HET FUNDAMENTEEL RECHTSBEGINSEL

THE FUNDAMENTAL PRINCIPLE OF RIGHT/LAW

For Greta

The Fundamental Principle of Right/Law

an essay on the foundations of right/law

Frank van Dun

(Translation by Rembert Moesick)

Copyright I don't know who
Translation provided freely for submission to Mises Institute (or whoever will publish it)

Translator's Note

The Dutch and English language lend themselves to translation pretty easily. There are not too many cases in which subtleties or connotations are lost. The subject of this book, sadly, is one of these.

Before I get to real complicated stuff, it even starts with "beginsel". The meaning of "begin" should be obvious. Straight from the web (I'm not a linguist): In Dutch, the suffix -sel mainly forms nouns from verb stems. So a "beginsel" is a start of sorts. In the context of philosophy it means a fundamental, starting principle. The word "fundamenteel" is given extra emphasis in the title already. The idea of a "start", however, I could not elegantly fit in there any more than by reiterating "fundamental principle".

Even more… fundamentally… In Dutch (and some other languages), there is the concept of "recht". The word itself has a whole bunch of meanings. It can be applied to mean "straight", as in not bent, not crooked. But, more to the point of this book, it also means "right" as in "my rights were violated". It also has the word "echt", which means "real, not false", in it. This may just be a coincidence, I haven't looked into it, but it stands as an interesting fact all the same.
These meanings are not the one use when one says "rechtsfilosofie", which would translate as "philosophy of law". In this context it means "justice, that which is right, real, correct". This connotation is not at all present, in my view, in the word "law" as it is used today. Furthermore, the way to translate "law" back to Dutch would be to use the word "wet". "Wet", is "lex, legislation, decree", not "recht". There is a fundamental distinction in these concepts which are not recognized in common, or even most expert use, today. Since there is not direct, true translation of "recht", and

in order not to lose what I consider to be one of the key subtleties in the book, in the fundamental principle of law/right and the argument for it itself, I will translate the word “recht” as “law/right” (or “right/law”). Where the emphasis is on the “justice” term explictly, I will endeavour include it.

One last linguistic subtlety I feel we must grapple with involves society. The book goes into the origins of the word society (societas), and what it means. That meaning translates perfectly into the Dutch word “maatschappij”. This is the word that you’d use for an organization, but it is also used for “society” in the social sense. We have another word, however. “Samenleving”. “Samen leven” translates to “living together”, the “-ing” is like that in “a hijacking”. So, something like the thing in which, or the process through which (or the combination) we all co-exist/live together. Fran van Dun, in other works, goes deeper into the distinction. Here I will just state in short: society is an organizational form in which conflict is avoided/prevented by making the members, and/or (a subset of) their means into to means towards the attainment of the goal of the organization. A society for stamp-collectors you pay an annual membership fee to, for example. Or, you know, society. “Samenleving”, society*, is a system in which conflict is avoided/prevented by absolutely denying anyone any right to use means other than their own towards the attainment of their own goals. Examples would include a circle of friends that would never violate each-other, and respect each-other as individuals, or you and a neighbour that lives 5 miles away and whose property you don’t try to unlawfully claim, nor he yours.

There are some other words I will use very specifically, or whose connotations prove my point, which I will list in a glossary along with a short justification of why I am using that translation. These explanations will, I think, further justify my slightly unconventional use of terms in this translation.

Glossary

law/right (or right/law) – “recht” – “straight, right, law”

legislation – “wet” – “Lex”, decree, eg state “law”

injustice – “onrecht” – something that is in violation/negation of, or is counter to “recht”

justice* – “gerechtigheid” – justice in the sense “let justice be done”

just* – “recht” – in accordance with law/right

just – “rechtvaardig” – “recht”-”vaardig”, the latter meaning skillful in, capable of

justice - “rechtvaardigheid” – “rechtvaardig”-”heid” the proper application of “recht”, the virtue

unjust – “onrechtvaardig” – not “rechtvaardig”

jurisprudence – “rechtspraak” – literally “speaking recht”, but usually refers to state monoply court functioning

judge – “rechter” – a judge, for a court, someone that renders judgments. The literal translation or interpretation would, however, be “right-er, one who makes right/straight/**recht**”

lawful (unlawful) – “rechtmatig” – “recht”-”maatig” – the root of the latter, “maat” meaning “measure”, so according to the measure of “recht”, as opposed to “legal/illegal”. Sometimes “rightfully” may be used.

given – “gegeven” – a given. Not data, but a fact of the matter

society* – “samenleving” – (living together) see Translator’s Note

Society – “maatschappij” – see Translator’s Note

rule(-rship) – “heerschappij” – dominion, but I want to avoid any connotation to dominium

context dependent – “mens/mensen” – “human/humans”, but also carries connotations of “people”. In these crazy days of possibly emergent AI, I opted for “people” or “humans” where I thought it context-appropriate

context dependent – “vermogen” – “ability”, but also “totality of means/wealth” like “estate”, which is an interesting fact in and of itself. I endeavoured to translate appropriately.

happiness* – “geluk” - The Dutch word “geluk” means “fortune/luck”, as well as “happiness”. This latter not so much in the sense of simple happiness (which would be “blij”), more like the happiness and contentment associated with recognizing your fortune/how fortunate you are, or with succes. “Het is gelukt!” - It succeeded! “*” is used to differentiate from “blijdschap”

Luck/Fortune – “geluk” – see above

misfortune/unhappiness/discontentment – “ongeluk” – see above “geluk”. Also means accident

Table of Contents

Translator's Note....iii

Glossary....iv

Preface to the new edition....ix

Preface....xi

1 Right/law and Philosophy....1

Introduction....1
Homo Agens....3
Practical Philosophy....5
Philosophy of Law/Right....7
Positivism....10
Subjectivism and Objectivism....15
Epistemological Remarks....19
Conclusion....25

2 Theories of Law/Right: Overview and discussion....32

Interpretations of the Fundamental Principle of Law....32
Masters and Slaves....39
Equality....43
Alternative theories of law/right....49
"Subjective" and "objective" right/law....56
The Casuistic Reflex....60
Right/Law and Unity....63
Consensus....70
Mysticism....78
The legal order....89
Duty to obedience, and representation....99

3 The Fundamental Principle of Law/Right....113

The Validity of the Fundamental Principle of Law/Right....113
Continuation....127
Fundamental Ethical Principles....142
People and Means....154
Contract....173

4 The Order of Law/Right....185

Law/Right and violence....185
Aggression and punishment....194
Financial Damages....201
Moral Damages....206
Discrimination....212
Self-defence....222

5 Zoon Politikon or Animal Sociale....229
Introduction....229
John Locke and “Natural Law/Right”....231
In the beginning….....247
A matter of happiness*/fortune....263
Eudaimonia....281
Equality and Justice*....301
Conclusion....324

6 Polis and Societas....327
Unity/Singularity and Multitude....327
Societization of politics....344
Constitution of the political space....357

7 Right/Law, Freedom, Equality....379
Two Conceptions of freedom....379
“Positive” Freedom....393
Equality and Egalitarianism....404
Egalitarianism and Imperialism....430
Conclusion....463

8 Right/Law and State....467
Introduction....467
The Fiscal Relationship....470
Fiscal classes: A Historical Note....489
The State as Protector....501
Conclusion....515

Appendix A....519
The Individual as a Sovereign Subject of Law....519
Introduction....519
2 The Fundamental Principle of Law/Right....521
2.1 The sovereign right to self-determination of the individual....521
2.1.1 Rejection of any "master/slave"-relation....522
2.1.2. The order of right/law according to the fundamental principle of right/law....525
2.2 "Political philosophy" contra "social philosophy"....526
2.3 Criticism of egalitarianism....528
2.4 The state as institutionalized violence....530
3. Critical Remarks....532
3.1 Man as a sovereign subject of law/right....532
3.2 Man as a rational being....533
3.3 Psychic Damage....536

Translators Thanks....540

Bibliography....542
A....542
B....542
C....542

D.....542
E.....542
F.....542
G.....542
H.....542
I.....542
J.....542
K.....542
L.....542
M.....542
N.....542
O.....542
P.....542
Q.....542
R.....542
S.....542
T.....542
U.....542
V.....542
W.....542
X.....542
Y.....542
Z.....542

Preface to the new edition

By Frank van Dun

Preface

Philosophy of law does not merely entail 'philosophising' on the subjects of language or of the problems, large and small, that judges, lawyers, lawmakers and jurists face during their daily practice and activities. When engaging in philosophy of law one has to at least dare to question said activities and practices. Using them as a given frame of reference would be methodologically unjustifiable. The philosopher of law is not the equal of their task if he simply constrains himself to a positivist approach to law/right, that is to say if he chooses to accept without question his contemporary generally accepted definition of law as the basis of his reflections. But even the questioning of certain "juridical" activities and practices itself does not necessarily provide the impetus for a fundamental reflection on the philosophy of law/right. Fundamental philosophy of law/right is not immediately and certainly not exclusively concerned with the so-called legal system that we know so well (yet so little) from our daily lives, the papers, education and the history books. That would indeed be impossible: that legal system is by its very design much more aimed at restoring injustice and would, ideally, be superfluous. It is consequently impossible to learn very fundamental things about law/right by studying an institution whose current form is so clearly determined by the experience, justified or not, of injustice in the world. It is safe to hypothesize that, if institutions whose giving task is the fighting and righting of injustice have a role in society as large as they do today, the conception of law/right in the minds of the people will not be very clear. As a consequence we may not simply assume matters to be different with professional jurists, and that their conception leaves nothing to be desired.

In a sense, philosophy of law/right is the most fundamental branch of philosophy. It is in this sense that I will regard this essay. The fundamental character of the philosophy of law/right comes to light when we consider that it is hardly possible to conceive of a domain of knowledge and reflection that is not the stage to far-reaching and deep-rooted differences of opinion. Each and every argument shows, time and again, that there are people that cannot share each-others' opinion, and it is no wonder:

we are all individuals. We all see the world from a completely unique perspective, necessarily so. It is impossible in the strictest sense of the word to look at the world through the eyes of another, to make the perspective of another our own. Despite all literary metaphors, we can change, but we can't become someone else: each of us is who he is, and none of us is capable of becoming another. It is easy to become not yourself, to deny yourself; but it is impossible to become another. We can encounter one-another, but every encounter presupposes multitude – every encounter presupposes that those that encounter each-other are not one. Every encounter destroys the illusion of unity and thus of infinity; every encounter makes us aware of the existence of a different point of view, a different perspective on all things, of a border between the Me and the Thee, and it does so precisely in the moment that is also makes us aware of each of us being a Me-Thee, both a 'Me' and a 'Thee'. That border can not be exceeded but in the fiction of self-deceit and the conventional subjugation of one to the other.

Every encounter undermines the illusion of unity and omnipotence, omniscience and infinity, and implies the challenge of dialogue. Dialogue is the negation of the monologue, the confrontation with another point of view, and thus with the necessity of coming to terms with that other point of view. The dialogue disrupts the monologue with the disconcerting question: "What if I disagree with you?". That question is implicitly present in ever dialogic context, regardless of the subject discussed, be it the most daily and mundane or the most deep and metaphysical matter. Each of us represents a point of view towards, a perspective on all things, and thus on the same things. The one is part of the world of the other, and vice versa. Behind speech is action, behind the symbols of things the things themselves; behind the mental manipulation of symbols and plans the physical manipulations. All symbols and plans can coexist, as symbols and plans, in one world, but not all plans can be executed in one world. All plans and schemes are threatened by the question "And what if not everyone agrees?". It is easy and seductive to build utopian constructions when one tacitly assumes everyone will agree -especially when one has only learned to monologue – to see others only as resistances,

there to be overcome, to be incorporated. Such tacit assumption is no more than this: an assumption, not a certainty, not a given.

The question remains: "What if not everyone agrees?' Who has the right to decide over what? Whose word is law? To whom? In relation to what? Why? These are the questions that make the philosophy of law/right the most fundamental branch of philosophy. There is no domain of human knowledge or ability that is not the stage to differences of opinion – philosophy itself being no exception. Philosophy is a dialogue however, and not a monologue. Only from a different point of view can the limitations of one's own point of view be made clear and concrete: one's own point of view always provides a perspective on all things, never a different perspective. Only through dialogue can the validity of a point of view be tested. However, dialogue can only exist when there are differences of opinion, such that philosophy can only begin once we have determine what our attitude should be in regards to the fact that there are differences of opinion, and thus conflicts (since it involves differences in opinion regarding the same things). Without a fundamental principle of law/right everything we do or say is undetermined, without border, indeterminate, without principle or finality: it is useless to call something the solution to some practical or theoretical problem or other, if we are not capable of expressing for whom that solution is valid, given that other solutions are also proposed.

What I offer the reader is an essay about the fundamentals of law/right: my answer to the question of what law/right is. The interpretation and the importance of that question are illustrated in the first chapter, in which I will also make a number of general epistemological remarks which, I hope, will suffice to situate the theory of law/right I defend here in regards to a number of philosophical controversies. The second chapter will attend to the various aspects of reality that allow us to specify the problem of law/right, and to identify apriorisitically the various forms a philosophy of law/right can take. Judgments of just* and injustice are, as judgments, logical entities: they cannot be combined at random into a logically coherent whole, rather they must be ordered in a logical fashion. Since judgments are judgments, and not external givens/data (ed), we must produce them ourselves, which means we must have an insight into the differing ways in which we can produce those judgments. Chapter 2

is an attempt at fine-tuning and solving that problem. It also contains a criticism of a number of alternative theories of law/right, that are concluded to be either incoherent or indeterminate in content. As the criticism pertains to the fundamental logical form of the alternative theories of law/right in question, there exists no need to dwell upon particular theories that can be categorized under said alternatives. The reader should therefore not expect a discussion on the contributions of individual authors . I believe it to be of a much greater importance to provide insights into the truly fundamental alternative theories of law/right than to provide yet another opinion on the opinions of others. As soon as we are capable of identifying the basic givens that determine the problem of law/right, we can tell what forms a solution to that problem can take, and at that point the details of the material which is pressed into those shapes cease to matter much.

In chapter three I argue for the validity of the only theory of law/right that is not found to be inadequate in the second chapter. A central point in this chapter is the relation between law/right and morals , more specifically the priority of theory of law/right in regards to moral convictions. The thesis is that no moral theory can be coherent if it does not presuppose some theory of law/right. This means that the theory of law/right I defend will have to fit into the frame of an ethical theory: law/right must be vindicated, In the sense that one must be able to show that there is an ethical theory that prescribes respect for law/right. That matter is addressed in chapter 5. In chapter four I discuss several implications and applications of the fundamental principle of law/right. One part of my intent is to put forward the general characteristics of the order of law/right. The other is to draw attention to the fact that while law/right is a prerequisite for a highly developed society from a moral point of view, it is by no means a substitute for moral development. The chapter can therefore be useful in providing the reader with an idea of how much law/right is a radical alternative to the status quo.

