Etica é Politica

Natural Law
A Logical Analysis

Frank van Dun
University of Maastricht

Introduction

The premise of this paper is that anarchocapitalism, at least in its Rothbardian version,[1] presupposes the existence of a natural order or law of human affairs. In the next sections of this introduction I shall briefly explain the sense in which natural law is crucial to an understanding of anarchocapitalism, namely as an order of human agents or natural persons. The concept of law as an order of persons is analysed in the body of the paper. I start with a discussion of the distinction between orders of natural and orders of artificial persons. Then, I give an admittedly partial analysis of the notion of law as an order of persons. The analysis is presented as a formal axiomatic theory. To that theory I add the notion of a natural person as well as the postulates that we need for a description of natural law as an order of natural persons. In the last two sections, I discuss various ways in which the theory of natural law can be linked to descriptions of human affairs and contrast the anarchocapitalists' view of the order of the human world with the alternatives that have come to dominate political and social thought.

Anarchocapitalism and natural law

The radical libertarian theory of anarchocapitalism rests on the concepts of natural law and natural rights. It is a reconstruction of economic theory that aims to prove the self-sufficiency of an economic order[2] of sovereign natural

[1] M.N. Rothbard, *Man, Economy and State* (Nash Publishing, Los Angeles, 1970); Idem, *The Ethics of Liberty* (Humanities Press, Atlantic Highlands, N.J., 1982); Idem, *For a New Liberty* (1973 ; Macmillan, New York, revised edition 1978). David Friedman's *The Machinery of Freedom* (1973, Open Court, La Salle, Illinois, revised edition 1989) is an attempt to develop an anarchocapitalist theory on the basis of the 'utilitarian' analysis of current mainstream economic analysis.

[2] In the language of anarchocapitalism, 'economic' and 'political' primarily identify different methods or ways of doing things. Popular references are Franz Oppenheimer, *The State* (1914) and Frédéric Bastiat, *The Law* (1848). While economic actions are lawful (with respect to natural law), political actions are not because they involve aggres-

persons and their voluntary associations. It also seeks to demonstrate how rights-violating interventions (crimes) disturb and weaken that order, especially when they have a systematic or institutionalised character.[3]

Anarchocapitalists probably are best known for their relentless critique of the state, its coercive practices (war-making, taxation, regulation, monopolisation of vital activities) and also of social organisations and institutions that have come to rely on subsidies and privileges granted or protected by the state or its legal system. However, the purpose of their critique of politics and politicised society is not to identify assorted 'inefficiencies' and then to propose reforms that will make the state and its client-organisations more efficient. Rather, they want to reveal, by theoretical argument and historical and comparative studies, the wide range of alternative non-coercive, voluntary and just ways of doing things that the state has displaced or crowded out. Thus, they apply Bastiat's distinction between 'what is seen and what is not seen'[4] to reveal the inevitable state-induced loss of freedom and justice and also the spuriousness of claims concerning the 'overall efficiency' of political ways of doing things.

The philosophical basis of anarchocapitalism is the conviction that we live in a real world where real, fallible human beings think, speak and act, feel, enjoy and suffer. The supposition is that the world is constituted by a multitude of separate, diverse, individual—but not isolated—human agents whose survival and well-being depend on their ability to produce (find, make, transport) useful things and to get along peacefully with one another. Thus, anarchocapitalist analysis always involves lifting the ideological, corporate or social veils that obfuscate our view of the human world and the individuals who live and act in it. However, the analysis does not stop at a mindless empiricism that merely registers the antics and opinions of human beings. It proceeds to categorise and judge them by the principles of order that it finds within the ontological structure of the human world. In short, anarchocapitalism, in its Rothbardian form, stands or falls with its supposition that there is a natural order—a natural law—of the human world and that each human person has a place in that order that is delimited by his or her natural rights. Moreover, in addition to the theoretical importance all anarchocapitalists attribute to the natural law, many of them subscribe to the view that the natural law is normatively significant and consequently that it is an order people ought to respect. That is why a proper understanding of natural law and natu-

---

sive coercion, invasion, unilateral takings or other forms of disrespect for the sovereignty of other natural persons.

[3] Hans Hoppe has deepened that theme considerably in his *Democracy : The God that Failed* (Transaction Publishers, 2001) ; also H.-H. Hoppe, 'The Private Production of Security ', (*Journal of Libertarian Studies,* 1999, XIV,1), 27–52

[4] Frédéric Bastiat, 'What is Seen and What is Not Seen' can be found in many collections, for example in Bastiat, *Selected Essays on Political Economy* (Van Nostrand, Princeton N.J., 1964).

ral rights is necessary for a sensible critique of the theoretical and normative claims of anarchocapitalism.

Understanding 'natural law': *caveat lector!*

'Natural law' is a controversial concept. First of all, there is the unfortunate habit of using 'law' as an all-purpose word for referring indiscriminately to, among other things, an imposed rule ('lex'), a rule validated by immemorial custom or practice and not invalidated by reason, a deduction from a description of some 'ideal society', an agreement among rational beings ('ius'), and a condition of order.[5] As a result, many people fail to distinguish between 'law' in the sense of a rule that ought to be *obeyed* or *followed* (as one would obey or follow a commander or a teacher) and 'law' in the sense of something that ought to be *respected* (as one would respect another person or, say, a thing of beauty). Understandable misgivings about 'natural laws'—assuming these to be rules that we ought to follow because they supposedly are 'given by' or 'found in' nature—are then easily, but without warrant, extended to the notion of a natural order of things that we ought to respect.

