

**FESTSCHRIFT FOR
JULIUS STONE**

*A Tribute to Julius Stone on his Retirement from the
Challis Chair of Jurisprudence and International Law at
Sydney University*

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TWO ARGUMENTS FOR AN EMPIRICAL FOUNDATION OF NATURAL-LAW NORMS: AN EXAMINATION OF JOHANNES MESSNER'S AND VICTOR KRAFT'S APPROACHES*

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I. THE IS AND THE OUGHT

The main objection that has been raised against the possibility of natural law is that human nature, as nature in general, is a fact and thus an "Is" (*ein Sein*), from which no norms, that is, no "Ought" (*ein Sollen*) can be derived.¹ The doctrine of the underivability of an "Ought" from an "Is," which was first expounded by Hume,² was espoused by Kant, who rendered it radical by contrasting the Is of nature and the Ought of moral law.³ Hans Kelsen, invoking this radical doctrine, makes a distinction between the explanatory sciences of causation and the normative sciences that receive their content from norms which, indeed, can be linked with each other and whose main groups depend on a basic norm but never on an Is. Between the causal order of nature and the diverse systems of norms there lies an "unbridgeable gap."⁴

The first question that confronts the doctrine of natural law is: how can social norms be ascertained from the Is of human nature? This question raises the preliminary problem as to whether there is a constant human nature at all, a secondary issue which has to be decided before the answer to the main question can be sought.

II. THE CONSTANT ENDS OF HUMAN NATURE

As against those modern writers of philosophical anthropology, including Jean-Paul Sartre⁵ and Werner Maihofer,⁶ who dispute

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1. H. KELSEN, *REINE RECHTSLEHRE* 46, 359 (1960).

2. D. HUME, *AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS* (1751).

3. I. KANT, *KRITIK DER PRAKTISCHEN VERNUFT* (1788).

4. Kelsen had already reached this conclusion in his book *Hauptprobleme der Staatsrechtslehre*, published in 1911. However, in 1963, he adopted the view that a norm presupposes an "imperator," i.e., a norm-positing will. Thus he returned to the nominalistic grounding of law by William Ockham (1290-1349). See Kelsen, *Zum Begriff der Norm*, in 1 *FESTSCHRIFT FÜR H. C. HIPPERDEY* 57 (1963); Kelsen, *Norm und Logik*, 12 *FORUM [Vienna]* 421 (1965).

5. J. SARTRE, *L'ÊTRE ET LE NEANT* (1943); J. SARTRE, *L'EXISTENTIALISME EST UN HUMANISME* (1953).

that there is a constant nature of man at all, Johannes Messner and Victor Kraft agree that despite all human evolution there remains a constant in human nature. Such a constant is for Messner the steadfast striving for goods that are necessary for our preservation and for our development—a striving implanted in our nature.⁷

Even this starting point shows that Messner stands on classical ground. For it was Aristotle who was the first to point out the tension between the nature present only seminally (*dynamei on*) and the unfolded nature (*energeia on, eidos physis*) and who conceived of the latter as the anticipated end toward which every living being was striving, by its nature.⁸ Since man can come to the full development of his being and thereby to "good life" (*eu zen*) only in a community that comprises all aspects of life, Aristotle regards the *polis* as the end (*telos*) for which men strive by their nature (*physei*),⁹ because in classical antiquity the only such community was the *polis*. The Aristotelian doctrine of State is therefore primarily a doctrine of the ancient *polis*.¹⁰

The order of *polis* was regarded to exist, above all, for the sake of the welfare (*eu zen*) of free men, who alone were full citizens. The *polis* was thus considered not to be an end itself but a *means* for the achievement of the welfare of its full citizens.¹¹ Therefore Aristotle could say that the statesman who had founded it (in fulfillment of the ends sought by men out of their very nature) was "the originator of the highest good."¹² However, the Aristotelian doctrine of the State goes beyond the ancient *polis*, because Aristotle conceived of man as a being who by his nature (*physei*) aims at an all-comprehensive community of life (in the fashion of a *polis*). In this sense man is by nature a political animal (*ánthropos physei zóon politicón*).¹³

6. W. MAIHOFFER, *NATURRECHT ALS EXISTENZRECHT* (1963).

7. J. MESSNER, *DAS NATURRECHT* 225 (1950). This work has now appeared in five editions, and has been translated into several languages. Quotations here are from the 1950 edition, which was published shortly before the second edition of V. Kraft's *Die Grundlagen einer wissenschaftlichen Wertlehre* (1951) which contained his *Foundation of Individual Valuations* for the first time. This formed the basis for Kraft's writings in *Rationale Moralbegründung* (1963) and *Die Grundlagen der Erkenntnis und der Moral* (1968).

8. ARISTOTLE, *METAPHYSICS*, IV.2, 1005a; *POLITICS*, I.2, 1252b. See also A. VERDROSS, *ABENDLÄNDISCHE RECHTSPHILOSOPHIE* 40-41. (1963); Verdross, *Die aristotelische Naturrechtslehre* 56 *ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE* 527 (1970).

9. ARISTOTLE, *POLITICS*, I.2, 1252b.

10. See generally J. RITTER, *NATURRECHT BEI ARISTOTELES* (1961).

11. A. VERDROSS, *STATISCHES UND DYNAMISCHES NATURRECHT* 19 (1971).

12. ARISTOTLE, *POLITICS*, I.2, 1253a.

13. *Id.*

Those ends which are pursued *naturally* by man are called "existential purposes" (*existentielle Zwecke*) by Messner. As mundane ends of this kind, he mentions: self-preservation, self-perfection in physical and mental respects, expansion of knowledge, procreation, education of children, social association for preservation of peace and order and promotion of general welfare.¹⁴ He remarks that not only are ends found in human nature, with its "drive-constitution," but as well an order of these ends. Thus, the outer material things are not ends in themselves, but means for other ends wherein man finds the fulfillment of his nature—ends such as the keeping of a home and a family. Family and social life are oriented to the preservation of human nature having the consummation of man in the "good life" (Aristotle) as their end.¹⁵

By his nature, man is thus not only an individual being, but just as much a social being. Both aspects of man are inseparably associated with each other. "The individual nature of man cannot unfold itself without a connection with society and man cannot fit into society without being a person, that is, without being an individual being on the basis of his spiritual nature."¹⁶ This trend of man towards a "*telos*," toward an end, is constant; it is encountered in every stage of civilization.

Victor Kraft likewise recognizes that there are human aspirations which are universal, because they appear in everybody *by virtue of his nature*. This view is the more notable because it is expressed by a scholar who belongs to an entirely different philosophical camp as Messner, namely to the neo-positivist "Vienna Circle,"¹⁷ and who thus stands on strictly empirical grounds. In his philosophy of values Kraft shows that from the "organization of man" certain basic valuations resulted which must obtain in every civilization. They must be present even in the most primitive stages of civilization at least in a rudimentary manner. These valuations relate not only to what is required for the immediate preservation of life, for example, the need for food, clothes, shelter and medicines, but also to anticipatory planning; making provision for the

14. Messner speaks also of supramundane purposes, *viz.*, "the knowledge and reverence of the Creator and the final fulfillment of human existence through merging with Him." He adds: "There is no doubt that the above list meets with a general assent." J. MESSNER, *supra* note 7, at 37.

15. *Id.* at 38.

16. *Id.* at 110.

17. See F. AUSTEDA, *MODERNE PHILOSOPHIE* 113 (1972). See also V. KRAFT, *THE VIENNA CIRCLE, THE ORIGIN OF NEO-POSITIVISM* (1953).

future and involving knowledge requisite for the mastery of nature. Moreover, man is organized in such a manner that he can achieve the unfolding of his proper being not in isolation but only in a social group. The recognition of a social group implies the recognition of all values necessary for its preservation.¹⁸

Kraft rejects the conception of a realm of values of the nature of the Platonic forms which hover above the domain of factuality. All values rest, according to him, on appraisals of man in regard to certain persons or objects.¹⁹ Nevertheless, he recognizes values which have a general and supra-individual validity because they are anchored in the general, constant and "end-oriented" nature of man.²⁰

In a recent work, Kraft further says that there are "primary aspirational ends" (*primäre Strebensziele*) whose attainment is "the condition for the satisfaction of all other desires of man." Therefore they have precedence over all other ends. These primary aspirational ends, set by nature, are divided by Kraft into the following four main groups:

1. Self-preservation. The striving for self-preservation could indeed become extinguished, as a result of unrelenting suffering, and man can be driven to suicide, but it is nevertheless an originally natural drive of man.

2. Avoidance of injury to oneself. Everyone wants by his nature to avoid all injuries to himself.

3. Freedom of action. Everyone wants not to be hindered in the realization of his intentions and not to be forced to actions, even though many want to be guided and directed.

4. Mutual assistance. Everyone desires as a matter of natural necessity to be supported by others, because everyone is dependent on the help of others.²¹

Messner and Kraft, despite their different philosophical bases, concur that human nature is not mere fact which can be explained only by causal laws, but has also an "aspirational aspect" which is oriented to the self-preservation, self-unfolding and self-perfection of man. But whereas Kraft is content with grounding this view on experience, Messner regards the above ends as implanted into human nature by God.²²

18. V. KRAFT, DIE GRUNDLAGEN EINER WISSENSCHAFTLICHEN WERTLEHRE 249 (1951).

19. *Id.* at 250.

20. *Id.*

21. V. KRAFT, DIE GRUNDLAGEN DER ERKENNTNIS UND DER MORAL 115-17 (1968).

22. J. MESSNER, *supra* note 7, at 154.

III. THE GROUNDING OF PRIMARY SOCIAL NORMS IN CONSTANT ENDS IMMANENT IN HUMAN NATURE

Johannes Messner considers the primary social norms as founded on the "existential purposes" present in nature. Since man can achieve his preservation and unfolding only by the aid of society, the purpose of society consists of making it possible for individual man to fulfill the tasks of his life through the cooperation of the members of society. For this purpose, society must create, above all, an external order, which provides protection to its members against encroachments. Further, it must help them to achieve their economic and cultural welfare.²³ These ends can be attained by society only through the creation of a positive legal order which serves them. Hence the formation of positive law must be guided by ends founded on nature.

Accordingly, Messner defines natural law as "the order of social relations that accords with the existential purposes of man."²⁴ From this definition it follows that primary natural law contains only general principles. It represents by no means a legal system that would hold good for all times. Nevertheless, these basic principles are "sufficiently definite in their meaning to guide the social authority in the establishment of a social order."²⁵ Thus they enable said authority to create, in every historical situation, a positive law that corresponds to the requirements of natural law. Messner remarks quite rightly that "a considerable pragmatic element" is unavoidable in the creation of this law.²⁶

A similar course is followed by Victor Kraft, who teaches that the natural aspirations mentioned in the previous section can be actualized only when the basic requirement is recognized according to which "everyone ought to desist from a desire whose satisfaction hinders the attainment of a primary end" of another person.²⁷ The four primary nature-given ends impose therefore the demand for the establishment of the following four main principles of social morality (with certain limitations to be mentioned below):

1. Everyone ought to refrain from any action that endangers the life of others.

23. *Id.* at 116-30.

24. *Id.* at 161.

25. *Id.* at 193.

26. *Id.* at 194. Messner later grounded natural law "existentially" also in family experiences. See generally J. MESSNER, *DAS GEMEINWOHL* (1962); J. MESSNER, *MODERNE SOZIOLOGIE UND SCHOLASTISCHES NATURRECHT* (1961).

27. V. KRAFT, *supra* note 21, at 117.

2. Everyone ought to abstain from all injuries to his fellow human beings.

3. No one ought to impair the freedom of action of others either by coercion or by threats.

4. Everyone ought to help others as far as possible.²⁸

The observance of these principles is a precondition for securing "the achievement of the natural aims for all."²⁹ Their validity rests on the general volition of the primary ends; thus the general approval of these ends operates as the justification basis of the corresponding generally valid norms.³⁰ It is a matter of course that the same claim of *all* men to the attainment of the primary ends is presupposed here. This does not exclude, however, an objective differentiation of *other* claims.

The principles of social morality stated above are "not arbitrary stipulations but are objectively determined as means for the attainment of natural ends."³¹ The "Ought" is grounded in the general volition of primary ends, because everyone who affirms an end ought to do everything that is necessary for its attainment. The striving for an end thus constitutes for Kraft the *sole exception* of the principle established since Hume that no norms can be derived from mere statements of fact.³² Thus a generally willed end provides us with a norm.

The four principles of social morality cannot, however, have absolute validity. Their validity must be suspended in relation to those persons who violate them, for otherwise the primary ends cannot be attained. Their non-observance must be prevented for the sake of their actualization. Therefore "resistance could be offered to an actual violation of a norm. . . . The warding off of its violation is morally admissible."³³

Since, however, the merely individual prevention of norm-violations is not sufficient for achieving the observance of social morality, law must "enter into the service of morality and help to fulfill its task." This is also necessary in view of the fact that "moral norms contain quite general requirements which law must concretize, apply to prevailing circumstances, and enforce against

28. *Id.*

29. V. KRAFT, RATIONALE MORALBEGRÜNDUNG 59 (1963).

30. *Id.* at 58.

31. *Id.* at 57.

32. V. KRAFT, *supra* note 21, at 105-06.

33. *Id.* at 128.

any resistance."³⁴

These ends can be actualised, of course, only by the positive law of a given community. However, if positive law stands in the service of social morality, it seems to me that certain principles must be asserted as a precondition of a detailed concretization of this morality. These principles call upon a social authority, not yet instituted by inter-individual morality, to take legislative, administrative and judicial measures for the protection of the members of the community, as well as for the protection of their existential purposes. They also authorize it to resort to coercive measures not only for warding off delictual acts but also to enforce rights and to perform other tasks of the community. The role of natural law lies precisely in these principles. Hence natural law is to be regarded as an intermediate instance between social morality and positive law³⁵—if the trend of thought of Kraft is brought to its conclusion—for he himself does not provide a bridge between inter-individual social morality and positive law.

The grounding of natural law by Messner and of social morality by Kraft cannot be refuted by an objection which Kelsen has raised (apart from the objection stated in the beginning of this essay) against the possibility of the derivation of social norms from the nature of man. Kelsen also thinks that such a derivation is excluded because human nature exhibits social as well as asocial traits. Therefore, only mutually inconsistent norms could be ascertained from it, but never a natural law that would be free from internal contradictions.³⁶ This objection proves to be untenable if it is recognized, with Messner and Kraft, that man can mature into a full human being only in a community, and thus his asocial drives must be combatted by the order of community. Hence these drives can form only a basis for the ascertainment of requisite norms of prohibition.³⁷

Neither of these two Austrian scholars—whose attempts to provide an empirical foundation to the norms of natural law or social morality I have discussed in this essay—is a lawyer. So far their arguments have scarcely been considered by lawyers.³⁸ Therefore, it

34. *Id.* at 133.

35. A. VERDROSS, *supra* note 11, at 100.

36. H. KELSEN, *supra* note 1, at 403, 411.

37. A. VERDROSS, *supra* note 11, at 62.

38. See, e.g., G. WINKLER, *WERTBETRACHTUNG IM RECHT UND IHRE GRENZEN* (1969); K. WENGLER, *DIE OFFENTLICHE UNTERNEHMUNG* (1969). These works concern themselves with Kraft's theory of values, but do not enter into the natural law problematics of that theory.

seemed to me appropriate to call attention to these arguments, which are so important in laying the foundation to legal philosophy.