Chapters five and six are meant as attempts to situate the theory of law/right in the framework of what, to me, is the most fundamental contrast in the Western philosophy of man and society*: that between social and political philosophy. I would like in particular to

question the traditional definition of man as an 'animal sociale': it has, in my opinion, no normative significance. Which is to say it cannot serve as the basis of a coherent normative system, and is as a consequence without value as a self-definition of humans, whatever its 'positivist' validity may be. In the seventh chapter I address a number of objections formulated from social philosophy. In the eight chapter, I defend the thesis that the state should be categorized under injustice: whomever tries to reach their objectives through the means which are characteristically utilized by the state-system, acts unlawfully.

The incompatibility of law/right and state urges one to choose between law/right and state, but also means that no-one has the right to choose the state in this question. Now, the state is without a doubt the most important institution of the status quo. For many people it even appears to be the ultimate guarantee of the solvability of our earthly problems (or the ultimate excuse not to do anything about those problems themselves). To them the order of law/right (as opposed to state order) is 'unrealistic' – they are literally and figuratively addicted to the state order. Even though I will be making several remarks about the coherence of the order of law/right, the workings of the order of law/right, of the free society, is not the subject of this essay. An adequate discussion of this fascinating subject would require too thorough an explanation of the principles of the praxeological sciences (the sciences of human action). It is of course correct that no study of philosophy of law/right can be complete without a demonstration of the practical superiority of the order of law/right in comparison to the state order. That demonstration remains beyond the scope of this book. One cannot handle all matters at once. This procedure naturally entails certain risks. It is not clear to everyone why a societal institution should be judged on the basis of law/right, and not on the basis of say, 'utility'. Why, one could ask, should we give up certain institutions just because they can be judged to be unlawful on the grounds of some philosophical construction?

Undoubtedly, a praxeological or economical analysis of the long-run effects of existing state-institutions (such as the state's monetary monopoly, institutions of social security, population policy, etc.) and of the effects of the functioning of said institutions on groups of people that are not involved in them in a "juridical" sense, is invaluable in supporting the thesis that those institutions are unlawful.

However, this thesis does not rest on such an analysis: it is based on arguments of philosophy of law, and only those arguments make clear why even the considerations of utility of all currently existing people do not make for an adequate criteria to judge the legitimacy of an institution. Law/right is a method that allows us to harmonize our actions with the actions of all people, present and future. Everyone agrees that the particular utility of an individual or group cannot be an adequate criteria for law/right, which is why calls upon the "common interest" are so prevalent. But even the interest of the entire currently existing generation is nothing but a particular group-interest. We need the idea of law/right to be able to make judgments whose validity is not dependent on particular considerations of utility. This is why the idea of law/right is such an abstract idea – which is of course not to say that it is based on an abstract conception of the people. On the contrary: the reader will be able to remark that the very abstract idea of law/right I develop here is based on a thorough concretism in the vision on humanity.

All that being said: the goal of this essay is to explain the what and why of law/right, not the how of the workings of the order of law/right. In that sense it may be construed as a plea for us to learn to think in terms of law/right and not in terms of the state or of legislation. And this still leads me, eventually, to the jurists, for it is to them that this plea is mainly addressed, and even then in particular to the students in legal faculties who run the greatest risk of becoming scholars of legislation rather than of scholars of law/right, and as scholars of legislation will be the talking heads of what I consider to be a radically wrong theory of law/right. May this essay show them that the science of law/right can be a legitimate science, and not merely an investment in a specialty that can only maintain its value as long as nothing fundamentally changes about the status quo.

Many people are owed gratitude and thanks for their encouragement and critical remarks. Special thanks go to professors Leo Apostel and Willy Calewart and my colleague Boudewijn Bouckaert. Johan Erauw, Marc van Hoecke, Alfons van Mensel and especially ex-colleague Willy van Poucke provided educational and stimulating discussions. Nico W. Apeldoorn, Rene Broekcaer, Fred Dekkers, Guy de Martelare,

Chris Hocepied, late Iteke Tirion and Dirk van Poucke have contributed much food for thought over the years that has in some way or another had an impact on this work (and not always in ways that will find their approval). Through this route I would also like to thank the many students at the faculty of Law at the Rijksuniversiteit of Ghent, that through their interest, questions and remarks have contributed in no small measure to the eventual formation of the ideas expressed in this essay. A very special place in this list of thanks belongs to Michiel van Notten, a resourceful and enthusiastic proponent of human liberty, and a good friend.

Thanks of a wholly different nature, I owe to my wife, my children and my parents, who applied much patience and understanding and an unshakable good mood in providing me the moral support that made the writing and rewriting of this essay so much lighter than it otherwise would have been.

… and legal tyranny arises whenever there is a departure from this simple principle.

— Elisha P. Hurlbut

Il y a des crimes de passion et des crimes de logique. Le Code Pénal les distingue, assez commodément, par la préméditation. Nous sommes au temps de la préméditation et du crime parfait. Nos criminels ne sont plus ces enfants désarmés qui invoquaient l'excuse de l'amour. Ils sont adultes, au contraire, et leur alibi est irréfutable: c'est la philosophie qui peut servir à tout, même à changer les meurtriers en juges.

There are crimes of passion and crimes of logic. The Penal Code distinguishes them, quite conveniently, by premeditation. We are in the time of premeditation and the perfect crime. Our criminals are no longer these unarmed children who invoked the excuse of love. They are adults, on the contrary, and their alibi is irrefutable: it is philosophy which can be used for everything, even to change murderers into judges.

— Albert Camus

We are all well aware from the history of science that ideas universally believed are not necessarily true. We are also aware that it is only after the untruth of such ideas has been exposed that it becomes apparent how pervasive and insidious their influence has been.

— Jane Jacobs

1 Right/law and Philosophy

"In the animal kingdom, the rule is: Eat or be eaten;

in the human kingdom: Define or be defined."

— Thomas Szasz

INTRODUCTION

The fundamental principle of law/right, the principle of material justice* is: *that every human being is a sovereign subject of law/right, that is to say that every human being has the right to do, or not do, what they will with what is theirs, with all of their means, and consequently that not a single human being has the right to do anything at all to or with the means of another, without the permission of that other.* To each their own, every man master of himself, and no-one else – that is the principle of law/right.

Law/Right, as I understand it, is nothing but the whole of implications of this principle. The fundamental principle of law defines a well-determined theory of law/right, a well-determined answer to the question what the law/right is. The illumination of this answer, and providing it with a foundation and justification, is what I will attempt in the following pages. There are of course also other theories of law/right than the one that considers each person as a sovereign subject of law/right. These theories will also be discussed and judged in what follows.

I will attempt to clarify why none of these alternate theories of law/right is acceptable. The fundamental principle of law alone provides us with a rationally defensible origin for a philosophically adequate theory of law/right. This also means that only this principle can be the basis of a reasonable society, that is to say, a society in which the human striving to better one's self can find expression in a harmonious manner, without being caught in a perverse dynamic that transforms the best of intentions into catastrophic conditions. What I want to present to the reader here is an essay of philosophy of law: a philosophical reflection on and judgment of the differing theories of law/right, their presuppositions and consequences.

It may also be required to point out that the fundamental principle of law/right may only be interpreted as a principle of law/right. It is not a confirmation of the validity of existing titles to property, of which not all, or even most, can be validated on the basis of the principle. It does not contain judgment in favour or against any particular form of economic organization: if every person has the right to use their means as they please, it follows that everyone has the right to create, in concert with like-minded people, an organisation or community that would manage their means collectively – however no-one has the right to force others to join that community: as such every form of *libertarian* 'capitalism', as well as every form of *libertarian* 'socialism', is compatible with the fundamental principle of law/right.

It seems appropriate, before commencing the defense of the fundamental principle of law/right, to use this introductory chapter to better define what I consider to be the actual task of the philosophy of law/right, and afterwards to consider briefly a few very general but fundamental epistemological matters. It is not my intention to put forward a comprehensive epistemology of law/right here. It does seem necessary to address that in an adequate manner, so that it is clear that the fundamental principle of law/right is a legitimate answer to the demand for a definition of law/right, so that it becomes clear how naive and confused is the often-made remark that the fundamental principle of law/right may very well conform to a conception of what law/right *ought* to be, but that it does not answer the 'scientific' question of what law/right is.

HOMO AGENS

The most direct imepetus for every reflection using the philosophy of law/right is of course the fact that people make judgments on right/justice and injustice. People judge the legitimacy or illegitimacy of actions, habits, practices and institutions, just as they judge the veracity or credibility of utterances, hypotheses and theories. They make judgments on the beauty or desirability of goals and ideals; and on the goodness or efficacy of various means and methods for the attainment of their ends and ideals.

Those judgments of just* and injustice, truth and untruth, the beautiful and the ugly, provide the premises for the action of humans, for the individual and collective decisions and deliberation, and are as such the primary objects of the domain of study of practical philosophy, of practical reason. *What should I believe? What should I desire? What should I do?* Those are the questions people in their capacity of acting beings face continuously, and which they must answer no matter what, in a manner more or less intelligent, with more or less 'good judgement' or applicable knowledge. The world does not present itself to *Homo agens* as a unity without alternatives, as an undisturbable process, but as a fluctuating field of possibilities and opportunities to act, as a dynamic structure of alternatives that lead person to doubt and force a choice upon them. Which alternative is best for me, which possibility should I actualise? The ability to pose and resolve this question, as well as he can, is what characterizes man qua *Homo agens*, as focus of the practical philosophy. It presupposes the ability of man to choose what to believe, desire and do; which cognitive and evaluative premises to use as foundation of his action. Those premises are not givens without alternatives to him, that force themselves upon him irresistibly, and master him, but judgments which he can accept or reject. It is in this that the specific of human liberty is to be found: in the human ability to control and modify through logical reasoning the very contents of consciousness; more specifically the rational, conceptualizing and critical consciousness, the 'mind'.

A plea to ignore or belittle human rationality would be beside the question. Stating that man is a rational being, is not the same as

claiming him to be a reasonable being.[1] 'Rationality' is a descriptive term that refer to the *modus operandi* of man as an acting being; 'reasonableness' is a term with which to evaluate the behaviour of a rational being. 'Reasonable' means as much as 'as befitting a rational being', and can only be used in relation to a rational being: only of a rational being one could say it is unreasonable. It is likely that no-one is always reasonable, but that fact does not provide grounds for the claim that man is an irrational being, eg a helpless plaything to irrational emotions. The emotions of a rational being, their intuitions and emotions, are rational emotions, of which the reasonableness or unreasonableness can be judged.

It is of course true that nobody can undo the fact that they react spontaneously to the objects and situations that enter their field of consciousness, that they are attracted to the taking of certain actions, the believing of certain propositions or theories, etc. We are continuously engaged in interpreting and evaluation the world around us, and that activity manifests itself in our emotions and intuitions. This does not take away from the fact that it is not impossible for a human to believe or do what they at first rejected, or to not believe or do that which attracted them at first. A human can control the spontaneously rising cognitive and evaluative contents of consciousness, by objectifying[2] them, to distance themselves from them as it were, to question them and judge them critically. By means of his abilities of conceptualization and his skill at language he can represent his intuitions and emotions symbolically in logical objects (propositions) on which he can perform logical operations and transformations: they can thus be analyzed in light of the whole of knowledge the individual has at their disposal. A person can have their actions depend on the answer to the question of whether to follow their initial impulse, or rather to look for different premises. Nothing forces them to ask this question, and nothing prevents them from posing it or

1 Here, as in chapter three, 'rationality' must be understood as a categoric property: a being is rational or not rational. There are no degrees of rationality, while there are degrees of 'reasonableness' and 'unreasonableness'. It is of the greatest import to realize that the validity of the fundamental principle of law/right (and of the fundamental ethical principle) which will be discussed in the third chapter, has no other basis than the rationality of mans, and most certainly not the relative degree of reasonableness (even though it of course takes a rather advanced degree of reasonableness to judge the validity of the produced arguments). Cf Ludwig Von Mises: Human Action, Chicago, 1966, 19: "Human action is necessarily always rational.'

2 Cf Van Dun: 'Freedom of Action' Communication & Cognition. IX,3/4, 1976, 281–321

to attempt to answer it in a serious manner. He can live as befits a rational being, being reasonable; or unreasonable, without using his critical faculties, as a stubborn dogmatic, or a gullible soul, carried to and fro on the waves of public opinion, as a nitwit, convinced what he doesn't know can't hurt him, or as a mystic, believing the deepest mysteries of the universe will spontaneously reveal themselves to him if he just tries to not think hard enough. The reasonable or unreasonable life, that is the most fundamental choice before man, and as a consequence for practical philosophy, as acting man's self-criticism, the essential alternative.

PRACTICAL PHILOSOPHY

The conceptual abilities of the human mind makes it possible for man to control the premises of their actions by questioning them. In this way people are able to motivate and potentially justify their actions. *What should I believe? What should I desire? What should I do?* The interpretation of these questions and their meaning to human life and striving, but also the critical judgment of those answer, and how those answers were reached, all of this determines the sense and meaning of practical philosophy and thus philosophy in general. In the end all philosophy is practical philosophy, even if only because philosophizing itself is a goal-oriented activity, which is itself controlled by the methodological notion of what is good practice, the notion of what the best thing is that one can do, with given means within given circumstances. Paul Lorensen, in my opinion wholly justifiably, writes:

> "The ultimate goal of philosophy as I understand it is to make the art of practical reasoning teachable. However, no-one can know if there exists such a thing as an art of practical reasoning, and if it does, if whether it is teachable. Unless they try to practice, and teach that art."[3]

A human being can not live without judging, and he can not judge

3 Paul Lorenzen: Normative Logic and Ethics, Mannheim 1969, 61.

his judgments without reason.[4] A life can be no better than the judgments of which it is a translation. The fact that people are conscious of the world as a field of possibilities generates the fundamental ethical question: *what is the best I can make of my life?* This question presupposes the fundamental ethical norm, that a person should make the best of what there is to make of their lives. This norm itself declares nothing on what things to do, and which not to do; yet it still reflects very well the meaning of ethical questioning and what the general frame of reference is for the judging of particular ethical positions. The problem of practical philosophy is in other words the problem of the good/beautiful life, the life worth living. It is a problem because that good life is not an automatic given: it must be identified and acquired, and its acquisition requires judicious action. To discover the principle of the life-in-beauty, to make it explicit and teach it to others, that is what philosophy is about. This most certainly does not mean the prescription of a recipe, which is only to be read and followed to the letter by anyone in order to make optimal use of their unique life-opportunities. Practical philosophy, ethics in particular, aim at being an art of living, not an instruction manual. It is not philosophically a priori that what is ideal for one is also ideal to all others. The emphasis is on the art of practical reasoning, as the method of the beautiful life, and not on the particular conclusions of certain practical argumentation bound to specific contexts or persons. The intent of practical philosophy is to allow everyone to determine *for themselves* what *their* best life is, not to devise a set of rules that can be sold as the key to a full life, merely on the grounds that some fare well by its application. Practical philosophy is not "moralizing": the aim is to inspire, not to induce imitation.

There will be occasion to note that the question of law/right is also inseparably connected to this practical problem of human action; in other words that law is also a category of practical understanding. That is not to say that the practical

4 This does not mean that a person that is not capable of judgement (and is therefore not a rational being) cannot be kept alive. The formula 'Man is a rational animal' does not mean that every man is an animal with a measure of rational abilities as a useful but ultimately unnecessary extra, such that, when these abilities are removed, what is left is an otherwise healthy animal, capable of keeping itself alive. One is rather left with a human wreck or ruin, that can only be kept alive artificially by others.

question of law/right – *What do I have the right to do?* – can be simply equated to the other practical questions cited above. This impossibility is already evident from the fact that those other question already relate to an "Ought" for the questioner. This is not the case for the question of law/right. There is a clear and, as we will see, relevant formal difference – in fact, the difference between law and ethics. Even though the function of judging on right/justice or injustice in the context of practical reasoning is a different one from that of the various questions of "ought" in relation to belief, desire and action; this still leaves those judgments of right/justice and injustice in a position of essential importance to human action. Moral judgments, where the propriety or impropriety of something is declared, presuppose judgments on right/justice and injustice, and can only be understood against the backdrop of a theory of law/right. Practical understanding cannot do without the category of law/right.

In this book attention will primarily be given to judgments of right/justice and injustice, though it will of course be impossible to leave those other judgments, of beauty, truth and good, aside completely. Acquiring any insight into why people have the need for the idea of law/right in the ordering of their activities (and thus, on the level of critical reflection for a theory of law/right) is impossible without discussing the full context of practical reasoning in which this need makes itself felt. The problems for whose solutions people need law/right are practical problems, in which all practical categories of judgment have to be invoked. It is impossible to analyze human action without referring to the concepts *knowledge, goal* and *means*, that is to say to the categories of the *true*, *the beautiful,* and *the good.* Furthermore it is indispensable in explaining not just what law/right is, but also *why one should respect law/right.*

PHILOSOPHY OF LAW/RIGHT

That judgments on right/justice and injustice play a large part in human societies* hardly needs any argument. Everyone ventures upon it, not just judges, officers of state justice, (ed: "justitie") officials and lawmakers, but truly everyone (though not everyone does it

quite so openly or with as much fanfare and ritual as these "authorities" whose judgments and statements are considered by some to be *law-made-into-word.*) There is no reason to presume that only the judgments of said "authorities" are meaningful to the problems of philosophy of law/right. There is nothing, after all, which allows for the differentiation between those "authorities" and their fellow man, save for the fact that they were bestowed with certain 'warrants', on the grounds of some decision or legislation, made or decreed by themselves or others. This does not tell us anything about the legitimacy of that decision or legislation, nor of the right of those who deign to authoratively declare what other people's "rights" and "duties"are. It is possible to construct a theory of law/right on the grounds of which to affirm the legitimacy of such decisions and laws, but this does not imply such a theories correctness. In any case it is not permissible in philosophy to make the authority of reason, of critical judgment, subservient to any other "authority": neither the *vox populi*, nor to the *vox dei*.

It is the task of philosophy of law/right to examine judgments of right/justice and injustice, to explain their principles and systematic connections, and found their rationality, regardless of the status or position in the societal hierarchy of the authors of said judgments. The only reason for the existence of philosophy of law/right is to attempt to determine how we can improve the quality of those judgments of right/law/just and injustice, in order to allow people to "better speak law/right" (ed:original "recht spreken": rendering judicial judgment, or literally speaking straight) ; and in doing so contribute to the spread of the knowledge required to effect a more rational, and thus more just, society*. If *this* is not the striving of the philosophy of law, I see no way for it to claim to be anything more than an non-committal intellectual diversion without any practical significance.

People act on the basis of judgments, and their judgments about right/justice and injustice are certainly not the least important premises of their actions. Judgments can be in error, however. To err is human: the idea of error is implied in the notion of judgment itself, as judging implies the making of a rational choice. That is to say requires an answer to the question "Which alternative is best?", and as such includes the possibility of choosing a less good alternative. Actions

based on incorrect judgments result in a waste of time in the best case, but often to failure, frustrations, misery or death. This also applies to judgments of just* and injustice as history demonstrates all too convincingly. These judgments of just* and injustice are often embodied in institutions and practices, fortified by force of habit and the authority of precedent, that many have to face, sometimes for many subsequent generations. Since many have a vested interest in maintaining such a situation, and are as such little inclined to listen to arguments suggesting the unlawfulness/injustice of that situation, incorrect judgments on just* and injustice can at times truly expedite the downfall of a world, a civilization or culture. Concretely this means: to plunge many generations into chaos, misery, and psychic, intellectual and moral upheaval.

Institutionalization of injustice drives up the price humanity must pay for the misjudgment of justice/right, and makes the committing and extension of injustice ever cheaper. Those who do not realize this because their conceptions of law/justice and injustice are borrowed exactly from the prevailing convictions or dominant practices and institutions of their environments and the society* they live in, will, through their self-righteous positions, tend to make any positive change impossible. Their motto is: *fiat justitia pereat mundus* – let justice be done even though the world perishes. No-one will want to underestimate the role of malice in human history; but much calamity is the unavoidable consequence of the immovable ignorance of those that take the subjective conviction of the purity of their intentions as the ultimate and untouchable justification of their actions. For the philosophy of law/right, that conviction is not enough, and it is most certainly absurd to use law/right in a play against life – law/right is to man an essential prerequisite to achieving life in beauty. *Fiat justitia ne pereat mundus* – let justice be done so that the world not perish. It is my opinion that this old saying expresses the fundamental motive of the endeavor of philosophy of law/right most clearly.

POSITIVISM

For there to be law/right, it is not sufficient for people to have opinions on just* and injustice and to live by them. It is not even sufficient that all people (or all people in a more or less closed society) to share the same opinions. The correctness of an opinion does not depend on it being shared by many, potentially a majority or socially dominant group. Opinion-polls are not a valid substitute to philosophical examination, not even if one were to give said poll the form of an analysis of the contents of some holy book, or of an analysis of colloquial language.

It is certainly no simple task determining which judgments on right/justice and injustice are correct, and which are wrong, but this may not be used as an excuse to evade the quest for a definition of law/right, or to escape into the solution of convenience, that law/right is what people call "law/right".[5] This answer obviously only has meaning when it is made explicit which "people" are referred to (in regards to this, many different suggestions have been made, and far from all of these may be logically reconciled). It's clear however, that the answer to the question "What is it that X calls "law/right"?" is not of a nature that will satisfy those who ask the question "What is law/right?". If it is so that people require law/right, then law/right is to them a means or method towards an end. What is the end, for whose achievement people require law/right? What is the ethical significance of it? Judgment of a means requires knowledge of reality – of *what is* – since a means not adjusted to the end it must serve, or the situation in which it will be applied, is as good as worthless. Law/right must be in concord with the nature of things, including the nature of humans themselves. The question for a definition of law/right is therefore a completely rational, legitimate philosophical question. There is no reason the believe it cannot be answered, or that it can only be answered by interpreting it as the question "what is it that people call "law/right"?".

5 Cf. Hans Kelsen: Reine Rechtslehre, Wien 1960, unedited reprint 1967, par.6a; Glanville Williams: “The Controversy Concerning The Word ‘Law’”, in diverse anthologies; H.L.A. Hart: “Problems of the Philosophy of Law”, in P. Edwards (ed.): The Encyclopaedia of Philosophy, New York, Reprint edition, Vol.4, 246sqq.

To say that law/right is what people call "law/right" is nonsensical – even and especially when one tries to justify that statement with the slogan that science should stick to the facts, and that the science of law/right should therefore study law/right "as it is" and not "as it ought to be". But, if law/justice/right is not what it ought to be, then it is injustice/wrong. What does one gain by calling injustice right/law? What else, but confusion and misery? Is it meaningful to make a distinction between logic "as it is" and logic "as it should be"? Is it meaningful to want to limit the scientific study of logic to the study of the fact that people reason, while refusing to examine in those studies the logical validity of the different reasonings people produce every day, en masse? If the logic of an argumentation is not what it ought to be, then that argumentation is illogical. It would be absurd to claim that, in judging an argumentation illogical, one leaves the domain of the strictly scientific, and engages in nothing more than wielding ones own subjective conventions of logic "as it should be" against logic "as it is". To claim that only the concrete reasonings of people, "logic as it is", are a legitimate subject of scientific/philosophical inquiry, that only they answer the requirements of objectivity of the scientific method, and that the whole notion of "logic as it ought to be" is nothing but a subjectivist phantasmagoria, means not merely shows a far-reaching ignorance of the role and meaning of logic in human thinking, but also spluttering out a dialectical contradiction, as no argumentation can be valid to science if it is not logically valid. As such legal/juridical positivism[6], and all its considerations of value-free scientific research, is completely irrelevant as a science of law/right. What legal positivism does is simply ignore law/right as as a category of the practical mind, and in doing so destroys any possibility of understanding and evaluating law/right from praxeological grounds and reasons for being. It looks to the answers that some give to the question "What is law/ right?", without regard to the meaning and utility of the question itself. In some cases it limits itself to examining those opinions on law which have been embodied in actual or current practices and institutions

6 For the many meanings of this term, see (amongst others): H.L.A.Hart: “Legal Positivism” in P.Edwards: op.cit. supra at p.10, Vol.4, 418 sqq; Karl Olivecrona: Law as Fact, London 1971, 50–61; R.A.V. Van Haersolte: “Het formele positivisme”, Rechtsfilosofie en Rechtstheorie. 8,1,1979, 22–34

of a certain society*: in these cases, it reifies the opinions of some into a "social fact"[7], without considering whether it is methodologically sound to accept such a "social fact" as an ultimate given.

Opinions on just* and injustice can be wrong. Consequently the practices and institutions that express ruling opinions can be wrong (just as constructions and buildings that concretize the opinions of an incompetent architect or engineer can be wrong). To lose sight of this is to lose sight of their most characteristic feature. To the positivist law/right is what law/right is said to be, though not all positivists will agree on who exactly does the saying. Now, it is undoubtedly the case that the word 'law/right' refers to a great many things, occurrences, conditions, practices, etc. but this should not lead us to conclude that the concept of law/justice is like a concept such as "fish". At first, we learn *which* things are appointed the term"'fish" in our linguistic community, that is to say we learn how to use the word "fish" before we attempt to answer the question *what* fish actually are (if we have enough scientific curiosity to ask that question in the first place). The things that we call "fish" have a great number of properties and features on the grounds of which they are distinguished from other things, but when we ask the question what fish actually are, we will find that some oceanic and aquatic animals are not fish at all, but mammals. This discovery is only possible when we try to *define* our initial understanding of fish. This initial understanding is nothing but a highly diffuse, unorganized clutter of tidbits, nth-hand observations (such as metaphores, sayings, fairy tales, etc.) in relation to all those things that we call "fish".

To be able to answer the question, what a fish actually is, we need to impose order on this clutter, to solve the contradictions it contains, to systematize the rest, etc., in order to integrate our knowledge of fish into the whole of our knowledge. We have to

7 Cf. F.A.Hayek: “The facts of the social sciences”, in Hayek: Individualism and Economic Order. London, 1949, heruitg. 1976, 57–76. M.N.Rothbard: Individualism and the Methodology of the Social Sciences. Cato Institute, Los Angeles. 1979. M.Rizzo: “Praxeology and econometrics: a critique of positivist economics”, in L.Spadaro (ed.): New Directions in Austrian Economics. Kansas City, 1978.

define[8] the concept to be able to use it in our conception of the world as a whole. As long as that systematization of all our cognitive contents of consciousness has not occured, we do not have an understanding of the world, and we can not use our knowledge in the context of abstract reasoning. The fundamental problem of the scientific definition, in terms of our example, is to discover which traits are the defining traits of fish. That is to say the features of fish that allow us to explain why fish are what we know them to be, why they behave the way they do etc. Within the context of our knowledge as it exists at a certain moment in time, we are able to define, to answer the question of what things are. Though growing knowledge may imply that more fundamental, more essential features are discovered, we need not fear that the definition conforming to the new epistemic context contradicts the definition conforming to the old epistemic context, as long as it is the case that at every time our system of definition forms a whole free of contradiction, during the construction of which the whole of available knowledge was accounted for.

We can discover that not everything that is called "a fish" is a fish. A fish is not what is called "a fish", a fish is what it is regardless of what we say or think. It is certainly not true that the things people consider to be the point of reference for the word "law/justice/right" are what they are, regardless of what we consider law/justice/right to be. On the contrary, it cannot be stressed enough that they embody or make concrete human opinions, and can therefore not be understood without reference to those opinions, and the question these opinions are supposed to answer. Whether they embody *law/justice/right* or not is another matter. Whatever the case: from the fact that the things that are called "law/right" embody opinions on law/right, we can deduce that these things are what many believe law/right to be, but not that they are what law/right is. The study of those things can therefore not teach us what law/right is, and it would be nonsense to believe that the opinions on the grounds of which certain things are called "law/right", form one coherent whole, flowing from one coherent tradition, all

8 Cf. Aristoteles: Topica, I. W.N.A.Klever: “Een epistemologische vergissing?”, in Van Rijen e.a.: Aristoteles, zijn betekenis voor de wereld van nu. Baarn 1979; H.B.Veatch: Two Logics: The Conflict Between Classic and Neo-Analytic Philosophy. Evanston 1969. Veatch: Aristotle: A Contemporary Appreciation. Evanston 1974; A.Rand: Introduction to Objectivist Epistemology. New American Library, New York s.d.; S.Kripke: “Naming and Necessity”, in D.Davidson & G.Harman: Semantics of Natural Languages. Dordrecht 1972

pressuposing the same fundamental theory of law/right. If we wish to be sure to learn about what law/right is from the study of the things we call law/right, we need to ensure those things conform to the definition of law/right.

The philosopher's task can't possibly be to merely register and render explicit what others say, write, and appear to think. To do so would be to commit "la trahison des clercs" (ed: the betrayal of the clerics) as Benda put it[9]. The conceptions brought to light by the analysis of common parlance, or of profesional jurists are not ultimate givens, not metaphysical fact, nor are the laws, judgements, administrative decisions, etc that some so readily identify as law/right, or the sources of law/right. The discovery of what law/right is, is what matters to the philosopher, not what X, Y or Z have to say about it. It is not permissible to consider concepts decoupled from their cognitive function and the rationality of the process of understanding, as primary givens. To do so would be to assume the conceptual system to be an a priori, a given, before the meeting with reality, that enlightens us on the essence of things, or, once we have lost the stomach for mystical intuitions regarding essences, that it is merely an arbitrary system of signs, the elements of which may be randomly defined. Such an approach implies we must define our concepts *first* and then adjust our knowledge of the world to that data. That is a direct reversal of the rational procedure, that builds the definition a posteriori as a summation of the knowledge, and that is guided by the principle of identity: things are what they are – the point is to discover what they are. If mysticism believes that things are intuitively know to us, then positivism believes things to be what we say they are, that is to say that it is the definition itself that determines which the characteristic features are, and that we can change said definitions at will. What that means to the philosophy of law/right will be shown below.

9 J. Benda: La Trahison des Clercs. Paris 1927, reprint. Paris 1975

SUBJECTIVISM AND OBJECTIVISM

The fundamental weakness of positivism[10] is that it reifies the results of the conceptualizing activities of the human mind as entities that are wholly independent from said activities. It takes as a primary given, as "fact", what is in fact no more than a hypothetical construction.

It is obviously true that, when we attempt to explain why people act a certain way, we must proceed not from things as they truly are, but from what those involved believe them to be. As early as 1751 Galiani wrote in his *Della Moneta*[11] that to economic science "things are equal that promise an equal satisfaction to the one in relation to whom they are said to be equal. Anyone who looks for equality elsewhere, in other principles, and expects to find it in equality of weight or appearance, shows their lack of understanding of the nature of human action.". People are rational beings; they act on the basis of judgment. Their actions are not automatic, unalterable *responses* to objective *stimuli*. In the domain of the sciences of human action there are no constant relationships between objectively measurable quantities, and if there were, man would not be capable of science, as that would mean the entirety of scientific output would have to be construed as a purely physical object. As I wrote elsewhere:

> "if the words and writings, the experimental manipulations of the practitioner of science, can only be produced according to constant relationships between measurable (physical, chemical, ...) quantities, then it becomes meaningless to want to evaluate them on the basis of methodological *norms*, of logical *argumentation* and of experimental *conclusions* deemed to be useful or relevant. For in that case they would not be logical, meaningful entities, they would not be theories, critical reflections, norms,

10 A concise introduction to the positivist movement in philosophy which is well worth reading can be found in L. Kolakowski: Positivist Philosophy: From Hume to the Vienna Circle. Harmondsworth 1972. My criticism refers only to the use of positivist statements and intuitions in the sciences of human action – an approach which completely disregards the difference between how we relate to, on the one hand, physical and chemical phenomena which can be described purely in spatio-temporal terms, and the meaningful and meaning-dependent phenomena that result from purposeful action on the other. Cf. P. Winch: The Idea of a Social Science and its Relation to Philosophy. London 1963. A. Schutz: Phenomenology of the Social World. Evanston 1969.

11 F. Galiani: Della Moneta (1751), in Scrittori classici di economia politica. Milano 1803–1805. (English translation) A.E.Monroe: Early Economic Thought. 1930, 303)

> or judgments, but merely sounds, objects and movements, occurring inexorably as a link in a precisely determined concatenation of events, each time certain preconditions are met."[12]

It is still possible to pretend to an extra-natural e.g. divine perspective, from which to judge the truth or untruth of a part of scientific output; but in no case can it be claimed that, in the production of said output by a human practitioner of science, the distinction between true and false, between logically valid or not, had any part to play.

People treat things the same not because they are the same, but because they judge them to be the same. This "subjectivist" basis is essential for the descriptive-explanatory sciences of human action. It of course does not imply that the world is as people believe it to be, nor that all results of action will conform to the goals and intentions of the human acting. It means simply that the immediate cause of an action is a decision, and that this decision is based on judgments, appreciations and expectation, each and every one of which may be in error.

The great irony is that in the explanatory social sciences positivism attempts to replace this correct subjectivism with a wholly misplaced "objectivism"[13], in order to be able to formulate constant relations between objectively measurable quantities, and thus to reduce the social and psychological sciences to the same form as the natural sciences. It is indeed that case that in the natural sciences

12 F. van Dun: “Het epistemologisch statuut van de wetenschappen van het menselijk handelen”, in Tijdschrift voor Sociale Wetenschappen, 24,2,1979, 185.

13 Criticism of behaviourist psychology, amongst others, B.Blanshard: The Nature of Thought. New York 1939, vol.1, 313–340; C.D.Broad: The Mind and lts Place in Nature. Paterson, N.J. 1960, 614–624; Ch. Taylor: The Explanation of Behaviour. London 1964; R. HARRE & H.SECORD: The Explanation of Social Behaviour. Oxford 1972. Criticism of modern macro-economy:Mises: Human Action, 55 en 350–357; Ludwig Lachmann: Macroeconomic Thinking and the Market Economy. Institute of Economic Affairs, London 1973; J.B. Ramsey: Economic Forecasting: models or markets?, Institute of Economic Affairs, London 1977; J. Pen: Macro-Economie, Utrecht–Antwerpen 1977, almost explicitly admits to the virtual bankruptcy of macroeconomics, yet nevertheless holds dogmatically to the existence of yet undiscovered constant relations between objectively measurable quantities (p.87). Carl Menger: Grundsätze der Volkswirtschaftslehre. Wien 1871; Boehm-Bawerk: “Der Letzte Maszstab der Güterwertes”, Zeitschrift für Volkswirtschaft, Sozialpolitik und Verwaltung, 3, 1894, 185–230 (Wien), Idem: Kapital und Kapitalzins, Deel I, hoofdstuk 12, Wien 1884, J.M.Buchanan: Cost and Choice, Chicago 1969, Chapter 1, deliver a criticism of the so called "labour theory of value". For the history of subjectivist theory of value, see a.o: M.Grice-Hutchinson: The School of Salamanca. Oxford 1952, R. De Roover: San Bernardino of Sienna and Sant’ Antonio of Florence. Boston 1967, E.Kauder: History of Marginal Utility Theory. Princeton 1965.

we are only capable of examining things "from without", and that any anthropomorphism, that is to say any explanation of phenomena outside the domain of human action that would presuppose rocks, gases, plants, etc. to be rational beings that strive to attain goals, make plans, form hypotheses, etc. is completely unacceptable, and at least wholly unfounded. It would however be a patent non sequitur to take this fear for anthropomorphic explanations so far as to apply it to the humanities, despite introspection allowing anyone to see that they have goals and preferences, make plans and judgments, and that they are capable of living with others only on the grounds that they, too, are rational beings. The positivist imitation of the method of the natural sciences betrays a lack of insight into the mind that is used to apply this method.

Examples of misplaced "objectivism" can be found in in behavioural psychology, in classical economics and modern macro-economics, in the sociology inspired by August Comte, and elsewhere. In classical economics for instance, the subjective theory of value of e.g. Galiani (which was already in development in 16th century Spanish Scholasticism) is replaced by various objective theories of value, such as labour theory of value, in which the value of things is detached completely from the subjective judgments of the people that create, trade and use that thing. As such, modern macro-economics attempts to discover constant relationships between macro-economic variables that are considered to be objectively identifiable and objectively measurable quantities, such as "the price level", "unemployment", "income", "output", etc. (which are in reality not distinct entities, but conceptual constructions).

In the normative sciences, on the other hand, positivism opts for a pronounced "subjectivism": that which is true, beautiful, good, right, is simply what is called "true", "beautiful", "good", "right".[14] This reversal of the meaning of the subjectivist and objectivist points of view in the explanatory and the normative discipline is ironic, but not

14 See Hobbes' famous quote from Leviathan 1/15: “Good, and Evill, are names that signify our Appetites, and Aversions; which in different tempers, customs, and doctrines of men, are different.” The noncognitivism of Kelsens deserves special mention. See also: David Hume: A Treatise of Human Nature (1740), iii/1,i–iii; E. Westermarck: Ethical Relativity. New York 1932. Critical: Paul Edwards: The Logic of Moral Discourse. Glencoe, Ill. 1955. G.E.Moore: Ethics. London 1912, hk 3–4. H.B.Veatch: Rational Man: A Modern Interpretation of Aristotelian Ethics. Bloomington 1962. H.B. Veatch: For an Ontology Morals: A Critique of Contemporary Ethical Theory. Evanston 1971.

paradoxical. The motive in both cases is the denial of meaning(fulness) of human rationality. If in one case one denies that people treat as equal only what they consider to be equal, and searches for an objective, measurable equality in the things themselves, then in the other case it is denied that human judgements are more than purely factual data, and it is posited that there is no grounds for considering one judgement to be more reasonable than another – a position which makes any and all science impossible.

However, though it is true that human action is directed by judgments, regardless of their veracity, it remains a fact that the people doing the judging believe them to be true. The task laid out for practical philosophy is of course to determine whether or not this belief is justified. We would not have anything to gain from knowing which judgments guide our actions if we believed there to be no rational criteria on the basis of which to accept or reject those judgments. The subjectivism that is so essential to descriptive-explanatory sciences is completely sterile in the normative sciences of human action. The historian or economist can be content in figuring out what people believe law/right to be. Not law/right itself, but the opinions regarding it are the causal factors for the explanation of real events. The jurist, as a practitioner of a normative science, is however precisely engaged in the process of the *formation* of opinion: to them law/right is what matters, not the topical opinions about law/right. If they are solely concerned with the opinions, they are merely an opportunist that is trying to make a living by pandering to certain people, and not someone with a valid claim on scientific knowledge of law/right. It goes without saying that determining what certain people believe law/right to be is a perfectly legitimate endeavour; it is unacceptable however to claim that law/right is nothing but the opinions that those certain people hold. This claim becomes no more honourable if one, like the modern positivists, stipulates that law/right is constituted solely from the opinions that were concretised in the practices and institutions of a certain society*.

EPISTEMOLOGICAL REMARKS

We cannot be content with the philosophical desertion that is positivism. People have opinions about law/right and are able to critically examine those opinions. The question of a definition of law/right, that is to say for a reasoned answer to the question of what law/right is, is a wholly legitimate question. We must therefore give it a serious answer – on the basis of what is, not of what is said. There is not a single reason to pretend that these opinions are merely external data that escape any rational inspection, or purely arbitrary constructions we can and may change at will as there are no rational foundations for norms to evaluate them with. We can inspect our opinions, and possibly even improve them. That is the goal of philosophy, not only philosophy of law/right, but also not everywhere *but* in philosophy of law/right. If we follow Leo Strauss[15] in defining philosophy as the attempt to replace opinions about all things in their mutual relations with knowledge about the universal relation of things, then we can define the philosophy of law/right to be the attempt to replace opinions on law/right with knowledge of law/right – opinions *on law/right*, not opinions on opinions on law/right, knowledge *of law/right*, not knowledge of opinions on law/right.

The principle of identity applies to the philosophy of law/right too: *all that is is, and all that is, is what it is*: A is A, and nothing else[16]. Formally speaking, the principle of identity is the most general form of judgment, the rendition of the essence of judgment qua judgment. The mystical tendencies of so many of the schools of modern philosophy and humanities all rest upon the negation of the principle of identity as the foundation of our knowledge. Usually, this principle is depicted as a purely formal tautology, as the general formula of the so-called analytic distinction, the truth of which can be determined a priori (before any experience) by analysis of the terms. It is however an error to consider *A is A* to be a tautology in that sense, when the formulation is used to signify the principle of identity. This interpretation presumes that the principle of identity

15 Leo Strauss: What is Political Philosophy? And Other Essays. New York 1959, 11.

16 Cf. J.Peters: Metafysica: Een systematisch overzicht. Utrecht–Antwerpen 1967, 86. also Saul Kripke: op.cit. bij p.13. Saul Kripke: “Identity and Necessity” in M.K.Muntz (ed.): Identity and Individuation. New York 1972; J.Woods & L.W.Summer: Necessary Truths. New York 1969. G. Jacobi: Die Anspruche der Logistiker auf die Logik und ihre Geschichtschreibung. Stuttgart 1962.

is limited to the conceptual domain, with no reference to the reality we are attempting to grasp in our conceptions. In doing so it ignores the factual, practical or methodological meaning of the principle of identity.

"A is A" means that whoever wants the answer to the question of *what A is*, must study A – in all probability not just A, but in any case also A. We must try to know all of A that we can, and systematize that information, to eventually condense it into a definition. There is no other way. That is the meaning of the principle of identity as a presupposition of any realistic philosophy. The alternative to this principle, thus considered, is therefore not the formal contradiction "A is not A", but the nominalist position that A is, not what A is, but *what A is said to be*. That is the meaning of the claim that the principle of identity is a purely formal tautology. The certainty the formula expresses is then reduced to a purely conventional datum instead of a metaphysical certainty relating to the reality of things.

If the realistic interpretation of the formulation "Man is an *animal rationale*" expresses the *conclusion* that animality and rationality are the most fundamental properties of man, those properties that, after careful study seem to best explain our understanding of man (that is to say, all that we know about man), then the nominalist interpretation of that formulation informs us only that "man" and "animale rationale"are conventionally accepted as synonyms – that it is an accepted rule not to call "man" that which we are not prepared to call an "animale rationale". That rule in no *conclusion* of a cognitive process, but an aprioristic rule of the language we choose to speak of the world. We are merely assuming "man" and "animal rationale" to have the same meaning.

If this were to be the case – if the answer to the question what the essential properties of things are, is indeed purely conventional in nature -then it would be possible to define and A in any arbitrary manner, and it would indeed be required to claim that A is not what A is but what A is said to be. There is of course no connection between the name and the thing, apart from the purely conventional connection of nomenclature, and as such there is no connection between two things we give the same name, other than the purely

conventional circumstance that we give them both the same name. The fact that there are different things we conventionally indicate with the same name "man" can thus not be interpreted as an indication of a belief that those things are the same in kind. On the contrary: all that follows is that we are bound by convention to also indicate those things with the term "animal rationale". Incidentally, one of those things can look like you or me, while another one of those things looks like a centipede, one can us lungs to breathe and another gills, etc. What all humans have in common is not the fact that they are all humans, but the fact that they are all called "man".

It is clear that this approach makes it impossible to inquire what things are. The way in which we group things into classes or kinds has nothing to do with what they are. It is impossible to inquire whether men are indeed rational animals. The things we call "man" are by the definition of the term "man" things we call "rational animals". We cannot *discover* if being human has anything to do with rationality and animality.

Conversely: all we can discover regarding the things we call "humans" is without any necessary connection to the fact we call them thus. Strictly speaking, there are no humans (nor are there trees, animals, plants, cells, molecules, etc.) there is something, but that something is not in essence what it is to us; it is to us a something without identity and thus, as it were, nothing. It has for us no reality nor actuality; it is to us nothing determined and it does not have a determinable, definable operation. As an unidentifiable something, what there is is to us without identity: therefore we cannot discover what things are. If we make a conceptual distinction, this has no basis in the reality of things. Any distinction we make is arbitrary, conventional.

It is as if we are to imagine the world as a collection of things without properties, or rather: things that can have any property. In that case there *are* no necessary connections (the is no necessity *de re*, in relation to the things themselves), there are only those necessary connections that our conventions dictate in the domain of the language we use to speak of the world (there is only necessity *de dicto*). Necessary propositions are thus analytical propositions, that is to say disguised postulates of meaning of the terms they are composed of, such as "All bachelors are unmarried" – but that proposition tells us nothing

about the world. It is obviously not true that a man that happens to be single right now, is necessarily unmarried; only *as a bachelor* is he by definition unmarried (ed: while he is a bachelor). Necessary truths, expressed in analytical propositions are not truths relating to the things that surround us. They do not contain knowledge.

Synthetic distinctions on the other hand cannot express necessary truths. An expression of the sort "This bullet is iron" does not mean this bullet itself *is* iron, or that one of the properties of this bullet is that it is made of iron. If we accept the distinction between analytical and synthetic distinctions, then we must say that this bullet might as well be made of a different material, and still remain this particular bullet. There is no necessary connection between the thing and its properties. The expression "bullets are round", they say, is analytical, because there is a convention on the grounds of which we will call no thing "bullet" that we would not call "round". But saying "this bullet is round" is not analytical; it is shorthand for "this thing is a bullet and round" and it is not analytically true that this thing is a bullet. We cannot even inquire whether this thing is a bullet or not, since nothing we can say about the thing necessarily relates to the thing itself. The world is a great big unknown and unknowable X: we can know that there is *something* (a consistent nihilism is impossible), but not *what* there is.

Just as the principle of identity "A is A" can be trivialized by interpreting it as a mere formal tautology, so can the fundamental principle of law/right be trivialized. When the philosophy of law/right is applied from a positivist, nominalist perspective, in relation to the sciences of human action, said trivialization is an automatic result.

To some the fundamental principle of law/right – the most concise wording of which is: to each their own – is indeed nothing more than an empty tautology. "It is quite obvious", they would say, "that each has the right to do or not do with theirs as they see fit, as it is precisely *the law/right* (ed. orig. het recht) that decides what belongs to somebody: something belongs to someone exactly to the degree to which they have the right to decide over it. That so-called fundamental principle of law/right would be better formulated as follows: each has the right to do what they have the right to do. Doing so would make it clear that we are dealing with no more than an analytical, but moreover a sterile, truth. "

This is obviously not the interpretation I have in mind when I defend the fundamental principle of law/right.

Now, the application of the formula "every human has the right to do or nor do with theirs as they wish" requires us to know where one person ends and the other begins. To claim that every human has an absolute right to self-determination is obviously only meaningful if we have a theory that allows for the identification, the definition of different people. We have to be able to determine the borders of each person, to determine which means belong to one, and which means belong to another – that is to say we have to at least be able to make use of principles that allow us to show the coherence of said attempt at identification. The fact that empirical difficulties may arise in the course of concrete historical circumstances is obvious. This fact alone is not proof of the incoherence or irrelevance of the fundamental principle of law/right, or of the theory of law/right of which it is the fundamental principle.

The application of the fundamental principle of law/right is essentially a matter of demarcation, definition (*finis* means border); for each human we must be able to answer the question: "Where are their boundaries?" There are clearly two options. Either: A is A, that is to say, each human is what they are, every human is objectively bounded, so that it comes down to discovering these objective boundaries; or: A is what X says A is, what A is said to be by for example, the priest, or the king, or parliament, etc. – that is to say each human is what some "authority" determines. This second possibility is of course the essence of positivism, To say that each human is what X says them to be, is to say that X has the right to determine the boundaries of each and every person, that X has the right to stipulate what each human should do and not do. The people are not what they are, nor are their boundaries objectively determined by what they do; they are what X says them to be. Their boundaries are only determinable if one knows the rules that X has made for their determination.

From the perspective of the philosophy of law/right it does not matter much who or what is substituted for X in the above formulations, God, the state, anything. What is of importance is the ignoring of the fact that man is what he is, and that he is an objectively bounded being, and the position that said boundaries are simply where the particular X said

them to be. This removes as a foundation for law/right anything objective and based on the reality of human nature, and creates a purely subjective foundation for the "rights" and "duties" of people. Since everyone is bound to have their own subjective conceptions on the determination of the boundaries of their domain and that of others, of their "rights" and "duties", and those of others, one may expect a great many conflicting theories of law/right. Common to all these theories is the introduction of an *authority* or *legislator,* which is attributed the right to determine the "rights" and "duties" of various people. As a consequence they are left with the problem of the identity of the legislator and the determination or discovery of the will of the legislator (the contents of the law), with the problem of describing the sphere of authority of the legislator (which people belong to which legislator?), and with the problem of the meaning of the law for the people (why would people, possessing, after all, their own conceptions of each others "rights" and "duties", have to obey the legislator?)

This last problem forces the positivists to give their actual theory of law/right, which has the form "X has the right to decide over A, B, etc.", the form of a *moral* theory: "A, B, etc., owe obedience to X"(also: "X has the right to punish A, B, ..., N, for their disobedience", which may be transformed into "A, B, ..., N ought to be punished in circumstances and according to rules as determined by X"). The result of this transformation is obviously no different from Hans Kelsen's infamous *Grundnorm*[17], which he rightly titles the fundamental epistemological presupposition of the positivist theories of law/right. This grounding/founding norm(ed: "grondnorm") is indeed nothing but the transformation of the epistemological conception that people are not what they are, but what X says them to be.

Its is interesting to note that Kelsen formulates his legal-theoretical grounding norm as a quasi-moral norm, which posits what ought to be. This formulation obviously leads to another tricky problem for the positivist theories of law/right, that is the determination of the relation between "law/ right" and "morals", which explains the seemingly irreconcilable conflict between those who believe that "law/right" and "morals",

17 Kelsen: op.cit. at p.10, par.34. As I will argue in chapter 3, the legitimacy of a norm is not at all dependent on its conformity to some normative (ethical) system or other; but this does not mean that the right of the one positing the norm does not require ethical foundation.

that is to say legislation of a "legal/juridical" nature and laws of a "moral" nature, are co-generic, thus flowing from the same source, and those that believe this not to be the case (and thus that the legal validity/legitimacy of "juridical" legislation has nothing to do with their moral validity). This problem is specific to the positivistic theories of law/right (in the broad sense of the word, so not in the sense of the vague contradiction between positive law/right and natural law/ right, but in the sense of the contradiction between the realistic view of man as an objective-natural entity, and the view of man as an externally, conventionally defined entity). When applying a realistic approach to law/ right, these problems do not present themselves, as we will see later.

CONCLUSION

Before concluding this introductory chapter I would like to revisit the positivist attempt at constructing the humanities without explicitly accounting for the rational consciousness of man. This attempt introduces an insurmountable dualism between man as a knowing subject and man as an object of knowledge: man as a mental/spiritual, knowing subject is simply lifted from nature (nature in the sense of the collection of objects knowable by science) and projected into the extra- or super-natural. The reactions against, and the fear of, anthropomorphisms, wholly justified in the natural sciences, has against all evidence led to the conclusion, starting from the early 19th century, that the knowledge of man is only possible if we assume people to be incapable of that of which they must be capable in order to be able to have any knowledge of even the most simple mechanical systems.

The practitioner of science that pretends that humans are not rational beings, proves that they are through his own practices and activities. He accepts a hypothesis that implies what he is doing is impossible. His only escape is the claim that he is different, that he possesses rational abilities, but not the people he studies, in other words that he is a superior supernatural being, a god. This mystical leap means death for the alliance *Man-Nature,* which provided the foundations for the classical realistic, or naturalistic philosophy, and confirms in modern philosophy the slumbering contradiction between the alliance

Body-Nature on one side, and the alliance of *Mind-God* on the other.[18] This split carries the germs (ed: Plant germs, as in germinating seeds) for the development of modern totalitarian politics: "scientifically considered" the other, one's fellow man, is not a spiritual, rational being, but merely a moving thing, producing sounds and smells, with no moral significance. It is however very difficult for one to consider one's self exclusively in this manner, certainly when one is producing scientific books or theories, and consequently constantly engaged in the asking of questions, the vetting and weighing of arguments, the verifying of the logical validity of reasoning, etc. It is almost inevitable for the *Mind-God* connection to be transformed into the *Ego-God* connection, and the *Body-Nature* connection into *Alter-Nature*, in which the other person appears only as a mere thing, as clay in the hands of the designers of utopian ideals, social engineers and other who feel the call to playing God. This was indeed the conclusion many came to when, at the start of the 19th century, attentions shifted from the pure natural sciences towards applied science, towards technologically controlling nature. The immense influence of Saint-Simonism[19] demonstrates the attractive force of the idea that if society is to be studied "from without", so it can be controlled and directed "from within". "Organisation" and "scientific planning" quickly became the key concepts of an unworldly and totally unscientific mysticism, which nevertheless kept appealing to the successes of modern natural science and technology. The application of the method of natural sciences not just to natural science but the humanities as well, was seen as the way by which *humanity* would succeed in controlling both the natural and the social circumstances of his existence. The existence of *many* men, and thus the fact that control over the social environment entails control over

18 Cf. I.Prigogine & I.Stengers: La nouvelle alliance: métamorphose de la science. Paris 1979.

19 Oeuvres de Saint-Simon et d'Enfantin Paris 1865–1878 (47dln). On Saint-Simon, his circle and his epigones (Enfantin, Bazard, Comte, e.a.) see: H.Gouhier: La jeunesse d'Auguste Comte et la formation du positivisme. Paris 1936 (2dln). A.Preire: Autour de Saint-Simon. Paris 1912. S.Charletry: Histoire du Saint-Simonisme. Paris 1896. F.A.Hayek: The Counter-Revolution of Science: Studies in the Abuse of Reason. Glencoe, 111. 1952, Indianapolis 1979. F.E.Manuel: The New World of Henri de Saint-Simon. Cambridge, Mass. 1956. G.C.Iggers: The Cult of Authority. Den Haag 1970. Albrich Meyer: Der Frühsozialismus. Freiburg 1977. E.HALEVY: L'Ere des Tyrannies. Paris 1938.

other people[20], were not felt to be insurmountable difficulties. Additionally, that time's democratic ideology could be invoked in order to sweep the problem under the rhetorical rug: control over the people would be exercised by the people itself.

The rise of this so-called *Scientism*[21], first in the form of Saint-

20 Charles Dunoyer: “Note historique sur l’Industrielisme” (Revue Encyclopédique, 33, 1827; Oeuvres, dl.3).Dunoyer there strikingly describes the Saint-Simonistic system as "a system which does not take individuals into account, it is concerned only with the entire human species. It deems the fate of the species to be the increasingly perfect utilization of the globe. It announces the organizational principle of a productive association of all peoples. But this association is not founded in liberty... The system is opposed to the critical tendency, and aims for the reinforcement of the organic tendency." This maltreatment of individuality is a basic condition to being able to study humanity from an external standpoint as a given homogeneous matter. Cf. A.Comte: Cours de philosophie positive. Ed. Littré, Paris 1864, dl.3, 188–9: Translated: The direct study of the external world could alone … produce and develop the great notion of laws of nature, the indispensable foundation of all positive philosophy, and which, as a result of its gradual and continuous extension to less and less regular phenomena, had to be finally applied to the very study of man and society, the last term of its entire generalization The idea of a productive association of all people was elaborated upon by Saint-Simon (in collaboration with Augustin Thierry) in his De la Réorganisation de la société européenne ou de la nécessité de rassemblar les peuples de l'Europe en un seul corp politique en conservant à chacun son indépendance nationale (Oeuvres, dl.15, 153–248).(ed: On the Reorganization of European Society or the Necessity of Gathering the Peoples of Europe into a Single Political Body, While Maintaining the National Independence of Each) The vitality of the Saint-Simonist vision regarding the matter is underscored by the boundless contemporary literature and activity around so-call developmental aid (eg UN Report on the Economic Development of Underdeveloped Countries 1951, unctad, the so-called Pearson Report 1969, the UN Declaration on the Establishment of a New International Economic Order 1974, and the so-called Brandt Report 1980). That this new "productive association of all peoples" is also not founded in liberty is clear from the following quote of one of its leading ideologues: “If the (Indian) government were really determined to change the prevailing attitudes and institutions and had the courage to take the necessary steps …(it would have to provide for) the abolition of castes, a rational policy for husbandry, including the killing of cows, (and) in general, enactment and enforcement, not only of fiscal, but also of all other obligations that are required for development … Institutions can be changed only by what in the region is called compulsion—putting obligations on people and supporting them by force.” G.Myrdal: Asian Drama. London 1968.

21 Cf. Hayek: op.cit. H.Schoeck & Wiggins (eds.): Scientism and Values. Princeton 1960. Y.R.Simon: The Philosophy of Democratic Government. Chicago 1951, writes: “A new lust for domination over man, shaped after the pattern of domination over nature had developed in techniqueminded man… Its highly emotional humanitarianism did not blind everybody to the fact that a new imperialism and a new lust for absolute power, was finding expression.”(p.44). Compare also to Adam Smith: The Theory of Moral Sentiments. (1759): “The man of system… seems to imagine that he can arrange the different members of a great society with as much ease as the hand arranges the different pieces upon a chess-board; he does not consider that the pieces upon the chess-board have no other principle of motion besides that which the hand impresses upon them; but that, in the great chess-board of human society, every single piece has a principle of its own, altogether different from that which the legislature might choose to impress upon it.” Also F. Bastiat: La Loi, Paris 1850, one of the most cutting polemics against the scientistic illusion of power ever written. That this illusion still has not been laid to rest is clear from the works of B. F. Skinner: Walden Two. 1948, New York 1962; Science and Human Behavior. New York 1953; and Beyond Freedom and Dignity. New York 1971. Less well known is F. Beutel: Experimental Jurisprudence and the Scienstate

Simonism, came at the cost of the downfall of the influence of the group known as *Les Idéologues*[22], who had made the role of ideas and judgments in human action and the development of social and economic formations, as well as the interplay between physical and mental factors, into the essential points of their program. This group was no less enthusiastic about the success of the natural sciences in the 18th century, but did not allow themselves to be enticed into the extravagant claims of the Saint-Simonists and their epigones. That the proponents of this scientific study of man and society and its implicit methodological individualism, which was only developed in the 18th century, have been defeated by the scientistic tendency is not so much a consequence of any intellectual superiority on the latter's part. Rather it is the consequence of the political evolution in France, where Napoleon made use of educational reform and censorship to isolate the *Idéologues* and to replace their "science morale" (humanities, including economics and the developing sociology) with more technologically inspired approaches. Enfantin, Saint-Simon's successor, would later reflect upon the period and write:

> “En même temps, Napoléon, membre de l’Institut, classe de *mécanique*, étouffe au berceau les enfants légitimes de la philosophie du xVIII-ième siècle”[23]
>
> (transl: At the same time, Napoleon, a member of the Institute, class of mechanics, smothers in the cradle the legitimate children of the philosophy of the 18th century)

Enfantin obviously welcomed this development: the Napoleonic centralism and the limitations on liberties concurrent with this were a step in the direction of the "organised" society.

The intellectual counter-revolution which, mainly from Paris, constituted the 19th century reaction against the 18th century's

22 Cf. F. Picavet: Les Idéologues: essai sur l’histoire des idées et des théories scientifiques, philosophiques et religieuses en France depuis 1789. Paris 1891 A. Schatz: L’Individualisme économique et social. Paris 1907. Michel: De l’idée de l’état. Paris 1895. Van Duzen C.: The Contributions of the Idéologues to French Revolutionary Thought. Baltimore 1935. Main representatives: Condillac, Destutt de Tracy, Degérando, L. Say; later Dunoyer Charles Comte, the periodicals La Décade and Le Censeur Européen. On the progress in the humanities in the 18th century, see especially: P. Gay: The Enlightenment. Pt.2: The Science of Freedom. New York 1977 particularly chapter 7 (“The Science of Society”) and chapter 8 (“The Politics of Decency”). Gay puts very strong emphasis on the libertarian aspects of the Enlightenment; we should nevertheless not forget that the philosophes inspired not just the Idéologues, but also the theory of enlightened despotism and the 19th century's visions regarding the organised society (see a.o. R.Porter: “Reading History: The Enlightenment” History Today, 33, 1982, 51–52, for a recent bibliographic overview; Chris Tame: “The Revolution of Reason: Peter Gay, The Enlightenment and the Ambiguities of Classical Liberalism”. Journal of Libertarian Studies. 1, 3, 217–227).

23 P.Enfantin: La Colonisation de l’Algérie (1843), cit. in Hayek: op.cit. bij p.26, 1979,210.

development of the humanities, seems to be past its peak.At least in the humanities there currently exists an attempt to once again continue the tradition of the Enlightenment founded on methodological individualism. Yet it still would be an error to underestimate the influence of this counter-revolution. It lives on still in the leading circles of technocrats and bureaucrats and politicians in and around societal centres of decision-making, which came to be partly under impulse of said movements. The cooperation, intertwining and merging of state and industry[24] which has been so characteristic of the development of the West-European states in the 19th century, especially on the Continent, conformed to the ideas, agendas and efforts of the Saint-Simonists and their continuators. In large part said development of an organisational superstructure of society* is still ongoing, though it has gotten a more international aspect owing to the rise of supranational institutions and organisations.

Scientism also faced the epistemological problem of knowledge which is the consequence of the negation of the naturalness of human rationality, or of the rationality of human nature as an object of scientific study. So great was the enthusiasm for the sciences however, that it was easily assumed that

24 "Capitalism" as a historical phenomenon on the European Continent is not defined by the private ownership of the means of production, or by the absence of state intervention in the economic domain, but by an active cooperation between leading industrial, financial and political circles aiming to achieve the rapid accumulation of capital and the construction of a national industrial infrastructure. During the formation of this cooperation, socialist ideas played (and still play) a big part. This is of course not paradoxical. Cf. M.Wallon: Les Saint-Simoniens et les chemins de fer. Paris 1908. H.R.D'Allemagne: Prosper Enfantin et les grandes entreprises du 19ième siècle. Paris 1935. J.B.Vergeot: Le Crédit comme stimulant et régulateur de l'industrie: La conception Saint-Simonienne. Paris 1918. That this evolution was strongly lamented and denounced by the defenders of the individualist legacy is illustrated by the following fragment from F.Bastiat: "Propriété et Loi" Journal des Economis-tes, 15 mei 1848: Protectionism has been the forerunner of communism; I say more: it has been its first manifestation. For what do the suffering classes demand today? They ask for nothing else than what the capitalists and landlords have demanded and obtained. They ask for the intervention of the law to achieve balance, equilibrium, equality in the distribution of wealth. What has been done in the first case by means of the tariff, they wish to do by other means, but the principle remains the same: Use the law to take from some to give to others; and certainly since it is you, landowners and capitalists, who have had this disastrous principle accepted, do not complain, then, if people less fortunate than you are claim its benefits. They at least have a claim to it that you do not. -Property and Law, F Bastiat. Bastiat, who was a proponent of the free market (laissez faire, laissez passer; libre-échange), was therefor definetly not a defender of the historical capitalism: the association between this historical capitalism and the free-market-economy, which still poses problems in intellectual discussion to this day, is also an inheritance from Saint-Simon, handed down by Marx (Cf. infra Chp 8).

the scientific method would result in "total" knowledge of man and society. That knowledge would not be part of society itself, but would be applied from without, as it were, by the scientific leadership in the same way an engineer applies his knowledge to the construction of a machine. In so doing, it became possible to attempt to approach an analogy between "la politique positive" and technology, and also to make a plea against freedom of expression[25] as August Comte (once the secretary of Saint-Simon) did. If the scientific leadership possesses true and total knowledge, why would they tolerate others voicing opinions which are necessarily untrue? The *Idéologues* on the other hand understood all too well that knowledge is not something that exists outside of society*, but is rather a part of that society*. Further, more knowledge, and more varied knowledge used by different members of a society* makes this society ever more complex and dynamic. The more complex and dynamic a society* is, the smaller the chances of success for those who would attempt to improve its performance with the use of a system of conscious planning and control. They rejected the analogy between society*and the relatively simple physical and chemical systems the practitioners of the natural sciences and engineers deal with, and held fast to what they deemed the most fundamental discovery of 18th century humanities: the position that freedom of action and expression is a basic requirement for the progress of humanity[26]. They saw in liberty a means or essential condition for the development of human abilities – a cause, not a consequence; a beginning, not an ending. This belief was obviously directly opposed to that of the Saint-Simonists and their epigons for whom liberty, man's control over their own

25 Cf. A.Comte: Cours de philosophie positive, dl.4, 43e.v. and also Comte: Opuscules de philo-sophie sociale 1819–1828. Paris 1883, in which Comte calls freedom of conscience "repulsive", "monstrous", and an "anti-social" dogma. It should be no surprise that J S Mill, despite his admiration for Comte, finally rejected him with the words: “He aims at establishing a despotism of society over the individual surpassing anything contemplated in the political ideals of the most rigid disciplinarian among the ancient philosophers.” J.S.Mill: On Liberty. London 1959, “Introductory”, in fine.

26 Refer, amongst others, to: Dunoyer: op. cit. op p.27. It should be remarked that for the Ideologues freedom of expression cannot be separated from freedom of action. This is unlike many of their contemporary intellectuals, as well as those of our day, who do defend freedom of expression (and even use it as an argument to force others to subsidize the publication of their writings) , but not the freedom of other producers to give their ideas concrete form. Refer to Dunoyer: “Du système de centralisation” Journal des Economistes, 1, 1842, 353–389.

conditions of existence, is an endpoint, the expected consequence of "scientific" planning. The implication was of course that in the meantime little or no account should taken of liberty in the sense of individual self-determination. This conclusion was in perfect accordance with the denial of the moral significance of reason which is so closely connected to the positivist approach to the humanities.

2 Theories of Law/Right: Overview and discussion

"Human kind cannot bear very much reality"

— T.S. Eliot

"We do not play God when we act—as we must— within our limitations. We play God when we pretend to an omniscience and a range of options we do not in fact possess."

— Thomas Sowell

INTERPRETATIONS OF THE FUNDAMENTAL PRINCIPLE OF LAW

Every person is a sovereign subject of law/right. Every person has the right to do or not do with themselves as they wish. Every person has an absolute right of self-determination. In law/right, every person is their own master, and no-one else's, and so no-one is a slave to another in law/right. For every person the following holds: their life belongs to them, and no-one else.

These formulations are naught but a number of logically equivalent expressions

of the same fundamental principle of law/right. Many may be willing to concede that every person has a right of self-determination, provided that the object of that right is solely one's own body (and perhaps some so-called "personal" objects of utility). That is to say only the *somatic* means of a person, their body and limbs, but not *extra-somatic* means, such as land, tools and perhaps consumption goods. The question is if this interpretation is coherent, or if it is possible to give adequate philosophical justification for such an emaced right to self-determination. In fact, this is a theological interpretation: it pressuposes that the extra-somatic means are property, not of the human producer, but of some super-human instance. As I interpret the fundamental principle of law/right, as a realistic principle based on the notion that each person is who they are, there is no grounds to include the distinction between somatic and extra-somatic means into the concept of law/right.

The means of a person, extra-somatic no less than somatic, *embody* their opportunities and achievements[1]. They constitute the person's moral or praxeological body, their moral person qua physically present extensiveness, their personal domain. (that which the person has in *dominium*, of which the person is the *dominus*) From a moral or praxeological standpoint a person *is*, qua scope, the totality of their means. This is the concrete embodiment of what the person has already achieved and may yet achieve, since what a person can do depends on their means (their properties and abilities), and what the person's means are depends on what they have already done. The domain of a person, the totality of their means, is the current embodiment both of their past and their future as an acting being. To deny a person the right to dispose over their means is to deny them the right to dispose over themselves. It denies a person the right to finish what they have started, to develop

1 Cf. o.a. J.W.Wiggins: “The Decline of Private Property and the Diminished Person”, in S.L.Blumenfeld: Property in a Humane Economy. LaSalle,Ill. 1974; M.Silver: “Men, Monkeys and Morals: A Property Rights Approach to Social Justice” in R.L.Braham: Social Justice. Boston–Den Haag 1981. This is of course the classical view. Cf. L.Wolowski & E.Levaseur: “Property”, Lalor’s Cyclopaedia of Political Science. Chicago, 1884, 111, 392e.v., gecit. in M.N.Rothbard: Man, Economy and State. Los Angeles, 1970, p.149. H.Spencer: Social Statics. (1850) New York 1970 (Ro-bert Schalkenbach Foundation), hk 4. Bastiat: op.cit. bij p.29, "In the full sense of the word, man is born a proprietor, because he is born with wants whose satisfaction is necessary to life, and with organs and faculties whose exercise is indispensable to the satisfaction of these wants. Faculties are only an extension of the person; and property is nothing but an extension of the faculties. To separate a man from his faculties is to cause him to die; to separate a man from the product of his faculties is likewise to cause him to die."

that which they have brought into being. It is, in other words, to take mastery over their life.

Means are not just a given to people[2]. What is given to people is a mass of things. Means must be discovered, produced, invented. They are creations of the human mind. Nothing is a means in and of itself: even the biological body is not automatically a means – this too a person must get to know. Even for their own biological body, the possibilities must be discovered, developed and brought under control (if need be, with the help of others such a physical therapists,

2 Cf. L.Mises: Human Action. Chicago 1966, 92: “Means are not in the given universe; in this universe there exist only things. A thing becomes a means when human reason plans to employ it for the attainment of some end and human action really employs it for this reason.” and also pp. 140–142: “Production is a transformation of given elements through arrangement and combination…Man is creative only in thinking and in the realm of imagination. In the world of external phenomena he is only a transformer…Only the human mind that directs action and production is creative. Production is not something physical, natural, external: it is a spiritual and intellectual phenomenon… What produces the product are not toil and trouble in themselves, but the fact that the toiling is guided by reason.”

Refer also to: I.Kirzner: “Producer, Entrepreneur, and the Right to Property” in Kirz-ner: Perception, Opportunity and Profit. Chicago 1979, Kirzner judges correctly that it is not the owners of the factors of production as such, who hold the right of property over the means produced by said factor. It belongs rather to the entrepreneur, that is to say the one who takes the initiative to organise the production proces and thus the collection or attraction of the factors of production the entrepreneur deems necessary. The owners of the factors of production are of course still entitled to any reimbursement (contractually) stipulated (which may consist of a "share" in the property rights over the means produced), but it remains the entrepreneur who was responsible for "arranging" the production process which gave rise to the product.

John Locke wrote in a well-known passage: "Thus the Grass my Horse has bit; the Turfs my Servant has cut ... become my Property". This does not mean the servant belongs to the master (as the horse does), and that therefore all that belongs to the servant belongs to the master. It rather means one is paying the other to be willing to execute a project of theirs, and that the other prefers a certain good (the contractually stipulated pay) over an uncertain one (the price the servant could sell the turf for themselves). This has nothing to do with slavery or exploitation. It is unsettling when one reads in Scheltens: Mens en Mensenrechten. Alphen 1981, 91,(Ed: Man and Human rights) the suggestion that labour-contracts come from "a great difference in assets which necessitates one to sell their labour". How can such a great difference come to be? How can such a difference necessarily compel a person to an action? How can it be that most employers hardly earn more than their employees (and often less if one accounts for things like potential remaining debts after liquidation of the company, for example)? Why is it that many employees earn more than many employers, yet these employees remain employees and the employers employers? How can it be that many economists speak in this regard of differences in risk-aversion, initiative and ideas? All these questions Scheltens ignores while, careful conformist that he is, holding fast to the orthodox "progressive" consensus that whatever does not feel good to the participants in this consensus, must be caused by differences in income and assets. Schelten compounds this failure with the gall to blame Locke for "naivety" and "simplicity" (p.92), and to warn us against confusing "beginning" (ED:orig "begin") and "fundamental principle" (p.88) (ED: orig "beginsel" that from which something starts, the underlying foundation). The fact that the origins of some fortunes is to be found in exploitation is not a good reason to assume this to be the case for all fortunes. For an explanation of the fact that the entrepreneur does not require their own capital for the fulfillment of their economic function, refer to: I.Kirzner: Competition and Entrepreneurship. Chicago 1973, 30–87 especially 57–61.

neurosurgeons, etc....). A thing becomes a means only when someone transforms it into one, by applying it to a goal-oriented specific use within their plans.

The first user creates the means as a means – he is the author or *auctor* of it, the creator, maker, discoverer, inventor, founder, builder, the one *because of whom* it is, the one to give it meaning/use[3]. The means is because of him, and in this sense it is *of him, belongs to him:(*ED: 'zijn van", to be of, also translates to belong to*)* as a means it starts from him and finds its origin in him. When we say that the one to whom the means belongs also has the right to dispose of it, then we are not merely stating a tautology. It is not the same as saying that the one who has the right to dispose of something has the right to dispose of that thing. We are saying that the person has the right to dispose of the means on the grounds of the fact that they have created those means. It is only the definition of the thing as a means that brings rise to the means. *As a means* the thing is not what the thing is, but what the person says it to be. The reality of the means qua means is in other words a spiritual reality.

The auctor or first user creates the means ex nihilo as it were, for even though nothing is added to the world of things (in the best case there is a combination of previously existing things), in the domain of means, that is to say in the domain of human possibilities and achievements something new has come to be. The first user adds something to the world as an object of human action, made it grow, increase, become enriched, fortified and improved. This is why the first user is called auctor, which derives from the verb "augero" which mean "to make grow, multiply, fortify, enrich.(cf the Greek "auxanoo",

3 At this point several concrete problems arise in determining the correct scope of the means. In principle the right to disposal relates to a technological unit rather than merely a three-dimensional segment of the universe. As such, a farmer's right to disposal in regards to a plot of land is not violated when, for instance, someone produces radiowaves which pass over said farmers land without permission. Refer, ao to M.N.Rothbard: “Law, Property Rights and Air Pollution” in Cato Journal. 2,1,1982. T.Anderson & P.J.Hill: “Establishing Property Rights in Energy” Cato Journal. 1 ,1,1981. M.Mueller: Property Rights in Radio Communications. Cato Institute. Washington, D.C. 1982. It should go without saying that it is not always possible to unambiguously identify the technological unit. The onus probandi always rests, however, with the claimant of the property. In many cases it will not be worth it to collect the means for such an evidence, or to publicize it, in the same way it will not always seem worth acquiring the means to enforce a right, in which case abandonment of the means will often be preffered. See a.o. H.Demsetz: “Towards a Theory of Property Rights”, o.a. in E.Furubotn & S.Pejovich: The Economics of Property Rights. Cambridge Mass. 1974. 31–40. G.Tullock: Explorations in the Theory of Anarchy. Blacksburg. Virginia 1972.

the German "wachsen" and the Dutch "wassen", "gewas" (ed:"Wassen' verb,to wash, to wax (like the moon, not "to cover in wax") "gewas" noun, crop, plants, overgrowth). Because he is the *auctor,* the author (the one to give purpose and meaning to a thing), he also possesses the *auctoritas*, the authority over the means. The means enters the domain of human action because of his definition of the use/purpose of it, because he says (denotes, signifies, makes know to others) what the meaning of a thing as a means is. The means enters the human domain under his say or authority. As auctor he has the right to dispose of the means. This is, if you will, the *credit*-side of authority.

There is also a *debit*-side: the auctor is responsible and liable for the consequences the means produces in the world of humans. The two aspects are logically connected: the means belong to the auctor, they are "of" the auctor, and what belongs to the means (what comes from them), what is "of" the means, is "of" the auctor (comes from the auctor). The auctor has the right to dispose of the means but is also responsible for it. The right to self-determination and the concept of individual, personal responsibility are inextricably linked. Application of the fundamental principle of law/right therefore means that all people are incentivized to make responsible decisions, and not to accumulate means they cannot adequately control. Conversely, as we will see, any negation or weakening of the fundamental principle of law/right gives people occasion to take irresponsible decisions and to accumulate means they cannot adequately control, without much risk to themselves.

To deny that the auctor or producer has the right to dispose of means produced by them is to implicitly claim someone else to have said right. Such a denial only gains cognitive value if it is followed by answers to the following questions: If not the auctor, who does the right, the authority, belong to? Who is responsible, if not the one who caused the means to be? If not the auctor, why is a certain non-producer chosen, and not another? Or, is it the case that *all* non-producers have a right to the means, and only the producer does not? Or do all, without distinction, have equal right to the means as the producer, compelling one to claim the productive act to be irrelevant? Though many ignore the validity of the fundamental principle of law/right, few even attempt to answer these question in any reasoned manner. We will discuss what must be presupposed in order to justify the denial of the validity of the fundamental principle of law/right.

The practical meaning of law/right/justice is that it enables a rational ordering of human action. Action is the goal-oriented application of means based on judgments of what is and what should be. The means with which people act are not restricted merely to the various parts, limbs and organs that naturally (by birth) belong to their biological organism. Human achievements are not restricted to what could be subsumed under the name "body-building". In the formulation "every person has the right to do with himself as they wish", it is without use, sense or grounds to interpret the word "himself" as if it refers only to the natural organism that is man. Such a purely biological interpretation of the presence of man in the world is devoid of any moral meaning and consequently cannot be presupposed in the formulation of the fundamental principle of law/right. If man is an *animal rationale*, then it is not merely as an *animal*, but as an *ens rationale* that he requires the concept of law/right/justice. Prima facie one must say either that each person has the right to dispose of their own somatic and extra-somatic means, or that a person has neither the right to dispose of the one, nor the other.

From the point of view of what, before the rise of positivism and scientism, used to be called the "moral sciences" (the sciences of human action as rational behaviour, praxeology, the approach of the old humanities to the study of man and society*), each person is the complex of possibilities and achievements embodied in the totality of their means. This is also the position people hold: they consider the means that embody their possibilities and achievements to be their property, to be proper to them, to embody their conception of the good (ed: good as opposed to bad). This conception of the good is of course a presupposition of human action in itself, since without it neither the specific character of being goal-oriented, nor the rationality of human action could be explained. That which is owned is "appropriated", it is an "appropriate" means: people strive to acquire a means on the grounds of a conviction that it will increase their odds of achieving their goal, and will strive to maintain it as long as they believe they can usefully apply it. The distinction between somatic and extra-somatic means is in this (praxeological) sense, not relevant.

MASTERS AND SLAVES

The fundamental principle of law/right ascribes to each person the right to dispose over their own means, and denies each person the right to dispose over the means of any other. It is essential to remember that this principle is interpreted in a realist manner, not as a purely analytical proposition. What the borders of a person are, the question of what falls within and what without their domain, is a matter of fact, not a "question of law/right". Whoever understands this, a fortiori sees that they themselves are a real, finite being, with an own identity, not some unboundable, vague smudge without beginning or end, without foundation or finality. Whoever understands this can see that the fundamental principle of law/right is wholly determined qua meaning, and is therefore capable of generating an objective, coherent order of law/right. The concept of an order of law/right relates to the fundamental choice each and every person is faced with, as a member of a society*.

There are only two ways for a person to achieve their ends[4]. He can attempt to realize his ends with his own means, or if that doesn't work, ask others for help. This can take the form of actively working together (potentially for a return-favour), or by putting some of their means at his disposal (potentially in exchange for reimbursement). The second option is for him to attempt to achieve his ends by attempting to achieve mastery over the means of others, potentially even over their physical person, through violence or deceit. Succinctly: he can attempt to achieve his ends in a lawful manner, or an unlawful manner. Tertium non datur – there exists no other option. Production and exchange among equals, (not "of equivalents" as modern economic analysis in its primitive phase presupposed -the concept of trade of "equivalents"is meaningless and absurd) or parasitism and oppression and exploitation: that is the fundamental choice. The fundamental principle of law/right defines the first method as the lawful one, and the second as unlawful. Whosoever ignores the fundamental principle of law/right in so doing justifies certain forms of parasitic behaviour and thus of the master-slave relationship: they justify exploitation and oppression; in one word: rulership.

To ignore the fundamental principle of law/right is to claim that at least some people are not sovereign subject of law/right, that is to say they

4 Cf. infra Chpt 8, the distinction F. Oppenheimer makes between the "economical" and the "political" methods.

do not have the right to dispose over themselves. If someone does not have the right to dispose over themselves, someone else has the right to dispose over them -they then are the slave, and the other the master. To negate the fundamental principle of law/justice is to claim that slavery of some form or another is lawful.

"Slavery" has become a dirty word, so one should not expect those who negate the fundamental principle of law/ justice to like hearing their convictions characterised as an attempt to legitimize slavery. They almost certainly have a certain empirical image of slavery (blacks in chains, slave-markets, white female slaves languishing in the desert), and they will likely use the word with much emotional display when confronted with limitations of the individuals right to self-determination which they disagree with. Such an empirical and subjective use of the word lacks an adequate conceptual basis however. A slave is a person whose right to self-determination is limited, not by the right of self-determination of others (which is not a limit on said right), but by the boundary-breaking acts of others. (Ed: orig "Grensoverschrijdend", crossing a boundary unlawfully)

The aforementioned subjective-emotional use of the term "slavery" is to be understood in light of the positive use of the term "serve". The opponents of the fundamental principle of law/justice use the term "serve" to denote those limitations of the personal right to self-determination that they do agree with: men must serve God, they must serve the community, they need to learn to live their life in service of others, etc. Put simply: they see man as essentially a servant, a helper, someone that lives in service to something or someone outside of themselves, and thus as an incomplete being, helpless without the guiding hand of the master. The Greek term for servant, helper is *aosseter,* which is related to the Latin *socius*. This helps explain one of the most popular definitions of humanity: man is an *animal sociale.* This can be taken literally to mean "a serving animal", such as a pet, a beast of burden, a tamed animal, as one might find within the domain of a master or *dominus,* a domesticated animal. The word *socius* is related to the verbd *sequi*, which means "to follow", such that the expression *animal sociale* also carries with it the meaning of "following, docile, obedient animal".

The postive use of the term "to serve", just like the word "servant", is made possible by its ambiguity. If a

slave is always an involuntary servant, then calling a person a "servant" does not make it clear whether they are a voluntary party to a contractual relationship between employer and employee, a charitable relationship between a helper and one needing help, a protector and protectee, or rather an involuntary relationship of master and slave. The Germanic word "thewa", from which the Dutch word for serve can be etymologically derived, did have the meaning of slave.

The fundamental principle of law/right does not deny anyone the right to serve, help, protect, or follow any other. As such those who call upon the idea of service to negate the fundamental principle of law/right can only mean to say that man is a slavish being, by nature a slave, a being that must be led and defined from without, a being that from an ethical standpoint is what others say it is. It is therefore not surprising that people whose entire world-view is built around this fundamental conception of humans have the tendency to, disparagingly, call one who sells his services, but not himself, not his right to self-determination, a "wage-slave". That man refuses to give *all* of himself, to follow unconditionally – he remains his own "master", and thus a slave to himself. (He is not "free" in the moral sense, since the ethical principle that gives his existence value is to be found outside of himself: he is a heteronomous being by nature.) We can find a very good illustration of this attitude in Sir James Fitzjames Stephen, *Liberty, Equality and Fraternity, 1873*:

> "I doubt much whether the power of particular persons over their neighbourshas ever in any age of the world been so well defined and so easily and safely exerted as it is at present If in old times a slave was inattentive, his master might no doubt have him maimed or put to death or flogged ; but he had to consider that in doing so he was damaging his own property, that when the slave had been flogged he would still continue to be his slave ; and that the flogging might make him mischievous or revengeful, and so forth. If a modern servant misconducts himself, he can be turned out of the house on the spot, and another can be hired as easily as you would call a cab."[5]

The juxtaposition is clear: the interest the master has in the wellbeing

5 J.F.Stephen: Liberty, Equality and Fraternity. London 1873, gecit. in E.F.Carrit: “Liberty and Equality” Law Quarterly Review. 56, 1940, 60–61.

protects said slave, the interest the modern clerk or employee has in their own wellbeing does not protect said clerk. Stephen seems to consider the slave, all things considered, to be better off than the clerk. Reasoning like the aristocrat he was, he seemingly assumed, that the "lower" people had an almost animal character. They may misbehave at times, but this is merely a fact which has no moral significance. It's something they themselves can't help – it just happens to them, it's not something they want to do. They are defenseless against themselves. The slave, at least, was not left to themselves. The master takes care of the slave, but the clerk does not take care of himself (even though he is his own master). Fate did him a dirty turn: naturally destined to be a slave, he finds no master willing to provide that care to him, that he himself cannot bring himself to provide. Note that Stephen is apparently incapable of imagining the slave turning to sabotage *before* any punishment, or of being vengeful just over the fact that they are held as a slave. Note also that Stephen does not spare even a word to mention the possibility the clerk has to discard his boss (to quit his job), and that he does not mentional "economical" discarding. What being "economically" discarded would mean to the slave is made clear when one considers what each of us does when "discarding" some utensil or beast of burden.

Stephen's argumentation fits into a long tradition. The fundamental idea that the slave is an incomplete person which needs a master, was formulated very clearly by Aristotle, who opined the master should be the cause of the slave's virtue, that is to say the virtue befitting of the slave. That is an explicit confirmation of the theme of heteronomy. The "natural slave"[6], to Aristotle, was the person who could, and therefore should, belong to someone else. The person that shares in human rationality to the degree that they are capable of understanding what is expected of them, but who is incapable of reason. The slave can thus not be a member of the polis; they belong in the household. The slave is not a *zoon politikon*, but an *animal sociale*. I will elaborate upon this distinction in a later chapter. It is fundamental to a proper understanding of the problem of philosophy of law/right. Aristotle was obviously not of the opinion that every man is by nature a slave, a being requiring moral meaning imposed from without. This opinion did play a major part in the Saint-

6 Aristotle: politics. Book I, hk 5. also 1/13.

Simonist degeneration of the humanities. This view conformed with Rousseau's conception of the citizen as a "moral, partial being" ideally animated by the so-called general will or the Legislation. Only organised society* in its totality was seen to be a real moral being, with the individual being no more than an abstraction. Not surprising then, that biology (under impulse of Darwin's sensational theory of evolution) replaced classical mechanics as the paradigm for the humanities. Rousseau's mechanical and external connection between individual and community in the form of the so-called social contract had to make way. It was replaced by a biologically inspired, organic relationship, which reached its apex in the fascist conception of the State. Anyone tempted into considering Saint-Simonism and fascism[7], in their many forms, to be aberrations should not lose sight of the fact that in a certain sense these claims are the most rigorous elaborations of the conception of man as a social being. Doing so would endanger any proper understanding of the philosophy of man and society*.

EQUALITY

It is easy to see and admit that "slavery"[8] is a dirty word, and "serving" is not. It is difficult however, to find a better term for that which the fundamental principle of law/right designates as unlawful, and for thus for that which is considered lawful by those who reject that fundamental principle. Which is the use (in a broad sense) of the somatic or extra-somatic means of an unwilling other. As such, I shall continue to use it. It speaks for itself that, as long as

7 Cf. P.Hayes: Fascism. London 1973: H.Reupke: Unternehmer und Arbeiter in die faschistische Wirtschaftsidee. Berlijn 1931, 14e.v., 29e.v.
It's a small step from Comte's idea of the individual as "un functionnaire public"(cf infra p 96(orig. numb)) to Mussolini's declaration that "the individual only exists as a part of the state, and as subject to the demands of the state.(gecit. Z.Sternhell: “Fascist Ideology” in W.Laquer (ed.): Fascism. Harmondsworth 1979, 379.

8 Cf. The chapter “Involuntary Servitude” in M.N.Rothbard: For a New Liberty. New York 1978. W.F.Rickenbacher (ed.): The Twelve Year Sentence: Radical Views of Compulsory Schooling. New York 1974. I.Illich & E.Verne: Imprisoned in the Global Glassroom. London 1976. Thomas Szasz: Law, Liberty and Psychiatry: An Inquiry into the Social Uses of Mental Health Practices. New York 1963. J.Defoort: De Belastingmaatschappij. Kalmthout 1981. L.J.Dumas: “Taxes and Militarism” Cato Journal 1,1, 1981, 277–292. R.B.McKenzie: “Entitlements and the Theft of Taxation.” Reason Papers 6, 1980, 15–24. And many others.

I have not validated the fundamental principle of law/right, we should keep open the possibility that slavery is not unlawful.

Many people don't seem to have much difficulty accepting, praising and enforcing certain forms of slavery. Some, for instance see no problem with forcing many thousands of young men and women each and every year, under threat of various punishments, to offer military services to others. Another may insist on forcing minors to be present in buildings they call "schools", so as to be sorted, marked and transformed into something which conforms to the standards held by some people. In both cases, we are dealing with forced labour, in the second even forced child labour. That judgment cannot be avoided, even if we do not dismiss the possibility of that forced labour being justified. Justified forced labour would still be forced labour. There is of course no lack of theories purporting to justify such practices. These may range from it being in the slave's interest ("the army makes a man out of you", "schooling makes you into a full person") to the interest of everyone ("everyone needs protection", "everyone is served by living in a well-schooled society*"). The weakness in these theories is to be found in the fact that it is not sufficient to prove merely that people require protection and schooling, it must be proved that they require exactly that protection or schooling they are forced to provide or undergo, and that it can only be provided by means of force.

Some consider it to be normal, even necessary, that people be forced to cede part of their incomes to an organisation they call a 'state', and thus force those people to provide the means that the controllers of said organisation believe they require for the attainment of *their* ends. This too is a form of forced labour, though it can be avoided by not producing taxable income (by not producing an income, or by producing an income which is not taxed) or by becoming a member of aforementioned organisation. Other still are proponents of specific sorts of serfdom, and claim they have a right to the life

of others, for instance when they endeavour to label abortion, euthanasia or suicide as *punishable* (not merely as immoral) facts.

Other forms of slavery are expressed when some claim for themselves the right to decide which books may be written, published and read; which religions may be held or the manner in which sexual, vestimentary, recreational, etc. needs may be satisfied. The claims some make on the right to a monopoly of the production of goods or services of a certain type, and the claim to the sole right to decide who is and is not allowed to engage in certain activities (licensing) are more examples.

What all these and many similar opinions – for this list is far from complete – have in common is precisely the conviction that not all people are sovereign subjects of law/right, and as such that such things as belong factually (objectively) to one person, rightfully belong to another, to the *master.* The essence of those conviction is the acceptance of rulership/dominion, and thus of slavery, not merely as a *fact*, but as a *lawful* condition. It entails the acceptance of the right of one to exploit the accomplishments of others, and the right of one to suppress the opportunities of others. Let "slavery"be a dirty word, we would do well to remember the words of Ayn Rand:“Those who want slavery should have the grace to name it by its proper name.”[9] The fact that we are so familiar with and accustomed to certain institutions and practices that we can scarcely imagine how we could do without them, may not be an excuse for neglecting to question their true nature. The conformist provincialism of positivism[10] which in regards to law/right attempts to legitimize as much as possible in order to create the illusion that, if our world is not the best of all possible worlds, it at least has no major flaws, is not a legitimate grounds for the rendering of judgment. The fact that many people fail to properly apply the rules of logic does not give grounds to the claim

9 Ayn Rand: Anthem. Caldwell, Idaho; reprint New American Library, New York s.d., p.viii.

10 “The positivist’s so-called ethical neutrality is so far from being nihilism or a road to nihilism that it is no more than an alibi for thoughtlessness and vulgarity: by saying that democracy and truth are values, he says in effect that one does not have to think about the reasons why these things are good, and that he may bow as well as anyone else to the values that are adopted by his society. Social science positivism fosters not so much nihilism as conformism and philistinism.” Leo Strauss: op.cit. on p.19, p.20.

that logic is "lacking realism", and analogously the existence of injustice does not give grounds to the claim that the fundamentals of law lack realism, if those fundamentals imply the existence of some of the most trusted institutions and practices to be unlawful.

Few people can be found willing to publicly, and without shame, proclaim, in their own name, that they have the right to confiscate the means of others. Such an utterance offends; it does not account for the fact that the idea of equality is an essential component of almost everyone's conception of justice*. It is a simple matter, however, to make that claim while still maintaining to uphold the criterion of equality. Opponents of the fundamental principle of law/right usually purport to represent some "higher" agency, that has the right to everything. An agency which is a sovereign subject of law/right which has, as the highest legislator, the right to dispose over the life and means of the people. They, as representatives of this "higher" agency, claim a right to the obedience and servility of all others, not because they are inherently superior to their fellow man, but because they are the chosen among the people. Chosen to ensure that the *will* of said higher agency be done, or that the *interests* of said agency might prevail over what is then dismissively called "the individual interest". For some, this higher agency is some god or the other, for others some mysterious supra-individual entity, a so-called state, community, nation, tribe, race, or whatever, seen to be some mystical being with its own will. A will which is law for those people that in equally mystical fashion "are a part of" that entity. These mystical entities are called upon to justify truly fantastical claims. For instance: even though the majority of Belgians has the right to dictate the laws according to which a minority of Belgians must live, the majority of French people do not have that right over the minority of Belgian people, even though they are numercally superior to the Belgian majority. Furthermore, the majority of Limburgers (ed: inhabitants of the Belgian province Limburg) do not have the right to rule the minority of Limburgers, except in those cases deemed to be specific to Limburg by a majority of non-Limburgers. From a naturalist perspective, all relationships aimed at in such claims reveal themselves as based on power, such that a theory of law/right which masks reality is needed, in order to be able to interpret it as lawful.

A theory is needed that will allow the aggressor to claim that he is merely fulfilling a "higher" calling, that he is not personally responsible for his actions, but that the principle of his actions is to be found outside of himself, with another.

In its most vulgar form this conception appears as that type of altruism built upon the belief that violating the rights of another is acceptable, if the aggressor aims not for their own profit, but that of another.

"I'm not doing it for myself, but for someone else" is here the ultimate excuse, the final justification[11]. There is hardly a poor person that sees *their* poverty as such as sufficient grounds to claim *they* have the right to the means of others, that *others* have the duty to sustain them and release them from their poverty. That claim would entail such a direct negation of one's own self-respect that it would immediately be experienced as the expression of a pathological state of mind. Many people seem not to have any trouble concluding they have the right to confiscate the means of others, or to suppress their opportunities, if they are convinced that they are exercising their domination of others for the benefit of some third party. It is difficult to understand why A would not have the right to confiscate the means of B in order to help himself, if C does have the right to confiscate the means of B, to help A. Why one would be a crime, and the other the fulfillment of some higher duty is unclear.

In more sophisticated forms of this type of altruism, this "other", whose interests justify C's agression towards B, is not some third person or group of people, but a super-human or extra-human entity, a God, or a Community. The same actions that all immediately recognize to be criminal when they are taken in one's own name, are summarily accepted as a moral necessity when those actions are taken in the name of said higher entity. These actions are even given different names:

11 “To be blunt, the poor are a gold mine. By the time they are studied, advised, experimented with and administered to, the poor have helped many a middle class liberal to attain affluence with Government money.” Thomas Sowell, in New York Times Magazine, 6/8/76. also, by the same author: Knowledge and Decisions. New York 1980, 249–260, en 354–368 Relating to the tendency of the "intellectual class" to use the less afluent situation of others as an excuse for their own political will to power. Also relevant: P.T.Bauer: “Western Guilt and Third World Poverty” in P.T.Bauer: Equality, The Third World and Economic Delusion. Cambridge, Mass. 1981.

criminal proceedings, confiscation in the public interest, taxation, legal servitude, public grounds, conscription, etc. The difference in name does not prove these actions to differ, in reality, from personal or "private"actions. The idea that it does has its grounds in the belief that the essence of the crime is not to be found in the disruption of real interpersonal relations, but rather in the usurpation by some person of the authority that actually belongs to the Sovereign whose will man is subject to "by nature". This makes the essence of the crime the breaking of some Legislation -nullum crimen sine lege – and the real victim is not the person who was murdered, harmed or stolen from, but the Sovereign, as it is its will the culprit disobeyed. This Legislation serves as the criterion for right/justice and injustice, but that Legislation can have *any* content. This is because, as previously noted, the reality of human nature is not taken to be the foundation of law/right, but rather the assumption is made that man must be defined externally. Man is what X says man is, X has the right to define man. This stance can only possibly lead to rationally irreconcilable differences of opinion regarding who that X might be, and what that X might want.

In so doing, law/right is lifted from the sphere of practical reason, decoupled from the existential situation of man as an acting being. Law/right, that is to say the implications of the legislation, becomes a "given", a "positive" law/right posited by some agency. Human reason, as a result, is incapable of discovering what justice is. The only fundamental source of law/justice is the authoritarian edict of those who, in some mysterious fashion, do know who or what the X, relevant to the definition of man, is, and which law X imposes on us. In this conception questioning what law/right is becomes pointless. Both the foundation and the finality of human action are not to be found in man himself, but outside of him, in X. Man can not live morally autonomously, he must live morally heteronomously (that is to say, as an altruist, as someone who sees themselves solely as the means to the ends of another). This is clearly no more than a repetition of Aristotle's definition of the natural slave. Man is a natural slave: intelligent enough to understand what others

desire of him, but not intelligent enough to figure out by himself what he should do. Whosoever reasons in this way, will not have a hard time using the dirty word "slavery" to point to those cases of exploitation and oppression which are not in accordance with the Law-as-Will-of-the-Master, in whose service humanity exists.

ALTERNATIVE THEORIES OF LAW/RIGHT

The fundamental principle of law/right, considered as a material foundation rather than a mere analytical formulation, requires the acknowledgment of the fact that people are natural, objectively determinable or boundable entities. From that follows that the crossing of the boundaries of another is also an objective fact. If injustice is a relationship between people, it is obviously imperative to the study of law/right and injustice to attempt to learn exactly where someone's boundaries are. First, obviously, each person is a clearly bounded organism. This is their first and most private means. There are many human organism, and each of them are means, more or less controllable by will on the basis of judgment, directable towards the attainment of various ends.

The human organism is a *scarce* means however, that is to say that even though it may be used to attain various different ends, it cannot be used to attain all these ends at the same time. One cannot read Hegel while also climbing a mountain at the same time, write a love-letter and simultaneously do your accounting, ride a car and a bike at the same time, etc. If towards the attainment of two or more different ends claim is made to the same body, there arises a conflict that must be resolved. Someone will have to decide towards which end's attainment the body will be used. Who? Who has the right to decide over that body? The one whose body it is, or another? If another, which other(s)? This is the fundamental question of law/right. Either each person has the right to dispose over their own body (in the biological sense), or some people have the right to dispose over the bodies of some others, or everyone has the right to dispose over the bodies of everyone, or no person has the right to dispose over any body, neither theirs nor any other's.

Quintum non datur – there are no other options.

We find the same list of alternatives when we consider means other than the somatic. Extra-somatic means are also scare in the same sense that somatic ones are. As such, these means as well may be the subject of conflicting claims, where the means must be used towards one end rather than the other(s). Someone must decide which end the means will be applied towards, or the means will not be used at all. Who has the right to decide over which means will be used where, by what method, when, under which conditions, etc? The one whose means it is, or someone else? That is the question of law/right. It is clear that in asserting this I rely on the presupposition that means aren't just a given to people, but rather that means only come to be though goal-oriented, rational action of people themselves. A means is a consequence of the activities of a person. Each means is because of somebody, means are not emanations of some supernatural or collective substance. They are always the result of one or more people using their imagination, their muscles, their organisational talents, and devoting their time to developing the means. They apply their means towards the creation of new means. Means result from specific activities, they have a history such that it is in principle, disregarding unavoidable empirical difficulties, always possible to determine who contributed in what way to the availability of the means in question.[12]

12 In an effort to avoid misunderstanding: to say that the auctor has the right to a means is not to say that this auctor is always one individual. Different people can decide to produce a means together, and if they do the means is theirs by law/right. To claim that all producers of a means share in the right of determination over that means is clearly not the same as claiming the means produced by them belongs to "the class of producers(of whatever means)" or to "the community". To put it in more legalistic terminology: the system of private property does not exclude co-ownership. The original owners or producers, regardless of their number, retain the right to exclude any non-producer from using their product. This is in keeping with the principle of private property. The negative of that would be to claim that the producers do not have the right to exclude some or all non-producers from the use of their product. It is telling that when C.B.Macpherson ("Liberal Democracy and Property", in his collection: Property: Mainstream and Critical Positions. Oxford 1978, 201e.v.) suggests "property…may equally be an individual right not to be excluded by others from the use or benefit of (another's product)",he has to explicitly admit that such a "right"can not be a fundamental (ed:original?) right, but must instead be a legislative "right" ("property is the creation of society, i.e. in modern times, the creation of the state. