reduce human action to observable behaviour (as if the study of man is the study of just another sort of animal). If that were so and if man is a subject of rights then any animal would be a subject of rights. See the chapter Human Dignity: Reason or Desire?

merely nameless persons ("nobodies", "hoi polloi", "the many"). In the discourse of lawyers and politicians, the nameless are often referred to collectively as 'the citizens', 'the people' or even simply as 'society'. In the discourse of economists, one often hears a reference to 'the market' when the subject is the actions of the masses of nameless consumers, savers and investors or their reactions to policies and undertakings of big economic players such as governments, central banks, and large financial and industrial corporations.

It follows that a person's position in an organization may have consequences for the degree and the manner in which he can deploy his personal capacities in it—the degree and manner in which he can be himself. That is only to be expected because a position in an organization usually implies a more or less well-defined organizational role or function, and therefore a more or less considerable degree of role-playing: acting not "as oneself" but as a functionary whose function is defined by rule-making decisions of higher-ups in the organizational hierarchy. Clearly, the fact that human persons may or may not act "as themselves" but "in this or that [organizational] capacity" is highly relevant for studies of law and economics.

Obviously, we should not lose sight of the "animal" part in the definition of man as a rational animal. The human animal is a mammal, a biological organism of a particular kind, with a distinctive life path between conception and death. All sorts of things, genetic defects, accidents, diseases, may prevent an individual human animal from becoming a human person or turn a human person into a mere non-rational animal. In fact, there are human beings who are not human persons and therefore cannot present themselves as persons. Like non-human animals they must be represented by human persons if they are to participate at all in human intercourse: someone who is capable of self-representation must take it upon himself to speak in their behalf. Foetuses and very young children and those unfortunates who are genetically or accidentally deprived of the potential to develop personal, rational capacities cannot represent themselves and cannot choose or designate those who will represent them. In contrast, persons who lose their personal capacities later in life may have had the occasion and taken the opportunity to authorize particular others to represent them "after their minds are gone" and even after they die. Similarly, people who are so severely handicapped physically that they cannot do much without the help of others may nevertheless have full powers of speech and self-representation. They may have the ability to appoint those who will act on their behalf where their own physical powers fail.

As most potential persons (foetuses, small children) become actual persons and all actual human persons eventually become former persons, the need for representation-by-others is inevitable in every human being's life but can only be met if there are actual self-representing persons. Again, the fact that human persons may act as representing themselves or as representing others is highly relevant for the study of law and economics—and so is the fact that potential persons have to be represented by persons they did not themselves appoint, while former persons often have representatives whom they did appoint personally.

Note that the capacity for self-representation is merely that: a capacity for self-representation, which is implied in the speech capacity. Thus, the definition of man as a rational animal in no way implies that a person cannot be very stupid, wrongheaded, mistaken, misinformed, intellectually lazy, or unreasonable. Only a rational being can be more or less reasonable, more or less unreasonable. It makes no sense to call a non-rational thing (e.g., a stone) reasonable, unreasonable, or more reasonable than another non-rational thing (say, a cloud). In contrast, it does make sense to consider how reasonable or how unreasonable a person is. However, judging a person unreasonable, silly or mad is not the same as denying that he is a person or as saying that he lacks the capacity to speak for himself.

Human persons are natural persons—persons "by nature", naturally capable of acquiring the capacity of speaking for themselves and representing themselves. However, people like to personify many things that are not natural persons, thinking and speaking of them, and to some extent treating them, as if they are persons. For example, human organizations (firms, associations, states, political parties) are commonly personified: they are said to want things, to deliberate, to plan, to undertake actions, to be responsible for what they do, and the like. Because they are not natural persons, natural human persons must represent them—and the actions that are ascribed to them are in fact actions of natural persons. Although they are quasi-persons at best, it is proper to call them artificial persons, because they are not natural entities or natural beings but man-made constructions, represented and animated, so to speak, by human persons. Obviously, artificial persons are of great interest to students of law and economics. Nevertheless, it is necessary to keep in mind that statements that are true of natural persons may not be true when applied to artificial persons, and vice versa.

Some people like to personify non-human natural beings such as dogs or trees. As dogs and trees have none of the characteristics of a person, and as they are not animated by human persons in the way that human organizations are, there is no point in taking their personification

seriously. However, many people believe that there are supernatural persons (gods, angels, demons, or the spirits of former persons such as one's ancestors) and that these may animate or inspire ("possess") not only human beings but also things like dogs and trees. Nevertheless, supernatural persons do not often (if ever) present themselves as such and typically play a role in the affairs of men only to the extent that there are human persons (priests, saints, prophets) who are or claim to be inspired or animated by them, who are or claim to be their representatives. From a scientific point of view, supernatural persons themselves are off-limit but their human representatives are not.

To sum up: human persons are self-representative, may animate or represent artificial persons (organizations or parts thereof), and may represent or be animated by supernatural persons. They are the primary objects of study in law and economics. Artificial persons are neither natural entities or beings nor self-representative persons. They are legitimate objects of study in law and economics but should not be considered independently of the natural persons that represent, animate, inspire or possess them.[6]

2. Orders of conviviality, community and society

Another common characteristic of the studies of law and economics is their focus on problems of order and disorder in human affairs. Human relations and interactions can be orderly and they can be disorderly. The concept of order suggests that things have their proper place (relative to other things) and the concept of disorder suggests that things are out of place. Order also connotes co-ordination—i.e., at the very least, absence of interpersonal conflict—in the execution of the actions and activities of several, possibly a great many persons. Disorder connotes lack of co-ordination and hence at least the potential for interpersonal conflict. Actions may, of course, "conflict" in the sense that, under the circumstances in which they are executed, one of them precludes the successful conclusion of the other. However, such conflicts are not necessarily interpersonal: even a single individual person may undertake several actions that are in conflict with one another. Moreover, even when the actions are of different persons, they do not necessarily lead to interpersonal conflict. For example, a football match involves two teams that engage in conflicting actions, but this does not imply that there is a conflict between the two teams. A more pertinent example: economic competition involves people undertaking conflicting actions but does not imply that these people are in conflict with one another.

The first task of the philosophy of law and economics is to identify the relevant order(s) of things: the order(s) with respect to which actions can be classified as either lawful or unlawful. Given that the primary subjects of the studies of law and economics are persons, the relevant orders of things are orders of persons. The most important and basic of these is the order of natural or human persons, which is the natural order or natural law of the human world. In addition, there are orders of artificial persons (human organizations), each of which defines an artificial order of positions, roles and functions that are to be occupied or performed by human persons—in short, a social order, an order of society. A human organization constitutes an artificial or social order, an artificial or social law (described as the "positive law" of that organization). Obviously, the relation between the natural law (or order) of human persons and the innumerable social laws (or orders) that one can find in the history of the species is a subject of the utmost importance. In the study of law, this refers in the first place to the relation between natural rights and social rights. The former are rights of natural persons, the latter rights of artificial persons, which may be human organizations considered as a whole, or positions or functions defined by their organizational rules. In the study of economics, the corresponding reference is to the relation between natural economic and artificial economic orders. The natural economic order is the order of exchange among persons acting independently of one another but with full mutual respect for their natural rights: the free market.[7] Artificial economic orders are, for example, companies, firms, and in particular, in the modern world, states as organizers of "national economies". The peculiar feature of states (and other "total societies" such as certain sects) is their ambition to position their own positive law above the natural law, their attempt to render ineffective any appeal by their subjects to the natural law. In the field of economics, this translates into the ambition to displace or at least regulate the market so as to make it serve the

[6] In the chapter The Law of Persons, we shall attempt a logical analysis of the difference between natural and artificial persons.

[7] Note that the definition refers to respect for natural law and to absence of government regulations and interventions that are incompatible with the natural order. The presence of such regulations and interventions distort the market, and then it is no longer free—whether or not the government acts to do something about the effects of the distortions.

interests of the state and the dominant groups ("elites") that set its goals and determine its policies.

Both in the study of law and the study of economics, the concept of disorder is related to the concept of crime: criminal actions violate or upset the natural order of persons. Such actions are called criminal because they do not discriminate among various things and their places in the natural order. In other words, they betray confusion about, ignorance of, or disregard for the boundaries that mark the proper place of a thing in its relations to other things. To kill one of one's own chickens is not a crime; to kill a chicken in the wild is not a crime; however, to kill a neighbour's chicken may well be a crime. To buy a chicken from your neighbour is not a crime but to steal it is a crime. And so on. A world in which indiscriminate killing or stealing would be "normal conduct" would be a world "without law" as well as a world "without economy". Non-criminal actions are called lawful: they do not violate or upset the natural order (that is to say, the law) of things. They respect the boundaries that define the order of things, for example, the boundary that marks the distinction between one's own chicken and a neighbour's chicken.