Part of the controversy surrounding the concept of natural law stems from the difficulty many appear to commentators have, to take the word 'natural' seriously. Indeed, natural law theory often is derided for being 'metaphysical' or even wedded to a particular theology. However, the fact that some theories of natural law are metaphysical or theological does not mean that natural law is something metaphysical or theological. A theory of mice and men can be metaphysical but the metaphysics is in the theory, not in the mice and not in the men. Natural law theories are, but natural law is not, a product of the human mind, although human minds are essential elements of the natural law. While natural law theorists may learn from their predecessors, their object of study is the natural law, not 'the literature'.

The purpose of this paper is to give an analysis and explication of the notion of a natural order of human affairs, which is logically independent of any metaphysical or theological system. It is true that, for example, Christianity and liberalism in the classical tradition call for respect for the natural law of the human world.[6] Rothbardian anarchocapitalism also insists on respect for

[5] See F.van Dun, 'The Lawful and the Legal' (*Journal des economistes et des études humaines* VI, 4, 1996, 555 – 579).

[6] See F.van Dun, "Natural Law, Liberalism, and Christianity" (*Journal of Libertarian Sudies*, 2001, XV,3), 1-37. In fact, most popular moral theories recognise that people ought to respect the natural order of the human world as it is known by common sense and experience, even if their conceptions of it vary enormously in scientific sophistication or analytical precision. Most of them simply assume that one has to be moral and make the best of things *within* the order of the world as it is. Notable exceptions can be found in Western academic moral theories which in many cases are based on the gnostic notion that historical experience and received wisdom merely reflect the alleged 'false consciousness' of historical man. Consequently, only 'enlightened reason' can grasp the (as far as history is concerned, utopian) condition of 'true humanity' and deduce the 'rights of man' from it as well as specify the code of conduct most likely to achieve it. Unfortunately, with their references to the 'true nature of man', a lot of those

the natural order of human affairs. It has no sympathy for any sort of 'revolt against nature'.[7] However, it does not follow that the concept of natural law as an order of human affairs in any way depends on the reasons that Christians, classical liberals, or libertarians adduce for respecting the natural order.[8] Indeed, the object of our respect or disrespect must exist independently of the answer to the question whether and why we should respect it or not. There is no difficulty here if we have in mind the natural order of human affairs, which we should be able to describe regardless of our normative attitude towards it.

Obviously, that dissociation of the descriptive and the normative aspects is impossible if we focus on the conception of natural law as a system of rules, commands or practical inferences. Moreover, that conception tends to obscure the difference between 'natural laws' that merely are guideposts to a good and virtuous life and those that allow one person to enforce his claims on others. Then the significance of natural law becomes ambiguous: either all natural laws are mere moral admonitions or all of them are legally enforceable requirements. That ambiguity has plagued the interpretation of natural law theories ever since Thomas Aquinas identified natural law and reason.[9]

---

theories (for example those of Mably, Morelly and some 'utopian socialists') used to masquerade as natural law theories. Although those exercises in rationalist constructivism were incompatible with the classical-medieval tradition of natural law theory, which took the real man to be the historical man, many critics assumed that their criticism of the utopian schemes brought down the classical-medieval tradition as well.

[7] M.N. Rothbard, *Egalitarianism as a Revolt Against Nature, and Other Essays* (Libertarian Review Press, Washington, D.C., 1974)

[8] The natural law theory of the Christian medieval theologians obviously referred to the world as God's creation and to the biblical covenants to derive the conclusion that people had to respect the natural order. Rothbard (*Ethics of Liberty*, op.cit.) assumed that Thomistic thinking on the *lex naturalis* was a sufficient basis for his radical libertarianism. Others, among them H.-H. Hoppe and this writer, have found the ground for the obligation to respect the natural order of persons in the practical presuppositions of 'argumentation' or 'dialogue'. See N. Stephan Kinsella, 'New Rationalist Directions in Libertarian Rights Theory' (*Journal of Libertarian Studies*, 1996, XII,2), 313-326.

[9] *Summa Theologica*, Iallae, question 91, art.2 (concl). Also John Locke, *Second Treatise of Civil Government*, Chapter II, par. 6. For a modern interpretation of the view that natural law is 'practical reason', see J. Finnis, *Natural Law and Natural Rights* (Oxford University Press, Oxford, 1980). I am not saying that the ambiguity vitiates the Thomistic theory, only that its typical medieval complexity apparently lies beyond the grasp of many modern interpreters and commentators for whom 'law' invariably connotes 'enforcement by public (political) authorities'. Hence the common complaint that the agenda of natural law theory is to legislate morality. However, Thomas clearly distinguished between mere sins (that merit disapproval and repentance) and injustices (that merit 'action in justice' and redress). He also distinguished between vices of the sort no virtuous man would engage in and vices that threaten the existence of 'society' (not this or that particular society but 'human society' as a general form of conviviality or symbiosis): murder, arson, theft, fraud, robbery, assault and other crimes against persons and property. (*Summa Theologica*, Iallae, question 96, art.2 (concl). Only with respect to injustice and especially crime can the coercive power of 'human law' intervene. In short, while all virtues are necessarily lawful (sanctioned by the rational appreciation of their agreement with divine providence), and all vices are consequently unlawful, only a few vices of a particular sort should be made illegal. 'Legislating morality' was not on Thomas' agenda.

Law as Order

Natural law and artificial law

For the natural sciences, law is the order of natural things as seen from the perspective of a particular discipline or branch of physics, biology, or chemistry. The main pre-occupation of a scientific discipline is to identify stable patterns of order and to express them as of laws of nature. Scientists also search for the conditions of existence of those patterns to determine where they do or might break down.

In the particular restricted sense in which I shall use the word, law is an order of persons. Sometimes, the word 'law' is used specifically to denote a respectable order. In that sense, law is an order that we ought to respect. However, for our purpose, we need not concern ourselves with the question of the respectability of an order. Persons are purposeful rational agents, in possession of means of action that embody their active powers and faculties and that they can use in the hope of attaining some goal. A person's rights[10] are his means of action and the actions in which he employs them.[11] Again, people often reserve the word 'right' for the respectable means and actions of a person.

Law is either natural or not. Natural law, in the general sense, is the order of natural things. In the relevant restricted sense, 'natural law' refers to the order of natural persons. Usually, human beings—at least those that have the capacity of purposive action—are cited as the paradigmatic natural persons, although many people assume that there also are non-human natural purposeful agents. However, those who mention such agents usually assume that they are part of the same order as human beings or that they somehow participate in the human world. In short, natural law is the order of human world, if it is not simply the order of human persons.

An artificial law is an order of artificial things. Here we shall consider it only as an order of artificial persons. Such persons are in some respects analogous to a natural person. However, an artificial person, for example a citizen, is not a thing of the same sort as a natural person.

As we shall see in this section, 'natural law' and 'natural persons' belong to an essentially different logical category than 'artificial law' and 'artificial persons'. There can be any number of artificial laws but only one natural law. How we can determine what natural persons are and can do and what the conditions are under which their relations are in order rather than disorder, differs fundamentally from how we can determine those matters where artifi-

[10] 'Right' derives from the Latin verb 'regere' (to control physically, to rule, to govern).

[11] Rights, properly understood, are not the now ubiquitous 'rights to', which are merely lawful claims. To say that my life or my property is my right is not the same as saying that I have a right to life or property. On this distinction, see F.van Dun, "Human Dignity: Reason or Desire?" (*Journal of Libertarian Studies*, 2001, XV, 4), 1-29.

cial persons are concerned. To find out about natural persons, go live among them; to find out about citizens, consult a lawyer! Obvious as this may be, confusion about the categories of natural and of artificial persons is rife.

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

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

A overview of artificial law

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

Every social organisation or society is an artificial person, subdivided in various positions, roles and functions according to its rules and regulations, whether they are written down in a rulebook or not. For example, the State is an artificial law, a legal order and an artificial, indeed a legal, person. It has its Head of State, government ministers, judges, members of Parliament, commissioners, mayors, citizens, registered aliens, etcetera. All of those are no more than rule-defined personified positions, roles and functions of, or within, the legal order of the state. Again, what they are and can do depends on the rules of the game of that state, its ‘positive laws’ or legal rules. Another example is a business corporation with its CEO, members of the Board, financial manager, research co-ordinator, public relations officer, and so on.

A business corporation is an artificial law. It is a legal order as well as a legal person according to its own legal rules. However, whether it has legal personality in a particular state depends on the legal order of that state.

Obviously, the rules of chess do not tell us anything about what those who play chess are or can do. Similarly, the legal rules of a state or a corporation do not tell us anything about the persons who occupy positions or perform functions or roles in their organisation. It is usually taken for granted that those persons are human beings. However, that is by no means a logical necessity, as Caligula demonstrated when he made his horse a consul of Rome[12] and as modern states demonstrate when they authorise computers, cameras and radar-equipment to act as police. Modern corporations apparently have a great interest in getting rid of the human factor by substituting computers and robots for their human personnel.

An artificial law is defined by a logically arbitrary set of divisions and distinctions among the artificial persons that are its components. Those divisions and distinctions do not depend on the physical characteristics of material things or on the natural persons that actually play or fill the roles and positions specified by the rules of the game. Whether in a game of chess a 'King' has the same powers as a 'Queen' or not, depends exclusively on the rules of chess. It does not depend on the shape or the material of the pieces, or on such conditions as whether individual men or women, teams or computers play the game.

Artificial persons have no physical characteristics. They are not individuals. If the rules of the game that define them allow it, they can be differentiated and split up into any number of other persons or merged into one person. Not having any physical characteristics, they do not exist independently of a set of rules. There is no such thing as 'a citizen'; there are only Dutch citizens (defined by the positive laws of the Dutch state), Bulgarian citizens (defined by Bulgarian law), and so on. Nor is there such a thing as 'a King'. It depends on the appropriate rulebook whether a King cannot be captured, can trump any other card except an ace, dismiss the government or name his own successor. Sometimes, there may be confusion concerning the natural or artificial status of a person. As a person who makes a study of, say, physics or economics, one can be a student independently of any artificial law. However, at a university, there are numerous rules that define what 'students' [of that university] are and what they can, or cannot, do. Not all students are 'students'—and vice versa.

The natural law must be defined in terms of natural, real, objective divisions and distinctions. It is an order of natural persons, which must be identified as they are and for what they are. The physical and other characteristics that make something a natural person are all-important. Natural persons are

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

individuals. Splitting a natural person only results in maiming or killing him. Merging two natural persons does not result in the appearance of one new person. If there are true statements about what natural persons are and can do then those truths must be discovered—they do not exist by stipulation. The natural law is an objective condition that we can describe as it is. Per se, the natural law has no normative meaning, which is not to say that it is normatively insignificant, irrelevant, or unimportant for natural persons.

Law and obligation

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

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

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

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

However, is it a matter of definition that rulers ought to respect the international law? Some people say it is, because, in their opinion, international law is a legal order in which rulers act as states, which are artificial persons defined by the rules of international law. Some say that the analogy of the rules of chess is even stronger. For them, the rules of international law identify not

only the parties (states, the analogues of Black and White) but also the composition of the parties (the constitutional order of a state, the analogues of Kings, Queens, rooks, and pawns). In their view, international law requires that states have, among other things, a Parliament, an independent judiciary, and universal suffrage, perhaps even a predefined utility-function, say, a commitment to human rights.

Others say that states exist independently of international law and that therefore international law must be derived from the characteristics of states. For them, it is an open question whether rulers ought to respect the international law. If it is part of the self-definition of a particular state that it owes no respect to other states, then obviously the rulers of that state have no legal obligation to respect international law. To avoid the conclusion that there is no international law, it is often maintained that international law is an analogy of natural law. The idea is that all states are 'independent sovereign persons of the same kind', irrespective of their particular size or political characteristics. Thus, it is claimed that they are analogous to natural persons, who are all free persons of the same kind, irrespective of their particular physical, intellectual or moral characteristics. Then, on the assumption that natural persons, regardless of their personal opinions, are under an obligation to respect natural law, it is argued that, in an analogous way, states are under an objective obligation to respect international law. Consequently, rulers acting as states ought to respect international law, no matter what the legal self-definition of their states may be.

Clearly, however, no amount of information about the rules of an artificial order tells us anything about what a natural person as such may or may not do. Whether assuming the role of a chess-player, a citizen or an official of some state or other is a good move in life; whether it is something that one at least has the right to do—these questions make sense only for those who look beyond 'the games people play' to the people who play them. That is exactly what anarchocapitalists intend to do. For that reason, the ruling methodological paradigm of positivism is anathema to them.

Positivism and socialisation

The central dogma of positivism in fields such as 'law' and 'economics' is that every order is artificial. There are no natural orders, or, if there are, they are not suitable objects of scientific investigation. Consequently, persons can be admitted as objects of study only if they are disguised as artificial persons. In economics, positivism typically involves the personification of 'theoretical constructs' (for example, utility functions) constrained by the rules of a model or a simulation.[13] It fits the profile of a technology of want-satisfaction

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

that characterises modern neo-classical and mainstream economics, but obviously is useless for the anarchocapitalists' program of research into the conditions of order and disorder of the real human world.

Legal positivism concentrates on the study of artificial 'positive' law while ignoring or denying that there is a natural law. Human beings are only accidentally involved in 'positive law', namely as occupying one social position or another or as performing one function or another. Ideally, they are fully socialised. Having internalised the rules that define it, they identify themselves completely with their position, role or function. As Rousseau put it, they then no longer act according to their own natural particular will. Instead, they act according to the society's general will, which is expressed in its legal rules. In short, they act as if they really were citizens. However, if a human being is not fully socialised, he or she is a 'deviant' and needs to be 'corrected' or forced to comply with the general will. At the very least, 'incentives' must be administered to enhance compliance with the legal rules.

Thus, legal positivism has no resources to comprehend relations in which people participate regardless of their social position or function in this, that, or indeed any legal or social order. It cannot recognise the natural convivial order of human affairs, which is the primary object of study for natural law theorists. While legal positivism is deficient in that respect, it also is a bearer of an ideological program of socialisation ('socialism') that seeks to control the human factor to immunise particular social orders and their artificial law from the incessant corruptive influences of human nature. As such, it is radically opposed to the endeavours of the natural law theorists, who are intent on humanising societies rather than on socialising human beings. Long dominant among adherents of the major traditions of Christianity and classical liberalism, the natural law theorists consistently have urged that societies, especially political societies, should respect the natural law no less than individuals. After all, societies are nothing more than organisations of human endeavour, ways in which people do things to one another in the pursuit of some alleged common purpose.

Law as an order of persons and their means of action

An axiomatic approach to persons and relations

For the moment, we shall disregard the distinction between natural and artificial persons. We focus on the general notion of law as an order of persons. What follows is an informal presentation of a formal theory of law in that sense.[14] For the sake of simplicity, we consider only persons and the means of action that belong to them. A full analysis should consider also the actions

[14] For a more technical and fuller exposition, see my "The Logic of Law" (in the Samples section of my Website http://allserv.UGent.be/~frvandun/welcome.html). Some paragraphs of this section are taken almost verbatim from that paper.

of persons. As we shall see, even our simplified discussion will bring to light many patterns of order that are familiar from the philosophical and theoretical literature on law.

'X lawfully belongs to y' is the basic relation in our conceptualisation of law. It is a relation between a means of action ('x') and a person ('y'). As a synonym for 'the means of action that lawfully belong to a person', we occasionally shall use the term 'property'. Alternatively, we shall say that if a means of action lawfully belongs to a person then that person is responsible or answerable for that means.[15]

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

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

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

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

Obviously, the axioms allow us to define different sorts of persons in terms of the relation 'x belongs to y'. For example, we can define the concepts of a real person (as against an imaginary one) and a free person (as against one who is not free) as follows:

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

[15] 'X belongs to Y' literally means that Y has an interest vested in X—an investment. In Dutch and German translations, it means that X listens to (or obeys) Y. In French, it means that X is linked to Y (as part to whole, or as periphery to centre).

Obviously, only real persons can be free. An imaginary person, therefore, is not free. On the other hand, a real person who is not free must belong to some other person(s). Indeed, a real person is not free if and only if he belongs to some other persons.

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

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

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

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

From definitions 5 and 6, it immediately follows that sovereign persons are autonomous. It does not follow that all autonomous persons are sovereign. Thus, while every person is either autonomous or heteronomous, it is not the case that only heteronomous persons lack sovereignty. Persons—for example, Rousseau's citizens—may be autonomous yet not sovereign. If that is the case for a particular person, we shall say that he is strictly autonomous.

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

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

Our definitions imply that every person either is sovereign or else either strictly autonomous or heteronomous. Thus, in law, the class of persons is partitioned exhaustively in three mutually exclusive subclasses of sovereign, strictly autonomous, and heteronomous persons. About the number of persons (if any) in any of those sets, our formal theory has nothing to say. However, some general quantitative results can be derived. For example, we know that every non-sovereign person belongs to at least one other person. Consequently, strict autonomy and heteronomy appear only in a world with at least two persons. Conversely, if there is only one person in the world, then the concept of law implies that he must be sovereign. Also, if only one person is autonomous then he must be sovereign. Moreover, we can use a process of inductive generalisation to arrive at the result that all persons can be heteronomous only in a world with an infinite number of persons. In other words, only in such an infinite world can there be serfs who are not subjects, or masters but no rulers. Conversely, in a world with a finite number of persons, at least one must be autonomous and all serfs must be subjects of some ruler.

Autonomous collectives

A strictly autonomous person always belongs to another strictly autonomous person, who in turn belongs to him. Thus, he is always ‘in community’ with at least one other strictly autonomous person. Both of them, we shall say, are members of the same autonomous collective. Obviously, every strictly autonomous person is a member of an autonomous collective. Indeed, while there may be any number of autonomous collectives (subject, of course, to the condition that such a collective must have at least two members), a strictly autonomous person is a member of one and only one autonomous collective. That is so because every member of an autonomous collective belongs to every one of its members. Consequently, if a person is a member of autonomous collectives C1 and C2, he belongs to every member of both collectives, every member belongs to him, and therefore (by Axiom 2) every member of C1 belongs to every member of C2, and vice versa. Then the members of C1 and C2 are members of the same autonomous collective, and C1 and C2, having the same members, are the same collective.

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

The members of an autonomous collective may be masters and rulers of other persons. The latter are the serfs and subjects of each of the members.

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

Autonomous collectives are well known in the history of the philosophy of law and rights. For example, we may represent Hobbes' natural condition of mankind as an autonomous collective. In the natural condition, Hobbes wrote, there is no distinction between 'mine' and 'thine' as every person has a right to everything, including 'one another's body'. Consequently, there is no distinction between justice and injustice.[16] His argument was that the autonomous collective of the natural condition was an impractical, indeed life-threatening state of affairs. For him it was a dictate of reason that men should abandon the condition of the autonomous collective and should reorganise in one or more 'commonwealths'. Each of those would be defined by the relationship between a free person (ruler-master) and a multitude of subjects (who are also serfs).

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

Rousseau and Hobbes, then, agreed on the thesis that natural law — the principle of freedom among likes (natural persons of the same kind) — had to be replaced by positive legislation. Rousseau, however, thought that it was theoretically possible to reproduce the formal characteristics of natural law as 'liberty and equality' for the members of an autonomous collective. That was the basis of his claim to have 'squared the political circle', that is, to have

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

proven that the state could be legitimate, in accordance with the formal requirements of justice. Formally, his solution requires that we distinguish sharply between natural persons and citizens. We have to suppose that for every Jean and Jacques, members of the same autonomous collective, there is a person that is different from both, a *citizen Jean* and a *citizen Jacques*. We also have to suppose that the latter 'civic personae' are merely numerically different manifestations of the same person, the Citizen. We can express those suppositions formally as follows:

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

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

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

Thus, the natural persons Jean and Jacques may be members of the same autonomous collective ('the People'), and then they are strictly autonomous in their dealings with one another. On the other hand, as natural persons they also legally and heteronomously belong to their own civic persona, the Citizen. They are subjects and serfs of the Citizen, who is a sovereign person. Hence, the Citizen may use force against them to free them from their own human nature and to make them into what they presumably want, and by accepting the social contract have committed themselves, to be: citizens. That, of course, is Rousseau's 'paradox of liberty'.[17] It is not really a paradox within his system: there is no place for free natural men in the state, as they would immediately destroy the unity that is the necessary condition of the sovereignty (hence the liberty) of the citizen.

Note that we had to introduce a modal notion of belonging, namely 'to belong legally', to make sense of the theory. The way in which one natural person belongs to another natural person cannot be the same way in which one such person belongs to some artificial persona. Indeed, if A is a natural member of an autonomous collective and A belongs to his civic persona c(A) in the same way in which he belongs to the other natural members of the col-

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

lective, then c(A) would be just another member of the collective — a strictly autonomous person. Rousseau's theory of the state then would be simply Hobbes' theory of the natural condition of mankind with an additional number of ghostly fictions participating in the war of all against all. Hobbes' theory of the social contract, by the way, also had to introduce a 'legal' notion of belonging. *Politically*, in the state, the subjects belong to the ruler. However, the latter *legally* belongs to the citizens, who supposedly have 'authorised' him to do what he wants. Thus, the Sovereign legally is the 'actor' or agent, of whose actions the citizens are legally supposed to be the 'authors'. Consequently, he rules them by their own authority.

We should also note that Rousseau's 'solution' to the problem of the legitimate state rests crucially on his inversion of the natural order of things. While the common aspect-person (the Citizen) is the product of the human imagination, the theory elevates him to the status of a sovereign person for whom his creators are merely subjects and serfs. It takes 'L'imagination au pouvoir!' very literally indeed. Rousseau's theory redefines the perspective on order among persons in terms of a 'legal' notion of belonging that requires a reference to the common aspect-person, the Citizen. That Citizen is the civic persona c(P) of every human member of the autonomous collective created by the social contract. If it were not for the inversion of the natural order of things, the notion of an aspect-person would be unobjectionable. For example, assuming that

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

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

Rights

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

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

Note that this definition merely states the truth-conditions of statements of the form specified in the definiendum. Thus, to refute the claim that P has

right to deny Q the use of X, one may point out that neither X nor Q belongs to P or that P is a serf or subject of Q.

As an immediate consequence, we have the theorem that no person has right to deny himself the use of himself. Indeed, according to definition 9, the statement that a person has right to deny himself the use of himself is true if and only if that person belongs to himself and does not belong to himself—but that is a contradiction, which cannot be true. Another consequence is that a person has right to deny himself the use of any means only if it belongs to him. The right to deny the use of a means to a person does not belong to one to whom that means does not belong. Making use of definition 9, we now define the notion of a right to use some means (or person) without the consent of some person.[18]

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

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

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

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

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

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

Concerning autonomous collectives, we see that a member of an autonomous collective has right to the use of any other members' means without

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

their consent. Moreover, members of the same autonomous collective have right to the use of each other without consent. Of course, the autonomous collective itself may be based on a contract. That was the case with Rousseau's social contract, which first creates a 'People'. However, once the People has been created as an autonomous collective, no further consent is required when one member, acting as a citizen, exercises his sovereign function in making law for all the other members. Only the constitution of the collective requires actual consent, particular legislation does not.

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

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

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

Again, it is worth noting the essential implication of our definition for autonomous collectives. If a member of an autonomous collective owns X then every member of that collective owns X—which is another expression of the perfect community and communism of such collectives.

Of course, we could define other types of property—for example, common property, communal property—but we shall not overburden this informal discussion with too many definitions. A far more interesting extension of the logical analysis results if we introduce the concept of action by means of an appropriate set of axioms. Then we can consider law as an order persons, their means and actions, and include in our analysis the right to do something as well as freedoms, liberties, obligations, inalienable rights, and harms that are relevant from the point of view of law. However, this is not the place to expound this extension.[19] Here, we shall continue to look at law as an order of persons and their means. It should be clear that the relation 'x belongs to y' as delimited by the axioms 1 and 2 allows us to define quite a number of concepts that are familiar from the theoretical and philosophical literature on law.

[19] See "The Logic of Law" (referred to in note 14).

The general principle of justice

One extension that we should consider is the concept of innocence. We have to consider the introduction of that concept as an extension because we do not define innocence in terms of the relation 'x belongs to y'. Of course, theories of law may differ significantly in their stipulations regarding the material conditions of innocence. Nevertheless, the distinction between persons who are innocent and persons who are not is of the first importance in any theory of law. In fact, it is difficult to see in what way a theory of law can be practically relevant if it does not differentiate between innocent persons and others. One reason is that we need the concept of innocence to distinguish between justice and injustice—and that distinction, after all, is a primary reason for developing a theory of law.

We use the concept of an innocent person to formulate a general principle of personal justice.

General principle of justice. In justice, only innocent persons can be free.

Thus, a non-innocent person cannot be considered in justice to be a free person and to belong only to himself. He must have done something or something must have happened that gave some other person a lawful claim to his person. A non-innocent person always belongs to some other person. While this does not exclude him from being a member of an autonomous collective, it does rule out that he is a sovereign person. Notice that the principle does not say that all innocent persons are free. For example, we may have a theory of law that allows innocent persons to be slaves or serfs. Alternatively, we may have a theory that allows corporations or other artificial persons to be innocent and yet insists that artificial persons cannot be autonomous. Such theories are neither necessarily inconsistent in themselves nor formally inconsistent with the concept of justice.

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

Natural persons and natural law

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

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

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

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

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

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

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

Clearly, for every natural person, some means naturally belongs to him. Also, for every pair of natural persons, there is a means that naturally belongs to one of the pair but not to the other. It is out of the question that one person by nature is a serf or subject of another.

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

However, the concept of a natural person, as it is defined here, is purely formal. We are not defining what a *human* person is. Natural law theorists focus on natural persons (in an ordinary sense of the word 'natural') as the persons whose existence is necessary to make sense of law as an order of persons. However, although we may believe that human persons are natural persons, and perhaps the only natural persons, we cannot charge a purely formal theory with these assumptions. A legal positivist, for example, might apply the definition and the axioms to 'states' or to 'legal systems'. Of course, he would not use 'by nature' or 'naturally' but an expression such as 'legally necessary' or perhaps 'by the fundamental presupposition of legal science'. Disdaining talk about natural persons and their natural rights, he nevertheless assumes that the whole conceptual edifice of law rests on a collection of basic entities—states, legal systems—and their rights. In the terminology of this section, they are his 'natural persons'. However, positivism clearly involves a misappropriation of the form of natural law. It is an attempt to base the theoretical edifice of law on a personification of certain theoretical constructs. In taking these as the primary data for defining the concept of law, it ignores the fact that those theoretical constructs merely are descriptions of patterns of human actions from which any reference to the actual human agents that produce those patterns has been eliminated.[20]

The Postulates of natural law

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

Finitism. The number of natural persons is finite.

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

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

With the help of Naturalism, we can deduce that every person belongs to at least one natural person. Note that the postulate of naturalism says 'belongs [by law]', not 'belongs by nature'. According to Naturalism, the responsibil-

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

ity for any means or person—and therefore for any action—ultimately always rests with a natural person. It also follows that only natural persons are free or sovereign.

In conjunction with the postulate of Finitism, Naturalism implies that not every natural person can be heteronomous. In other words, at least one natural person must be autonomous. Consequently, natural law as an order of natural persons must contain at least one sovereign natural person or else at least one autonomous collective of natural persons with at least two strictly autonomous members.

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

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

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

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

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

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

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

The Principle of natural justice

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

Principle of natural justice. Innocent natural persons are free.

In natural law, a person who is not free is either an artificial person or else he is not innocent. This is a way of saying that a justification must be given for denying freedom to a natural person—that is, for asserting that he lawfully belongs to some other person. That justification should consist in a proof of his guilt. Together with the general principle of justice, this gives us: A natural person is free (or sovereign) if and only if he is innocent.

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

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

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

Law and human beings

The place of human beings in law

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

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

Obviously, anti-humanism has no use for the principle of natural justice in its consideration of human beings. It may acknowledge that only innocent humans can be free persons, but it does not hold that in justice an innocent human being is entitled to freedom. Anti-humanism is the postulate underlying modern positivism. As we have seen, positivism reserves natural personhood to legal systems or states and personhood to artificial persons such as social positions, roles and functions within a legal system. People have a place in

law only as holders of such positions or as performers of such roles and functions. Thus, human beings have no rights of their own. Natural law theories, on the other hand, are committed firmly to the view that the natural persons par excellence are human beings.

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

Humanist naturalism. Every natural person is a human being.

This postulate asserts that only humans are natural persons. Consequently, it is unacceptable to those who believe the natural law comprises non-human yet natural persons (animals, gods, demons, personified historical or sociological phenomena like tribes, nations, states, or whatever). On the other hand, the postulate leaves open the weak anti-humanist possibility that some human beings are not natural persons. Arguably, some human beings cannot be classified as natural persons because of genetic or other defects that cause them to lack the capacity to act as persons. However, humanists certainly would refuse to leave open the possibility that some human beings that have that capacity should not be regarded as natural persons.

In conjunction with the postulate of naturalism and the general principle of justice, the postulate of humanist naturalism implies that all free persons are innocent human beings.

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

Naturalist humanism. Every human being is a natural person.

Clearly, naturalist humanism in conjunction with the principle of natural justice implies that all innocent human beings are free persons. However, it maintains that there may be natural persons other than human beings.

Of course, as noted before, one can make a good case for the thesis that very young children or humans with severe mental deficiencies should not be considered as persons because they do not have the requisite capacities to act as purposive agents. Moreover, they have no capacity for understanding what it is to have or to lack a right. However, if we read the postulate as a presumption—all human beings must be presumed to be natural persons when there is no proof to the contrary—then we can take much of the sting out of that objection. Another but rather vague way to do that, is to construe the words ‘human being’ as short for ‘normal human being’.

The conjunction of the two humanist postulates mentioned above gives us a general postulate of humanism.

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

In conjunction with the postulates of natural law and the principles of general and natural justice, Humanism implies that all and only innocent human be-

ings are free.

Leaving aside merely fanciful and nominally possible interpretations of the concept of a natural person, we have to make do with the postulate of humanism. Assuming further that human beings enter the natural order as innocent persons, the postulate also implies that the 'original status in natural law' of every human person is that of a sovereign person.

If we are very liberal in our ontology of the natural world, the postulate of naturalist humanism might enter as a possible candidate. However, it would bring in its wake controversies about what non-human natural persons there could be, which we could not decide by any rational method. In any case, natural justice obtains only if innocent human beings are left to be free or to belong to themselves and only to themselves.

As noted above, the postulate of humanism implies that all and only innocent human beings are free. In other words, it implies that 'sovereignty' is the status in natural law of an innocent human being. Thus, all the propositions that we have derived about the rights of sovereign persons apply without restriction to innocent human beings. An innocent human being has right to the use of what he owns—in particular, his own body—without the consent of any other human or non-human person. Moreover, no natural or artificial person has right to the use of what belongs to an innocent human person without his consent.

Those propositions state the natural rights of a human person, at least in so far as he is innocent. They are the logical basis of the theory of anarchocapitalism, which is, therefore, a theory of natural law and justice. Its distinctive characteristic, which sets it apart from other theories of law as an order of persons, is its application of the concepts of a natural person, an innocent person, and the principle of natural justice, to human beings.

Law without justice

The proof of the sovereignty of innocent human beings crucially involves the principles of justice and the concept of innocence. If we leave aside references to the principles of justice then we no longer can prove the thesis of individual sovereignty for innocent human beings. However, that does not mean that we cannot derive any conclusion about the status in natural law of humans. Indeed, the postulate of consistency implies that natural persons (which, according to Humanism, are human beings) are persons in the sense of law. Thus, any theory of law that denies that human beings are persons violates that postulate of natural law. Moreover, the combined postulates of Finitism and Naturalism imply that at least some natural persons (human beings) must be autonomous. Therefore, if we postulate Humanism, no theory of natural law can hold that all humans are heteronomous persons. At least some of them must be autonomous.

Consequently, if we reintroduce the concept of innocence but leave out the principles of justice, we have a choice of natural law theories that deny that

freedom or sovereignty is the natural right of all innocent human beings. Among those theories, some are consistent with the notion of 'equal rights' for all innocent human beings. Their common characteristic is that they assign to every innocent human being the status of a strictly autonomous person or membership in an autonomous collective.

Other theories of natural law without justice are not compatible with the notion of 'equal rights'. For example, a theory of this sort may hold that while some innocent human beings are sovereign, others are strictly autonomous. Another possibility is that some innocent human persons are regarded as sovereign, while the others are regarded as heteronomous. Obviously, other distributions of the attributes of sovereignty, strict autonomy and heteronomy among human beings are also possible.

Philosophically speaking, an 'equal status' type of theory is considerably less demanding than an 'unequal status' type. Because it starts with the premise that, in respect of the law, human beings are fundamentally alike, it needs no justifying argument for discriminating among innocent human beings. An argument for assigning to such persons one status rather than another is all it needs to provide. Note, however, that a theory of a type that assigns to all or some innocent human persons the original status of a member of an autonomous collective need not assign all of them to the same collective. Similarly, theories that assign to all or some innocent human persons the status of a heteronomous person need not assign them all to the same masters or rulers. All of those theories require not only an argument for justifying their pick of the original status in law of any human being, but also an argument justifying a particular distribution of human persons among an untold number of autonomous collectives or rulers.

Only theories that assert that every human person originally (in his state of innocence) is a sovereign person avoid those complications of discrimination and distribution. Formally speaking, there is only one such theory. As we have seen, it is the humanistic theory of natural law to the extent that it makes a person's status in law depend on his innocence according to the principles of justice. It is the only type of theory that combines freedom and equality as defining the natural rights of innocent human beings. In short, it holds that, for human persons, 'freedom among likes' is the only lawful condition.

If we accept the postulate of humanism and the principles of justice, then the concept of natural human law is formally unambiguous. However, it does not leave any room for an original right of legislation, only for contractual obligation. In that sense, it has decidedly anarchistic implications, as indeed we should expect from any theory that takes freedom and likeness ('equality') for human beings seriously. Not surprisingly, at all times, major political and social thinkers have attempted to deny that conception of natural human law. They endeavoured to replace it with a conception of a social law in which all or some human beings merely function as artificial persons, defined

by imposed rules. They did so by attacking either the thesis that innocent natural human persons are free or the thesis that they all are equal in law.

For each of those strategies, we can distinguish between attempts to prove that for human beings the characteristic of freedom or equality is in fact false and attempts to prove that, although it is true, it nevertheless is undesirable. Plato's theory of the 'noble (or necessary) lie' grants that all humans are 'equally children of the Earth' but then argues that they must be convinced that their souls are made of different stuff (gold, silver, bronze) to make them accept the inequality imposed by the structure of the *polis*. Rousseau claimed that though 'men are born free, everywhere they are in chains', and proceeded to legitimate their loss of natural freedom (and its transmutation into the 'civic liberty' of a particular state). Aristotle flatly denied that likeness ('equality') was a natural relation. His theory of 'slaves by nature' was the egregious expression of that denial, which made social order 'natural' by citing nature as the formal cause of rule and servitude. Marx denied that freedom was even possible for a 'particular individual'. It would be attainable only in the advanced stages of communism, and then only for the 'universal individual'.

The denial of equality, which implied that natural freedom could be at most the privilege (that is, the 'liberty') of a social or political elite, dominated in attacks on natural law until the eighteenth century. At that time, the attack began to aim at the concept of freedom, making 'equality' quasi-sacrosanct. However, that 'equality' no longer was the natural likeness of human beings (as members of the same species), but an equality of social position. To become 'socially equal', human beings had to renounce their freedom.

The denial of equality implied that at least some innocent individuals lacked the natural right of freedom or had the status of a heteronomous person. It implied a distinction between rulers and masters, on the one hand, and others who, although they are innocent, are subjects and serfs. This made it possible to introduce the notion of lawful political rule or legislation 'of one man over another'.

The denial of freedom by theories that nevertheless assign an original status of strict autonomy to all or some human persons allows the introduction of the notion of lawful political rule or legislation of a 'republican' kind. Indeed, as we have seen, within an autonomous collective every member has right to the use of every other member as well as of all means that do not belong to any one outside the collective. In other words, every member has right to impose his will or rule on the other members while being himself subject to the rule of every other member. In its crude form, such a collective is what Hobbes called 'the natural condition of mankind' and Marx 'raw communism'.[21] In its civic form, it is the republic of Rousseau, in which human be-

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

ings have no status except as means of action, or serfs and subjects, of the artificial person that is the Citizen.

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

As we noted before, among lawyers of a positivistic persuasion, the common denial of natural law and justice takes the form of a denial of the postulate that human beings are natural persons. In this, they make use of Rousseau's strategy of substituting particular aspect-persons as the primary subjects of law. We have seen that Rousseau considered natural persons under a certain aspect, as citizens, and assumed that they accordingly have rights only as citizens. Thus, in the legal order of the state, neither Jean nor Jacques has any rights; only citizen(Jean) and citizen(Jacques) have rights.

Obviously, the aspects under which we can consider natural persons are innumerable. They do not form a closed set. Any aspect of a person P might be personified. A theory of law that took aspect-persons as its starting point would have an arbitrary basis in its selection of relevant aspect-persons a(P), b(P), c(P), and so on ad infinitum. It would allow us to say that P is one person but also that, from the point of view of law, P-as-a-woman is a different person with a different set of rights. Similar constructions are possible, as the case may be, for P's rights as a consumer, a member of some 'minority' or other, a worker, a child, a childless person, a pensioner, a veteran, an obese person, a Muslim, and so on. The multiplication of persons would apply to every natural person. It is then all too tempting to dismiss P himself altogether and simply add P-as-a-human-being, say h(P), to the list of aspect-persons.

As soon as we admit aspect-persons as persons in their own right and not simply as heteronomous serfs of a natural person, we can assign a different status in law to each aspect. Consequently, a natural person P, considered under one aspect, a(P), might be sovereign and at the same time, considered under another aspect, b(P), heteronomous or a member of this or that autonomous collective — yet P himself need not have a status in law. Arguably, that is very nearly the ruling conception of persons and rights in fashionable opinion today. However, it is indicative of a complete dissociation of the concepts of 'person' and 'rights' from any reality. With the suggestion that a natural person is simply a 'theoretical construct', the result of assembling apparently pre-existing different aspect-persons, it is also a denial of the proposition that a natural person *is* an individual person. It is in fact a complete dissolution of the idea of a natural law.

Anarchocapitalism rests on the notion of natural law as an order of natural persons rather than a binding set of rules or commands. As a normative theory, it holds not only that we have good reasons to respect the natural order but also that we have no right not to respect it.[22] However, whether or why natural law ought to be respected—that is to say, whether we ought to respect one another for the free persons we are—was not the issue here. My purpose was not to try to justify any particular position in ethics or politics. It was only to explicate and to de-mystify the concept of the natural law that anarchocapitalism presupposes. Any one who can grasp the notions of a human person and what belongs to him, and of innocence, and the distinction between artificial and natural persons, should be able to comprehend what natural law and natural rights are. Nevertheless, I hope that the analysis will help the reader to get a clearer view of some of the problems of justification in ethical or political discourses about law. At the very least, it should clarify the logic of the anarchocapitalist claim that individual human beings are sovereign persons in natural law.

[22] I have provided an argument to prove that position elsewhere. See my *Het Fundamenteel rechtsbeginsel* (Kluwer-Rechtswetenschappen, Antwerp, 1983), especially chapter 3.