With respect to social orders (societies), disorder is related primarily to rule-violations and acts of disobedience to the constituted hierarchy of authority—in short, illegal actions.[8] These fail to respect the artificial or conventional boundaries defined by the constitution or statutes of the organization, for example, the boundaries that mark the distinction between the positions or the functions of the Chief Financial Officer and the Head of the Department of Legal Affairs, of the commanding officer and the subaltern, and so on. No organization can exist or function effectively when disobedience is rife among its members: that would be a "breakdown of social order". Similarly, no organization can exist or function effectively when there is pervasive disregard for the boundaries that mark off different functional competences.

Rule-violations and disobedience per se are not usually considered crimes because they concern boundaries and distinctions that are merely conventional, not natural. Nevertheless, states often treat them as if they are crimes even when they do not involve violations of the natural order. In part, states may do so because they or large segments of their subject population deem certain aspects of their own social orders of greater, more fundamental importance than the natural order of persons. Here we encounter such beliefs as that a particular social order has a religious foundation in a higher supernatural order, or that it embodies superior knowledge of human affairs. However, the criminalization of mere rule-violations and acts of disobedience may also be a preferred policy for no other reason than that states have the means to enforce their regulations and commands.

Another source of disorder in a social order may be the design of the order itself, that is to say, the rules that define it. Unlike natural laws, social orders are constructed things, which need to be adapted to their purpose, available resources (both human and non-human), and the environment in which they they seek to maintain themselves. As these criteria may and are likely to change over time, maintaining an artificial order requires continual tinkering with its rules, chains of command, organizational structures and subdivisions, and programs of socialization (which are intended to make the people in the organization identify with the organization and their position or function in it). There is, of course, no guarantee that such tinkering will be successful in maintaining or improving the organization's efficacy or efficiency or, indeed, in maintaining its identity. Whether the tinkering is drastic ("revolutionary") or incremental and piecemeal, it is in any case based on imperfect knowledge of present and a fortiori future conditions.

Too little adaptation may lead to frustration and erosion of loyalty among the members of an organization; too much adaptation may have the same effects. Loyalty depends largely on the congruence of individual and social interests, i.e., on the degree of socialization of the members. However, because the members are natural persons, born as human beings with all their genetically and experientially determined individuating characteristics, socialization can never be total or complete: the "human factor" is always to be reckoned with. Inevitably, there is always tension between those who identify more fully with the organization as it is and those who are rather dissatisfied with it; and within these groups, tension between those who prefer one particular way of strengthening, respectively changing, the organization as it is and those who prefer other ways. To put it differently, in every organization, there is more or less open, more or less acute political conflict, as individuals and groups vie for power or influence in one or another of its decision-making, policy-making circles. Consequently, conflict management is an important factor—but it may be a source as well as a solution of conflicts within a social order.

Apart from the natural order of persons and the artificial orders, we should also mention communities. However, the general concept of community covers many arrangements. After all,

[8] See the chapter "The lawful and the Legal" for a discussion of the different connotations of the words lawful / unlawful and legal / illegal.

a community is merely a group of people who have something in common: e.g., language, religion, ethnicity, nationality, hobby, preference, illness, place of residence, or any particular purpose whatsoever. It follows that most people are members of many communities, some of which they may hardly be aware of. Obviously, with respect to some communities, the sense of community may be quite low among their "members", in which case the community as such will not or hardly be detectable as a determinant of their actions. Thus, the community of speakers of Dutch need not be marked by a high sense of community, and belonging to it imposes no other requirement than the ability to speak Dutch. The rules of the language are virtually the only rules of the community.

In other cases, however, the sense of community can be very pervasive. Then, the community is seen as a repository of customs, mores, norms and values that give direction to, or impose side constraints on, its members' lives and works regarding a broad range of pursuits. For example, a group has many things in common and shares the belief that all these things are intrinsically connected to a particular way of leading a good and righteous life. Alternatively, a group's members believe that their common thing is something of the highest value to them, which they should honour and defend even at great cost to their other (private or common) interests.

It is to be expected that not all people in a community value the common element to the same extent. Occasionally, those that do place a high value on it try to transform the community into a society or proto-society (say, an association of likeminded people), or at least to create a platform from which they can claim to speak for the community, to "represent" it. Of course, a community can be a community even if it is not represented by, or has not been transformed into, a society or association. Likewise, being a member of a community does not imply being a member of a society or association. Nevertheless, people who seek to create formal social (including political) organizations often appeal to a sense of community in their endeavours to recruit supporters and collaborators.

Disorder in communities manifests itself primarily in defection from the traditional norms, values, rules, and deferential relations that give them their peculiar identities. Attempts to stem the disintegration of a community by transforming it into a society in order to deal more effectively with "deviants" may or may not succeed. They are in any case likely to exacerbate existing tensions as they diminish the scope for gradual adaptation "at the margin" and put a premium on getting control of the inevitably scarce positions of power and decision-making in the society.

It will be helpful to bear in mind that 'law' means order; in the case that is of interest to us, it means order of persons. Hence, 'natural law' means natural order (of persons); 'social law' means the order of a society; and 'community law' means the order of a community. The problem of describing a particular law is of course different from the problem of ascertaining its normative import. The latter problem revolves around the questions, why a particular order ought to be respected, by whom, in what sort of circumstances, and just what the notion of respecting an order implies. That problem is, moreover, different from identifying the means (if any) people devote to the goal of ensuring compliance with that order.

Assuming that we have an adequate description of the natural order of persons, we need to establish what follows deductively from the thesis that it ought to be respected. In other words, we need to identify the primary or principal rules of law (principles of law) for that order, as well as its secondary rules as they apply to broad classes of common situations. Only then can we begin to apply the rules of law to particular situations. The reason for this "deductive" approach is obvious: the natural order is given; it needs to be discovered before we can say anything about it.

In the case of community and positive law, that approach does not work well. The reason is that communities and societies are not given but evolving, occasionally consciously constructed and in any case historical phenomena. They have existence but no essence or permanent being. We can hardly identify them except by noting which rules, norms and value actually (and in a relevant period of history) determine or influence the behaviours, actions and opinions of the people who make up a community or society. Moreover, we should expect these rules, norms and values to be focal points in the education of the members of the community or society. Therefore, we are most likely to learn about the order of a society or a community by first getting acquainted with the rules, norms and values in question. In short, we get to know about community or social law (as distinctive orders of human affairs) almost exclusively through our knowledge of their rules and norms. For example, under the paradigm of positive law, lawyers study legal codes and official records of decisions. In communities, figures of authority are expected to be knowledgeable about the traditions of the community, i.e., about what their ancestors have taught them. That is why community law and social law is primarily a matter of knowing texts (either written or spoken) and not of having an insight into human nature and the

human condition. Of course, communities do not rely on formal legistation but on principles based on experience (which may be recorded as a form of judge-made law).

Conflicts of order

From the standpoint of an individual person, community norms and values are as real as are the rights and obligations derived from his being a member of the largest community of all: the community of human persons, the order of which is simply the natural law. They are also as real as the rights and obligations derived from his voluntary or coerced membership in particular organizations, most notably political societies that control a preponderance of the means of coercion, intimidation and indoctrination. Thus, there is reason to consider not only natural law and the organizational phenomenon of positive law but also the laws of unorganized yet in some cases remarkably stable and distinctive communities.

Theoretically, it is possible that these three layers of law are in perfect harmony. In practice, there may well be many, occasionally insurmountable, conflicts. In the nature of things, the natural law takes precedence over community law and over the positive laws of societies. That is so because communities and societies are merely historical arrangements of human affairs that appear at certain times in certain places, adapt or fail to adapt to changing circumstances, and ultimately change beyond recognition, if they do not disappear altogether. In contrast, the natural order of human persons remains the same as long as human nature remains the same.

Because of the great variety of communities and societies, it is impossible to state a fixed order of precedence regarding a particular community's law and a particular society's law. However, to the extent that a society (e.g., a nation-state) proclaims itself to represent an independent community (e.g., a nation), it would appear to recognize the law of that community as having a more eleveated status than its own rules and regulations: one would then expect these to reflect and respect the laws of the community. To the extent that a society creates its own community (the community of its members or subjects), its laws *determine* the laws of that community. In that case, the positive law of the society takes precedence over the norms and values that its members may subscribe to or develop independently of the formal societal hierarchy. This is the case, for example, with the modern Western state, which typically legitimizes itself by referring to its own procedures of decision-making rather than independent religious, moral or other orders of community. It will continue to defer to "public opinion", because this a significant source of political power, but only the outcome of official decision-making procedures determines what is to be [positive] law.

Depending on the context, the notion that, in case of conflict, the natural law trumps both community law and social law is associated with the many varieties of libertarianism (e.g., [classical] liberalism, free-market capitalism—also anarcholiberalism, and anarchocapitalism[9]). Certain theological views (to the extent that they refer to a "God of the world", as distinct from a god of a tribe or sect, and reject theocracy or sacerdocracy) also qualify. The common element is the primacy of the natural law over social and traditional law. This is the essence of philosophical constitutionalism: the notion that neither societies (even state societies) nor communities are "sovereign" (i.e., not bound by any law that has its origin outside the particular society or community in question). It follows that these libertarian views are essentially agnostic concerning questions of politics (i.e., questions concerning the policies particular persons or societies should pursue). As long as people or organizations respect the requirements of the natural law, they are free to make their own decisions.

The primacy of community law is a typical tenet of traditionalist, conservative or "communitarian" views. They are not constitutionalist views in the philosophical sense, although there is a certain likeness in that they support the idea of a historical constitution: societies, including states, are not sovereign but should show respect for community norms and values. The main theoretical problem of communitarian thought is, of course, that communities are

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[9] In contemporary discussions, the prefix 'anarcho' serves to distinguish libertarian views that reject the classical-liberal claim that the state's legislative, executive and judicial branches are capable of maintaining respect for rational law. In these discussions classical liberalism is sometimes called minarchist libertarianism. The anarcho-liberals point out that the centralization ad monopolization of powers in the hands of the state make the state the de facto judge and executioner in all cases (including those in which he is one of the parties.)

The literal meaning of the Greek word 'archè' is head. 'Anarchy', therefore, means an order without a "head", leader or commander ('archont'), as opposed to monarchy (one head), polyarchy (many heads), patriarchy (the head is the father), matriarchy (the head is the mother), and so on. The suffix '-cracy' (as in democracy, aristocracy, plutocracy, autocracy) derives from the Greek 'kratos', meaning force, [physical] power, or violence. It specifically denotes an organization of *coercive* power: who has the right to force others to obey? (A leader or commander need not have coercive power.)

hard to delineate and are subject to sometimes rapid change (even decline and disintegration). As noted already, attempts to strengthen a community by turning it into a formal organization are likely to fail in the long run because they will almost inevitably lead to power struggles and the politicization of community life.

According primacy to the social law of a society—usually a political society such as a modern state—is the hallmark of socialist and collectivist doctrines (e.g., [political or policy] liberalism[10], social-democracy, fascism, corporatism, communism). Here, there is no longer any trace of constitutionalism, philosophical or historical. Everything is political, i.e., subject to the policy enacted by those who happen to have control over the commanding positions in the particular society.

(I shall use the terms 'libertarian', 'communitarian', and 'socialist' to refer to the positions noted here. I am of course aware that other writers often use them with different primary meanings.)

Constitutions and the separation of powers

Intellectuals continue to refer routinely to the concept of the separation of Church and State (i.e., of the "spiritual" and the "worldly" powers). This concept was arguably one of the solidest constitutional foundations of historical Western civilization, its moral and intellectual bulwark against caesaropapism. In recent times, however, the State has taken over or provided alternatives for all of the Church's functions. Traditional religion has been declared "a merely private matter", which leaves one's affiliation with the State as the only legitimate basis of one's "public" persona. Thus, although there still is a (largely ceremonial) Church separate from the State, the separation of wordly and spiritual powers has been effectively undone. The State claims supremacy in both spheres. The loss of this fundamental notion of the separation of powers, which implied an external limit on the province of the state and its political action, has farreaching effects. Certainly, lip service paid to the legal-political principle of the *trias politica* (the separation of powers into legislative, executive and judicial branches of the state) does not compensate for it. The *trias politica* merely expresses a formal rule for the internal organization of a state. As such, it is not essentially different from, say, the separation of the depertments of production, commerce and finance in an enterprise or corporation. Moreover, the rule is honoured more in the breach than in the observation of it. Indeed, it is virtually impossible to maintain in representative democracies, where the effective rule is that the ruling parties (executive branch) are at the same time the parliamentary majority parties (legislative branch) and the state-appointed judges are required to apply the legal rules promulgated by the legislature.

In this respect, it is worth noting that for more than a century, formal schooling has been controlled effectively by the state. This has lead to an almost uniform political indoctrination of large classes of "intellectuals" and hence of the media and social, educational and cultural organizations in which they find employment. It is no wonder, then, that most people have great difficulty even recognizing the philosophical concept of politics, which is pre-occupied with constitutional limits on socially organized power. They are accustomed to the state-friendly concept of party politics, which is pre-occupied with advocating one or another set of policies to be implemented by the social authorities, but does not challenge the state's claim to have authority to regulate all areas of life. As a result, they tend to present, for example, libertarian views as merely "extreme" variants of political liberalism. They are not aware of the difference between libertarian deregulation (i.e., restoring the full force of the principles of law regarding property, contracts and liability, for example, to the business of banking) and a political-liberal deregulation (i.e., abolishing this or that regulation without abolishing other regulations and the legal privileges and immunities they confer, for example to banks).

Nevertheless, there are remnants of the constitutional impulse even in today's politics as reported by the media (in the West), usually in connection with some controversial "ethical question" (abortion, euthanasia, homosexual marriage) or ill defined social right such as the right

[10] Classical liberalism is committed to the rule of law, hence imposes on the state maximum respect for the natural law. It is a constitutional view in that it restricts, as a matter of principle, the state's normal function to the enforcement of the natural law (the "nightwatchman" conception of the state). Political liberalism rejects the classical-liberal constitutional view and, like socialism, accepts the concept of the *sovereign* legislative powers of organized society (in practice, the state), not restricted by any other law. Hence, it permits the state to make any laws its rulers want, but insist that the policies pursued by the state should be "liberal", i.e., rely to a fair extent on private initiatives under general legislated rules for their implementation. It is constitutionally socialist but politically liberal. Other parties join constitutional socialism to other policy-prescriptions giving the government more or less extensive powers to impose its will in economic, cultural, moral, health-related and other matters.

to privacy. However, although in these areas many people feel moral outrage as they perceive the state intruding in spheres of life where it simply does not belong, the state does not recognize their opposition as having a constitutional meaning. It treats them as opponents of a particular policy, not as critics of the state's institutional claims to sovereignty and omni-competence. Everything is fit to be fixed by legislation, and legislation is entirely a matter of political power and influence.

Law and law enforcement

The positive law of societies (especially of course political societies) is much easier to enforce than either community or natural law. Societies are after all designed as systems that are specifically concerned with rules: with making, changing, applying and securing adherence to rules. Even small societies like clubs have a government and it, or some designated part of it, has statutory authority not only to make decisions in internal conflicts or about rule-violations but also to see to it that the decisions are effectively applied and enforced. The means of securing conformity to the rules may differ from one society to another but, in any case, rule-enforcement is part of any society's organizational scheme.

Things are different in communities. There the application of sanctions is typically a matter of letting members publicly but in their own name express their approval or disapproval of someone's action, and take appropriate measures as they see fit and at their own expense to enhance or reduce that person's standing in the community, perhaps even to the point "excommunication". Such measures are of course as much subject to what the community deems appropriate as other types of action are. In many cases, communities are functioning kritarchies—that is to say, marked by the presence of one or more well-known figures of high standing within the community, whose counsel is sought and readily accepted in moments of crisis or scandal (such as when a serious crime or transgression of community norms occurs). These figures of authority will also step forward spontaneously as spokespersons for the community when there is an external interest at stake, or an external threat.

With respect to the natural law, enforcement is essentially a matter of self-defense, at least to the extent that there is no community or society that has respect for the natural law among its basic principles. This is not to say that there is no internal mechanism of enforcement connected to natural law. There certainly is one. Violations of natural law inevitably cause suffering, directly but also indirectly. Such foreseeable suffering may be enough to motivate people to take measures for preventing or containing such violations. Moreover, widespread indifference in the face of violations of natural law is likely to cause suffering on a much larger scale. Thus, people know that there is a price to pay for not acting to forestall and discourage such transgressions. However, the dire consequences of violations of the natural law fall primarily on the victims and other innocents, not on the perpetrators; and no institution of a communitarian or social nature is specifically authorized by the natural law to enforce the natural law. Every person has the right to act according to the natural law and to help maintain respect for it, but apart from the victim of a crime no one else may have a strong motive to act to ensure that the harm done by criminal activity falls preponderantly, or entirely, on the criminal.

Of course, problems of enforcement are essentially technical. They are of a different nature that the problem of identifying the law and the available means of enforcing it. Unless there is an answer to the question what the law is that should be enforced, enforcement is as likely to be a source of crimes and violations as it is likely to be an adequate means of reducing their number or severity. Communities and societies cannot always be counted on to act decisively against violations of natural law. Indeed, they may themselves be guilty of such crimes. The numbers of innocent people that have been killed in foreign or civil wars, or in the course of the execution of repressive policies, by modern states is staggering. Communities that effectively restrain internal crimes may tend to protect members that have committed crimes againt outsiders.

One clear mark of positivism in thinking about law is the idea that law is whatever is effectively enforced. As Blaise Pascal noted a long time ago in his *Pensées*, "Unable to fortify justice, we have justified force." He wrote this when the notion of absolute sovereignty was associated with the rule of kings who claimed to be supreme, sovereign legislators: legislation ("making law") was turned into an attribute of military and police—in short, political—power. The absolute kings are no longer with us, but the positivist (and ultimately barbaric) tendency to reduce law to force remains a vigorous strain in Western thinking. It is the "Right is might" or "Have power, have right" doctrine confirmed by Abrahm Lincoln in a speech (January 12, 1848) commenting on the communist agitation in Europe: "Any people anywhere, being inclined and having the power, have the right to rise up and shake off the existing government, and form a new one that suits them better. Nor is this right confined to cases in which the whole people of

an existing government may choose to exercise it. Any portion of such people, that can, may revolutionize, and make their own of so much of the territory as they inhabit."[11]

[11] The argument works both ways. As president of the U.S.A. (1861-1865), Lincoln put the doctrine into effect when his troops defeated the Southern secessionist states. Defeated in combat, the Southern states had no rights, while the government in Washington had the right to “reconstruct” the South. Lincoln accordingly redefined the American republican-federalist constitution of “united states” as the charter of a centralized unitary state, the embodiment of a mythical “perfect and perpetual (i.e. holy) Union”—hence, the custom of treating the name ‘United States of America’ as a singular rather than a plural noun.

Session 2

Model-theoretic approaches

In their different ways, the study of law and the study of economics are now predominantly "model-theoretic": they suppose that their material object is for all practical purposes a deterministic system that, although not directly knowable in itself, can nevertheless be known indirectly by its observable effects. Thus, via the detour of studying those effects, the system can be modelled symbolically as a formal object, a formal symbolic system of more or less fixed theoretical functions. Such models certainly do serve a cognitive purpose—knowing the real system and understanding how it works—but they also serve the practical purpose of controlling reality. They typically attempt to establish functional relationships between supposedly more or less directly controllable variables and other variables that are not directly controllable.

Economic models suppose that human beings react or can be made to react to changes in certain key variables of the system in ways that maintain or restore a socially preferred equilibrium. This social preference is not known directly but only through the observable reactions of people to observable data. The economist's task is to identify the functions that describe the relations among these observables. Ideally, then, the economists' theoretical functions should make it possible to fully describe the preferred equilibrium, predict how people will react to deviations from it, and suggest ways of ensuring that those reactions will return the system to it with little or no delay.

Economic models are usually presented as mathematical structures, suggesting that many, if not most, economic variables are quantifiable in principle and measurable in practice. The suggestion is bolstered by the use of "the measuring rod of money", i.e. prices as direct measurements or as indicators of an underlying real phenomenon called "utility". However, as money has no fixed value, it is often necessary to invoke hypothetical, calculated values, such as when one refers to "constant prices in 1980 dollars". Moreover, while it is widely accepted that utility is really an ordinal concept (so that one can only speak of greater or lesser utility), its link to money prices is often taken as sufficient reason for treating utility as a cardinal value (as if there were a fixed unit of utility). In this way, one can get much more mileage out of the models, i.e., more "theorems" and deductions of in-priciple testable hypotheses. The "realism" of the assumptions on which such methods are based is, of course, a matter of discussion.

Legal-positivistic models assume that positive law is the tentative or imperfect expression of a common social or collective will, interest or opinion, which is not known in itself but can be known by observing the manner and degree of compliance with the positive law. If lack of compliance is due to inconsistencies, ambiguities or other causes of uncertainty in the positive law, officials and lawyers should remedy these shortcomings. Ideally, the positive law should be fully "effective", i.e., really expressive of the social will: if it is then what the laws prescribe will be realized because human beings either obey or can be made to obey the laws[12]. Thus, to the extent that effectiveness can be assumed, the positive laws describe the society: one can infer the actual workings of the real social system from the symbolic model of its positive law. Under the paradigm of positive law, lawyers' services are preponderantly focused on guiding clients through the labyrinthine structures and procedures of modern societies and institutions. Traditional aims, such as justice and fairness, are less in evidence, as lawyers assume that these are "social" or "political" in nature and hence that compliance with the positive law (as the expression of the social will, interest or opinion) is the most reliable way of achieving them.

Obviously, unlike economists, lawyers are not renowded for their use of mathematical models or reliance on quantifiable data. Their models distinguish between functions that are internal to the positive law itself (and identify the legally necessary consequences of some action or event) and relationships that are more or less undetermined (because the legal consequences of an action or event cannot be predicted). Moreover, lawyers do not assume a given probability distribution to explain such indetermination of particular consequences. Instead, they base their judgments on their experience and appreciation of the concrete situation. In short, they regard their work as an "art" rather a "science". Nevertheless, there are movements that claim to be able to enhance the "scientific value" of legal models (by wedding them to models used in other disciplines, e.g., psychology, sociology, and most recently, economics) and so to increase the efficiency of the law (by bringing in other considerations than mere effectiveness or compliance versus ineffectiveness or non-compliance).

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[12] People who do not obey the law are considered deviants: they have not sufficiently internalised the common will. As long as deviance is sporadic and unsystematic, it is not deemed a challenge to the "effectiveness" of the law.

1. Abstraction in law and economics

Judging by the curricula of modern universities, it would seem that the study of law and the study of economics are essentially confined to particular models (regarding this or that national system of law, or this or that national economy) and general models that abstract from national peculiarities (legal theory, general economics). In the law schools, the focus is on the particular local (national) system of law, whereas legal theory is typically considered an "academic" subject. In contrast, in economic faculties, general economics usually takes first place.

This difference reflects a difference in the purpose of abstraction in economics and in law. In economics, abstraction leads to a consideration of human beings engaging in economic activities unencumbered by any conventions and institutional constraints other than those that make such activities conceptually possible. General equilibrium models, the most abstract model-theoretic representations of economic reality, make no mention of institutions or other historical factors. Their ambition is to model aspects of a natural universal phenomenon: human behaviour—which is supposed to be essentially the same everywhere and at all times, and therefore the same in every particular economy. In this way, general economics retains a link with human nature, and therefore with an independent, objective real touchstone for any economic model. This explains why one who is not familiar with general economic principles will not be considered an economist at all: they are the foundation of all economic science. It also explains why there is considerable overlap between the basic propositions of general model-theoretic economics and the principles of economics that were identified by other (and older) approaches in their search for the natural laws of economic order. However, model-theoretic abstraction assumes without much supporting argumentation that human behaviour, to the extent that it is relevant for the study of economics, can be described adequately in terms of mathematical, mostly continuous functions and operations (such as differentiation and integration). It also assumes that economic data fall into homogeneous groups with a constant underlying distribution, so that statistical methods and the calculus of probability can be applied to them. Natural law economics, in contrast, does not assume a priori that economic reality is amenable to mathematical analysis. Its starting point is the study of economic reality, not the application of a preferred method, no matter how powerful it may be in other domains of inquiry (such as physics). In other words, the nature of the material object should ultimately determine the nature of the appropriate methods of research and analysis—not the other way around.

In legal theory, the favoured mode of abstraction leads to a consideration of social institutions as formal structures that are in no way dependent on human beings or other causal constraints. Legal theory has no ambition to provide a reality check for any system of positive law. On the contrary, it treats such systems as the data against which its own conclusions should be checked. It is a meta-science (if it is a science at all), not the foundation of legal science. Within the paradigm of positive law, a lawyer's knowledge is always primarily knowledge of particular local institutions (organizations, customs, practices). Hence, knowledge of legal theory is not a prerequisite for being a competent lawyer. In the same way, a person may be a competent speaker of a language without having any knowledge of general linguistics.

The case would be different if one were to revert to the old tradition of teaching general jurisprudence, which, like general economics, used to start from a conception of human nature, human action and interaction. Its aim was to identify general principles of law. It sought to explicate, and explain the reason for, such concepts as property, contract, liability, restitution, crime, guilt, innocence, justice, and the like, independently of how these concepts are used in any particular system of positive law. It would provide a way to check to what extent positive law conforms to real law, to law as it is in the nature of things—in short, to natural law. However, in the law schools, courses in general jurisprudence seem to have been largely superseded by courses that merely offer "introductions" to the study of positive law and the language of its practitioners. Similar remarks apply to the study of economics. The at present nearly undisputed dominance of model-theoretic pragmatic approaches in law and in economics and their focus on functional relationships should nevertheless not blind us to the potential of other and older traditions that were primarily concerned with truth and causal relationships in the human world itself—with the natural laws of the human world.

2. Modeling behaviours and actions

Until about the middle of the nineteenth century, law and economics were regarded as mainly natural rather than social sciences: their ambition was to identify the true principles of law and economics rather than provide formal models of, and detailed guides to expert action within, a particular society. Nowadays, the study of natural law has been virtually abandoned in the law schools. Where it survives, it is likely to be in the form of a study of antiquated literature

produced by long-dead authors who, even in their own times, had no "legal" but only intellectual authority. Thus, it appears as if the natural law is a collection of merely subjective opinions in speculative books, and as if the positive law is an objective given, recorded in legal codes and collections of court verdicts, or observable in the common practices of judges and other officials. Similarly, in economics, causal analysis of human actions and how they interact over time is rare in comparison to the ubiquitous reliance on formal models and their in-principle instantaneous functional relationships. Where such models were once merely analytic and didactic aids in searching for or teaching economic principles, they appear to have become the very things that economists need to know.

The differences between, on the one hand, natural law jurisprudence and natural law economics, and on the other hand, positivism in law and in economics, stem from a philosophical distinction that is often overlooked. In English (now the dominant academic language), the philosophical meaning of the words 'reality' and 'real' is ambiguous. They are used to translate not only the corresponding German words 'Realität' and 'real' but also the words 'Wirklichkeit' and 'wirklich'. The former denote what is, as far as it is intelligible; the latter denote what is, as far as it is effective (i.e., productive of physical effects; hence, tangible, observable, manipulable).

Positivism and empiricism, which constitute an influential tradition in thinking about science, require scientists to focus on the search for [recurring patterns of] observable, preferably measurable effects, because only these can supposedly be known objectively. In other words, science should concentrate on *Wirklichkeit*. It should not bother with *Realität*, with trying to grasp the true essence of things, as this would necessitate a metaphysical "going beyond the physical effect"—and in the estimation of most positivists and empiricists, metaphysics, like religion, has nothing to do with science, if it is not antithetical to everything that they say science stands for.

If we could get at the essence of things, we would be able to understand the world in terms of its own first principles. However, the methods that have proven so successful in science—that is to say, in the physical sciences—do not reveal the essences of things. They can only give us systematic knowledge of how the world appears to us. We can only get knowledge "from the outside", never "from the inside" of things. This is sometimes expressed by saying that the scientific method is inductive: it leads from particular observations to the formulation of general propositions, some of which may even be deemed universal in scope ("laws of nature").

This attitude certainly makes sense with respect to the physical sciences. Indeed, it makes more or less sense with respect to all the sciences that deal with non-intelligent matter or beings whose intelligence (if they have any) is of an entirely different sort from ours, so that no intelligent communication is possible between them and us. There is no way in which we can communicate intelligently with particles and electromagnetic waves, cells and strings of DNA. Even with properly trained, long-domesticated higher animals, communication does not rise to the level of intelligent discourse[13]. Our knowledge of them is limited to what we can learn from our observations of what they do. It does not rest on any understanding of why they do what they do (except to the extent that we surmise there is some analogy with what we would do in roughly similar circumstances). Moreover, our knowledge of them has no effect on how they behave. We can sometimes force or train them to behave in ways that they would not have shown otherwise, but this merely confirms that our relations with them are restricted to physical interactions.

As far as the physical sciences are concerned, understanding *why* things happen in the way they do in terms of what the objects of study *really* are, is not in the offing. We can only observe how such objects behave; systematize our observations of them; hypothesize about fixed or constant relationships that can be rendered as functions, e.g. of the form $x=\mathbf{f}(a,y)$[14]; and test whether the

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[13] The root of the problem is the fact that there is no shared language or no way to translate the language (if there is one) of a species of animal into any human language or vice versa. Any human language is translatable into any other human language, at least as far as rational or logical content and structures (*speech*) are concerned, even when it is notoriously difficult to translate rhetorical nuances and other evocative and pragmatic aspects of the use of a language. In other words, human beings constitute one *logical* (or *speech*-)community, and no other species or kind of thing fits its conditions of membership. (Perhaps some manmade artificial intelligence may fit in at some future time but we are not there yet.)

[14] The letter *a* stands for a constant (or coefficient) and *x* and *y* are variables denoting observable or measurable aspects of particular kinds of things or phenomena. Simple examples would be $x=a+y$, $x=ay$, $x=y^a$, $x=ya^2$ (cf. Albert Einstein's famous equation $e=mc^2$) and $x=a/y$ (cf. Boyle-Mariotte's law of the inverse proportionality of the pressure and the volume of a gas at constant temperature). Unless at least rough estimates of the relevant constants are available, there is no point in using such functions in calculations or for deriving and testing predicted values.

hypothesized relationship holds in all already observed and in hitherto unobserved circumstances.

Systematically successful prediction is, therefore, the touchstone of knowledge of what happens and how it happens. Note, however, that this statement relies on an assumption, namely, that the world, which we admittedly can know only from the outside, is a constant deterministic system of a kind that we can confidently describe by applying our logical and mathematical skills of classification and calculation to our observations of its effects. The assumption of constancy is obviously not an observable quality of the physical world itself. It reflects our determination to understand the world and its relation to what *we* can observe in such a way that empirical science is a (perhaps even the only) valid method for acquiring knowledge of what is out there, independently of our observations of it. At least in that sense, there is a metaphysical dimension to the physical sciences.

Moreover, at its most advanced frontiers, physical science may well shade into pure metaphysics as the mathematical development of particular hypotheses outpaces our capabilities of observation and measurement. Nevertheless, the limits of those capabilities determine the limits of our empirical science. One may believe that the known universe originated in a "Big Bang" but that belief rests on one's belief in some of our present cosmological theories and how they make sense of currently observed data. No human person actually observed the Big Bang—indeed, our theories explain why it would have been impossible for a human person to observe it. More generally, if we would need to measure the values of two variables and find that measuring the value of one of these makes it physically impossible to measure the value of the other, then we hit upon a fundamental uncertainty that we cannot resolve empirically.

We reach another sort of limit when we have to deal with physical arrangements that we know to be intelligently designed. For example, the physical sciences cannot by themselves predict that, or explain why, one house has a flat roof and the house next to it a sloping roof. Moreover, we cannot predict future knowledge that is not presently available. Therefore, we cannot predict any action or behaviour that relies on or embodies such presently unavailable future knowledge.

In our studies of non-intelligent things, there is no point in trying to understand why (for what purpose, from which motive, on what sort of reasoning) such things *choose* to behave as they do or appear to do.[15] However, in the sciences of human actions, choices and intelligent designs are as ubiquitous as is the fact that the knowledge upon which human actors act is not constant or even equally distributed. This means that it is rare, if not altogether impossible, for us to discover the constants that we would need if we were looking for quantifiable functional relationships for use in calculations and predictions of human actions. Thus, while we may say that demand for a good varies inversely with the price of the good, we cannot meaningfully express this in a formula such as $d=a/p$ or $\Delta d=a/\Delta p$. The latter formula implies that there is some fixed relation between the magnitude of a change in the price and the magnitude of the corresponding change in the quantity demanded. However, we do not have even a good approximation of the "true" value of the relevant constant a. The reason is that the actions that constitute "demand", namely making an offer to buy at a particular price, are human choices. They are not fixed responses to some objectively ascertainable signal—not even responses with fixed probabilities.

What is demanded and priced is an economic good. As such, it is not something objective that has and retains its economic qualities regardless of what it means to any particular person. On the contrary, it is subjective in that it is more or less of a good in the estimation of an individual person. It is person-relative in that one person's estimation need not match another's. Finally, it is situation-relative in that a person's estimation of its quality as good need not remain constant regardless of his particular situation at any particular moment.

In this context, "situation" refers to such things as a person's goals, values, preferences, moods, expectations, knowledge, information, perceptions, fantasies, insights, skills, budget, and available means of action, as well as to other factors, including his relations to other people, his position in one or another society, and the like. All of these can vary significantly from one person to another and for any person from one moment to the next. Not all of these factors are observable, let alone quantifiable or measurable, as some of them exist only "in the actor's mind" and even there perhaps only for a fleeting moment or at a low level of awareness. A person's "situation" is neither a given constant nor an observable or measurable variable: it is a unique, truly historical constellation of external and internal factors, subject to sudden, occasionally quite dramatic changes.

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[15] One may of course hypothesize that the observable universe is an object of choice for a supernatural person and try to understand why *he* chose to have this particular universe rather than another. However, we cannot answer that question, which is entirely metaphysical, by means of the methods of the physical sciences.

Thus, whether or not there is a constant relation between a person's actions and his situation, a formula such as $x = \mathbf{f}(a,y)$—where y denotes a person's situation, and x his action, say, of making, or not making, an offer to buy—has no empirical significance. Even if for every person there was such a constant relation, we should not assume that it is the same for every person. Moreover, people can, and occasionally do, confound or surprise others by doing something entirely unexpected or novel. They may even surprise themselves, acting "out of character", "on the spur of the moment", yet not "at random". In short, they can and do act in defiance of any presumed behavioural constant. We make sense of this by saying that human actions reflect a person's choices.

Of course, it is always possible to find a function that more or less accurately fits a particular set of data. However, data are always of the past, and a retrospective fit provides no guarantee that the same function will fit new data as they become available. In the physical sciences, where constancy of the real system can be assumed, adding more data to the set will generally allow us to narrow the margin of error in calculating the value of the physical constants we need to make our functions operational. Even if the data are collected at very different dates and places, we regard them as data concerning the same underlying reality. Hence, we can attempt to inductively generalize from the data and fine-tune our generalizations by looking at more data.

In the sciences of human action, in contrast, adding more data to the set is unlikely to produce such a positive result. The underlying reality is simply that at any moment people employ the means at their personal disposal according to their personal priorities, beliefs, expectations, and the like. There is not the kind of homogeneity in the data about human actions in the flux of real-life situations that we expect and find for example in sets of data concerning volume and pressure in a gas held at constant temperature. Consequently, there is no reason to believe that we can fine-tune behavioural functions by extending our sets of data about actions and their effects. In the sciences of human action, the particular histories of the particular actors matter. Thus, we should not expect to be able to inductively extract a valid theory of human action from historical accounts. Either there is no possibility of arriving at a truly general theory of, say, economics (a position often called radical historicism), or the theory must have another basis than induction from historical, i.e. *dated*[16], data. The obvious alternative is deduction from the first principles of human action itself.[17]

It is to no avail to try to overcome these difficulties by using the methods and techniques of statistical analysis and the calculus of probabilities. In the sciences of human action, we are not dealing primarily with unchanging routines and homogeneous classes of events, which lend themselves to statistical and probabilistic analysis. Instead, we are usually dealing with qualitatively unique events in qualitatively unique situations. To the extent that activities appear to be behavioural regularities, they are likely to be revealed sooner or later as historical illusions, valid in one period for one group of persons but not for another period or for other groups. Yet, no independently observable condition may serve to separate the one period or group from others. The only relevant change may be that first one person, then another, and eventually many people become aware of hitherto unrecognised opportunities of action. In taking advantage of these opportunities, they create opportunities that did not exist at an earlier date and render formerly profitable actions unsustainable. Discovering and taking advantage of an opportunity is typically the feat of one person, not of a whole class of people in a similar situation. His undertaking creates a new situation not only for himself but also for others as they come to experience or know about his action or some of its consequences.

An undiscovered opportunity is of course not a relevant datum for any human agent, not even if he is a scientist. Thus, their science does not enable economists to know more, or sooner, about business opportunities than entrepreneurs do. The reason is the same as why it is not only physically but also logically impossible for earlier scientists to predict what new knowledge later scientists will acquire. Time is not a merely external parameter of human action, useful for locating actions relative to earlier, later or simultaneous actions. Rather, timing is an intrinsic property of human action. Thus, whereas it makes no sense to say of a physical event that it occurred ahead of its time, or after its time has passed (as distinct from "ahead or after the moment we expected it to occur"), we are continually reminded of the importance of choosing the right moment for undertaking, or abandoning, an action.

Because action reveals new information, generates new knowledge, changes expectations, and so on, it modifies the situation in which agents will undertake further action. This is not at all like a laboratory experiment in which an intervention reveals new information about the

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[16] "Dated" both in the sense of referring to a particular date and in the sense of not being relevant at the present moment.

[17] This is the road taken by Ludwig von Mises, Murray Rothbard, and others (e.g. F.A. Hayek) within the ambit of the Austrian School of Economics.

behaviour of, say, a gas, and so increases our knowledge of its properties as well as our power to use it for our purposes. *We* learn something new from the experiment, but the gas does not: its behavioural constants remain as they were. In contrast, a human action always has the potential of revealing something new about our situation that will induce us to act differently from the way we did before we had that revelation. After all, that is the point of learning. Moreover, learning is a personal process. One person learns *this*; another learns *that*; and what one person has learned does not spread automatically or instantaneously or in exactly the same form to another, let alone all others.

Perils and paradoxes of scientism

None of the considerations mentioned in the previous secton enter into the positivistic mindset that has given us the modern model-theoretic approach in economics. It has mimicked the physical sciences with its basic assumption that its object of study is a deterministic system that we can get to know only from the outside, i.e., by formulating hypotheses about how it will behave and then gathering data to test the hypotheses. This is the fallacy of scientism[18]: expecting knowledge about the world of human action from the application of the methods of the physical sciences, even though the relation of the physical scientist to his objects of study is known to be fundamentally different from that of, say, an economist to the human beings who are the object of his studies. Thus scientism induces economists to regard human beings as if they were of a different kind of species than the economists who study them—as "behavioural units" defined by one or another behavioural function (e.g., utility maximization), whose "intelligence" is limited to their having some built-in algorithms for transforming "given" inputs into optimised outputs. We marvel at that sort of "intelligence" when we see spiders spinning their intricate webs in a great variety of conditions, but we are entitled to ask if it is what people exhibit in their economic activities. Obviously, the economists would not describe themselves as mere behavioural units hard-wired to maximize some function or other.

The basic assumption entails the need to derive the values of constants or coefficients in order to make the hypothetical functions that supposedly describe the functional relationships of the system (the real economy) operational—fit for doing calculations and making quantifiable predictions. The model-theoretic approach has, in fact, been called 'the hydraulic view of the economy'. It supposes the economy to be like a hydraulic system of containers of various shapes and sizes linked together by a complex arrangement of pipes. In such a system, changes in the volume, pressure or temperature of the water in one container eventually affect the contents in all of the other containers—at which point the whole system returns to a state of rest (equilibrium).

It may well be that the hydraulic analogy is a useful *didactic* device, if the purpose is to illustrate that changes in one part of an arrangement of connected parts will spread throughout the whole arrangement. As a scientific hypothesis about the nature of an economy, it is worthless. Moreover, it is a fallacy to think that "this does not matter because it is merely a starting point upon which we can improve by adapting our functional description of the system to make it fit an ever-expanding set of data." By similar fallacious reasoning, one can argue that "it really does not matter that interventions and regulations in the economy produce unforeseen and often undesired consequences because we can always deal with these when they manifest themselves". There is no reason to expect the later, ostensibly "corrective" interventions and regulations not to produce their own unforeseen and undesired effects; and no reason to expect the people reacting to the emerging undesired consequences to have the same desires as those that agitated for the original interventions and regulations. In short, there is no reason to believe that the real economy is a constant, unchanging system that will progressively reveal its inner workings as more data become available. There are and can be no constants in human actions and interactions if these by themselves modify the situations of the actors by revealing new information, knowledge and insights to them, by redrawing the boundaries between what appears feasible, possible or likely and what appears infeasible, impossible or unlikely. Moreover, there is no chance of extracting information from the data (about the past, or about distant places) that will remain valid for all future events wherever they may happen. There is no reason to believe that such data fall and will continue to fall into homogeneous classes that lend themselves to statistical analysis. Nor is there a reason to believe that relative frequencies (probabilities) of choices made in the past will last into the future. At best, the approach may *seem* to work in situations where the trends of the recent past in the relevant locality do not

[18] The term was coined by Hayek, *The Counter-revolution of Science* (1952). It "involves a mechanical and uncritical application of habits of thought to fields different from those in which they have been formed." (Hayek, *The Pretense of Knowledge*, his 1974 Nobel Prize acceptance speech)

change much. However, where trends are driven by human actions, they are bound to change. In other words, the empiricist approach has limited practical value in the study of economics, and no cognitive value to speak of in discovering general, universal truths, valid for all times and places.

Several paradoxes follow from the failure to consider human action as something else than in principle predictable behavioural responses to "scientifically observable" data. For example, the model-theoretic approach of the ubiquitous equilibrium models used by economists comprehends competition not as something human agents engage in but as a condition of the economic system itself. Hence, "perfect competition" is the conceptually ideal, perfectly efficient form of the system—in the same sense that the theoretical construct of a frictionless machine provides an engineer with an upper but unattainable limit of mechanical efficiency. However, under the equally unattainable conditions of perfect competition, there is no scope for competitive activity. All agents (or rather, behavioural units) possess the same faultless and complete information at exactly the same time as every other agent. Thus, they all respond instantaneously to the present condition of the system and do so in exactly the right way to immediately bring about the efficient equilibrium condition implied in the data to which they respond. This may be a good description of how a thin layer of water turns itself into a sheet of ice when its molecules are exposed to freezing temperatures, but it has no relevance for understanding rivalry among human agents.

Another paradox is that profit has to be understood as rent accruing to a factor of production and not as the reward of successful entrepreneurial action (which has no place in a deterministic system). However, entrepreneurship manifests itself precisely in initiating action, bringing together factors of production and the means of paying for their use, and employing them according to some business plan. Of course, the entrepreneur may foresee in his business plan a payment to himself for letting the enterprise have the benefit of his own factors of production (labour services or capital) or for putting at risk the capital that he invests in the enterprise. Such payments are to be understood, however, as wages, interest payments, and risk premiums, not as profits. Entrepreneurial profit or loss derives from being alert to opportunities and acting on the judgment, which might turn out to be correct or incorrect, that there is a way to make available factors of production produce higher-valued output than they do in their present uses. But being alert, exercising judgment and acting on it is not a factor of production: it cannot be produced, sold, hired, loaned or given away.

Still another paradox appears in the inclusion of the so-called law of diminishing marginal utility. It is typically thought (and taught) to be a sort of physiological or psychological law of saturation: the first cigarette gives more pleasure than the second, the second more than the third, and so on, until the smoker's craving for a cigarette disappears. However, whether the example corresponds to a law of physiology or psychology or not, it is in any case doubtful whether the demand for, say, money, labour, or lorries is a matter of physiology or psychology. Nevertheless, there is an obvious relation between marginal utility and human action as the purposeful employment of means to one or another of an actor's ends. A means of action that can equally well serve either a higher- or a lower-valued but not yet attained end will be used to the attain the former rather than the latter. It derives its utility from the highest-valued not yet attained end for which it can be employed. Obviously, this highest-valued but not attained end is of a lower value than any end that has already been attained by using the means in question. In other words, the utility of a means of action inevitably diminishes as it is used to secure successively less valuable ends. In short, marginal utility is a necessary feature of human action, regardless of the actor's physiology or psychology.

It is also paradoxical to see a complex phenomenon such as the structure of production, which encompasses a multitude of more or less specific items (capital goods) employed in a great diversity of partly complementary, partly competing lines of production, represented model-theoretically by a single value called Capital. This value is (except in the case of a fully centralized economy) of no interest to anybody: people are concerned about the value of *their* capital goods, not of all capital goods. Endeavouring to maintain or increase the value of their capital goods, they may (and often do) diminish the value of the capital goods employed or held by others. The model-theoretic notion of Capital refers at best to an ex post facto statistic, not to a determinant of economic activity.

The use of capital goods implies credit. The capital goods required for any undertaking have to be put in working order weeks, months, even years before they will be capable of earning enough revenue to pay back what they have cost—and there is no certainty that they ever will be capable of doing that. The entrepreneur buys the final products on credit for sale to the public sometime in the future, yet in the meantime he must have the means to pay his workers and suppliers. In most cases, he will get this money from capitalists (i.e., savers-investors) who grant

him loans or buy shares in his interprise.[19] Credit must therefore come out of real savings. It constitutes a waste of savings in those cases in which it goes towards mal-investments, i.e., projects that eventually return losses rather than profits. However, if capital goods are treated as constituting a homogeneous quantity (represented by a single variable) then the possibility of mal-investment drops out of sight: with one variable one can only represent "too much" or "too little" investment.

Surely, a valid economic science should be able to explain the phenomena of competition, profit, marginal utility and capital, and not be satisfied with explaining them away or merely postulating their existence. Moreover, there are other problems. Microeconomics and macroeconomics appear to require different models with no satisfactory way of deriving one from another. Yet, there can be no doubt that there is only one economic reality: ultimately, micro-models and macro-models refer to the same thing. Part of the problem here is that the model-theoretic approaches of mainstream economics are particularly disappointing when it comes to dealing with the phenomenon of money, which is by all accounts an essential condition for the very existence of complex economies.

The study of economics is on the wrong track if it confines itself in the manner of a physical science to the study of economic *effectivity* ("Wirklichkeit") while foregoing to pay attention to economic *reality* ("Realität"). The former boils down to a form of description of a state of the economy in a particular place at a particular time that ignores the fact that human persons, their actions and interactions drive the economy. The proper study of economic reality, by definition, aims to reveal the principles that make it intelligible. If scientific predictions of the kind that are prized in physical science are not forthcoming from economic research, then we want to understand why this is so. Distorting the reality of human persons and their actions merely because one is addicted to a borrowed method that is unable to deal with anything else than behavioural units and stimulus-response connections is not the way to go. Unlike in the physical sciences, where the scientist-observer and the things he studies are entirely different sorts of entities with no possibility of intelligent communication, in the sciences of human action both are of exactly the same kind. Thus, if the world of human action can be known at all, it can be known "from the inside", not just from its effects as they appear on the researchers' data-registering apparatus but from the first principles of human action itself—its essence.

The question remains whether similar criticisms apply to the legal-positivistic approach to law. The latter does not rely on mathematical models (although the so-called Law & Economics movement suggests that it should). So, much of the critique of model-theoretic approaches in economics would not be relevant for the student of law. However, the idea that the study of law reduces to the study of the positive law of this or that society and ultimately, therefore, to the study of a society's common will, interest or opinion, remains counterintuitive. After all, societies (and cultures) come and go, but they remain at all times phenomena produced by human actors, their actions and interactions. Unless we should suppose that, merely because they are social, all social arrangements are equally lawful from the perspective of human nature, we cannot dismiss the study of natural law. We shall return to the question later. It will appear that the methodological confusion is at least as great in the study of law than it is in the study of economics.

3. Knowledge and power

In a good model, some variables should correspond more or less directly to observable, preferably measurable conditions in the real material object. The formal model-theoretic relations should then be sufficient to predict with greater or lesser precision how changes in some real conditions will play out over time. If a model is correct, interventions in the real world that match particular settings of the controlled variables should yield particular desired effects. If it is not correct, the model should be refined or altered, and re-tested until changes of rules, procedures, incentive-structures, and the like, do produce the desired effects.[20]

For obvious reasons, one does not admit to testing for—i.e., trying to produce—undesirable effects in law or economics, although one can try to check a model by applying it to past events to explain how undesired effects came about as the consequence of particular interventions by law-makers, policy-makers or administrators. For equally obvious reasons, the actual testing of models in law and economics is rarely of the kind that one would find in science laboratories, where tests are highly controlled so as to exclude contamination of the results by unknown

[19] In other cases, he may get the money from the government as a grant or subsidy. That money is likely to be tax money (in which case it represents savings forced on the tax-paying public); or it may be in the form of, say, newly printed paper money (in which case it does not represent any savings).

[20] See Milton Friedman's essay "The Methodology of Positive Economics." (1953), excerpted below.

factors. Hence, testing in law and economics usually takes the form of keeping large records of data and then checking changes in the data between the period just prior to the intervention and a later period in which its consequences should have become observable. The changes in the data should somehow and to some extent match the predictions or expectations based on the model. However, there inevitably remains a lot of uncertainty regarding the manner and degree in which factors that were not or inadequately accounted for in the model have contributed to the observed changes in the data.

The models, then, are the formal objects of positivistic approaches to law and economics. Because the corresponding material objects are supposed to be unknowable in themselves, the primary purpose of the formal objects is not the discovery of truth about any underlying reality but gaining insights into "what works". In other words, the primary concern is with the efficacy and the efficiency of actions (policies) based on the model in use. Failures or disappointments can be met either by tinkering with the model (experimenting with new or more complex functions) or by investing more resources in making human behaviour conform to the specifications of the model (e.g., by stricter control and enforcement or other means of changing the incentives for human agents to act in one way rather than another). Thus, the models serve not only as tools of knowledge and understanding; they serve also as tools of control. Indeed, with its supposition that it is dealing with deterministic aspects of reality, the model-theoretic approach suggests the possibility of planning and inducing changes to produce real improvements in society in the same way in which engineers can use theoretical and experimental physics to improve existing ways of doing things.

To the extent that this control motive, this desire to improve society, is present, we may expect models in law and economics to have a particular interest in variables that are more or less directly controllable by those who are in a position to apply the model. Obviously, the latter cannot be envisaged as working in institutional environments similar to physics laboratories, in which the researches intervene from the outside in a well-controlled, well-designed and well-insulated system to detect how it behaves under specific conditions. While academic economists and lawyers may produce formal models as they see fit, the decision to intervene in human society according to one model or another is clearly political. It is reserved for people in political institutions, the state, the government, or the public sector. To them falls the task of formulating a clear conception of the desirable condition of society. They should have at their disposal the right and enough means of control to implement the interventions: information-gatherers, inspectors, monitors, law-enforcement officers, and a wide array of educational, regulatory, fiscal and monetary tools.

Thus, positivism in law and economics tends to emphasize questions concerning what the government can do or what it would need to implement a particular policy. It accordingly tends to emphasize distinctions between public sector law and private sector law, public sector economy and private sector economy. This scheme implies that, ideally, the public sector is the controlling sector, able and empowered to set the values of directly controllable variables, while the private sector is the controlled, dependent sector, reacting in predictable ways to public-sector decisions. In this way, the positivistic approach fosters the idea that the studies of law and economics prepare their practitioners to be "counsellors of the Prince". Consequently, even questions concerning the merits of government intervention versus of the merits of letting the market work are framed as policy-questions: "letting the market work" is just another policy-option the government may accept or reject. Similarly, questions concerning the merits of legislation and regulation versus the merits of letting independent courts find justice in particular cases are framed as policy-questions to be decided by the legislative branch of government. In both cases, we have the idea of an omni-competent decision-maker, an absolute "Prince", with the authority to draw and re-draw the boundaries between the public and the private sectors, even though he is at the same time party and judge and executioner in the case before him.[21] The

[21] Although advocating, as a matter of principle, the primacy of de-centralized [evolutionary] judge-made law over centralized [constructivist] legislation, the classical-liberal author F.A. Hayek (in *Law, Legislation, and Liberty*, Vol.I, 1974) also writes about the need for legislation to correct judge-made law when it goes the wrong way. This notion of a god-like legislator with power to override the judges "but only when necessary" obviously abstracts from the reality of politics. Does anyone really believes that the legislators will remain idle, possibly for years or decennia on end, only to become active when there is some necessity of which they and they alone are the judge? Is it not far more likely that they will see such necessities wherever they look, and that they will be under constant pressure from partisan advocates and lobbyists to "correct" the judge-made law. Reasoning similar to Hayek's is also common in the literature on economics, for example, when economists justify government intervention "only in the case of proven market failures." This is the notion that the government is like a fire brigade—but a fire brigade with the authority to define what is and what is not a fire.

basic notion of constitutional thought, that such boundaries are matters of principle rather than of decision, does not fit readily into the positivists' schemes. Moreover, the idea of an absolute "Prince" with an exclusive interest in "doing the right thing" is absurd. Because of political rivalry and power struggles, "uneasy lies the head that wears a crown."[22] A lot, if not most, of a ruler's or government's energy is bound to be devoted to keeping power, defeating opponents, forging supportive coalitions, and creating more instruments of control. It is likely that, on most occasions, partisan politics will have a higher priority than any real or imagined "public interest".

Natural law approaches in law and economics do not have this fixation on "Princes" and their apparatus of rule. There is no reason to suppose a priori that economic reality or real law imply the need for a *political* ruler, judge and enforcer. The starting point of natural law approaches is the nature of things, not the specifics of a particular social system in a particular period of history. The primary justification for this starting point is that the nature of things can be presumed to be far more constant than the manifold social and historical guises in which the things in question appear. From the natural law perspective, social and historical phenomena are explananda ("what needs to be explained"). It will not do to extrapolate from any particular society in any particular period to the whole of human experience, even if it is our own society as it is today, even if it is some other presently "extremely successful" society.

The use of the model-theoretic approach in economics explains the disconnect between the economic discourse of academic specialists (and the politicians and the media, who take their clues from them) and the economic discourse of ordinary people, who are nevertheless engaged daily in solving economic problems. Confronted with academic discourse, people readily acknowledge that they do not understand and cannot follow the reasoning because they are not familiar with all the assumptions and technicalities that go into the models. They do not look at the world through model-theoretic glasses. Being told that these models are "scientific", they are inclined to accept on the authority of the specialists that their own "common sense" provides bad guidance, and to bow to the "Prince", who invokes the counsel of these specialists. Obviously, such trust is entirely misplaced if the model-theoretic assumptions and technicalities fail to capture the reality of economic actions and relations—a reality that, one would think, is largely constituted by the common sense people have gained in actually and continually dealing with situations and problems of all kinds.

Similar remarks apply to the discourse of lawyers. For them, the law is indeed wrapped up in the procedures and technicalities of the national positive law and the state-imposed institutions that virtually monopolize its administration. Moreover, it is riddled with rules and regulations that provide exemptions, immunities, privileges and other "exceptions" to the general principles of law that people take for granted in everyday-life, where they deal with one another directly (on a person-to-person basis), not through the institutional structures of formal societies. Yet, the specialists (and the politicians and the media) maintain that in law, as in economics, common sense cannot be trusted. It is no wonder that people are lead to believe that one has to be a lawyer to know the law, when they are continually told that the law is the same thing as the lawyer's model of a society; not a reality that owes nothing to any model.

Man and citizen

The gap, noted above, between "academic" and "ordinary" discourse is not simply a question of the academics' use of "technical" language. The root cause is the difference, to which we drew attention in the introduction, between natural persons and artificial persons. To be more precise, the difference between a human person speaking and acting in his own name, on his own personal responsibility, and a human person speaking and acting in some corporate capacity, i.e., performing a role or function in a formal organization. This is especially true, of course, where the state is concerned: it imposes upon every natural person a legal status ("citizen", "legal alien", "illegal alien") with particular "rights", "duties" and "obligations", all of them organization-specific and often widely at odds with common sense.

Consider the difference between a natural person and a citizen. If you take, say, € 100 from your neighbour's pocket without his permission, you are a criminal—a thief or a robber. However, as a citizen you have the right to cast a vote to authorize the state, its government or officials to impose a tax of € 100 on your neighbour and to use the proceeds or part of them to provide a subsidy, grant or tax-relief to you. Moreover, if your vote carries the day, it may even become an illegal, punishable act for your neighbour to resist this imposition or to seek to avoid having to suffer it. From the point of view of the natural law, theft is theft, whether it is the act of one or more individuals or the act of an organisation acting on behalf and with the consent or authorisation of one or more individuals. Likewise, self-defence is self-defence, whether it is

[22] This is Shakespeare's famous rendition of the basic insight of Nicolo Machiavelli: the problem for politicians is to get and keep power given that others have similar ambitions.

undertaken by a single aggrieved person or by an organisation acting in his behalf and at his request. Not so where the positive law of a political entity such as the state is concerned. According to the positive law, the question of the lawfulness or criminality of an act is not resolved with reference to the real nature of the act but with reference to the social status of those who commit it. This is true with respect to any act that would be criminal under natural law, not only with respect to stealing. Thus, a citizen (an artificial person) has a right to do what no natural person has aight to do. Conversely, there are many sorts of things that a natural person would have the right to do under the natural law to which most citizens have no right under the positive law of the state, although usually some citizens (the representative agents or officials of the state) still retain the right to do them on behalf of the state. The specifics depend on the particular positive law that applies to the case.

The foregoing explains the libertarian thesis that where the positive law is entirely subordinate to the requirements of natural law, it is merely a way of "legalizing crime" or else "criminalizing lawful actions". The implication of the positive law is, therefore, that an individual person in a society always has hope that there may be legal means to get what he cannot get in ways that are compatible with his natural rights and obligations. All he has to do is to get enough control or influence over the political decision-making processes to ensure himself of the collaboration of the organs of the state. It does not really matter whether he achieves this control or influence in an occasional voting procedure or by persistent lobbying of the relevant authorities. Some people are more adept than others in making the most of their natural rights; just so some people are better placed and more adept at making use of the opportunities offered by the positive laws of a particular society—including opportunities for modifying either the rules of the positive law or the conditions of its implementation or enforcement.

Rent seeking (as economists call the attempt to secure some benefit or other from the use of political, legistative or administrative means) is, therefore, a regular feature of political organisation. This practice covers not only the actions of citizens seeking favours. It also covers the actions of politicians and bureaucrats who, on the one hand, threaten to impose or enforce rules that will harm the interests of some individuals or groups and, on the other hand, are willing to withdraw their support for, or to actively oppose, the legislative or regulatory proposals in return for concessions or funding from their targets.

Unlike the principles of natural law, which are universally known, and to a lesser extent, the principles of community law, which are well known locally, the positive law is riddled with uncertainty, as it is subject to sudden, possibly far-reaching changes. It is, in fact, the result of decisionist policy-making, not of law making (in a proper sense of the word 'law'). Because this uncertainty also affects economic life—via changes in the tax-and-subsidy laws, the regulatory regime superimposed on property law, contract law and liability law, and not least the monetary policies—a positive-law regime prompts all sorts of groups and interests to invest heavily in political activities and organisations, which only increase the overall uncertainty of the regime. It is hard to predict which of these "investments" will eventually pay off and who will eventually end up paying for them (in the form of taxes, fees, or loss of freedom of action). Moreover, as many people face the choice of getting what they want either in *lawful* ways (e.g., via the market) or in legal ways (via the state), the economic meaning of the price system changes from a common source of information about relative scarcities to a politically manipulable variable with highly reduced information value.

This uncertainty is particularly manifest in democracies with "mixed economies", where both "the market" and 'the democratic process" offer ways in which people can express their preferences. In this respect, both are ethically neutral in that they merely record which preferences are expressed. However, while markets allow the formation of as many niche markets as people are willing to sustain, the democratic process (especially voting) is concerned with identifying who will privileged access or control of the monopolist organisation of the state. Thus, markets allow people to express and satisfy their desires at their own risk and expense; the political democratic process allows some people to satisfy their desires at the expense of others. In economic terms, the democratic process is therefore "inefficient" by definition. It does not permit the equalization of costs and benefits "at the margin" because it is, in effect, a winner-takes-all game.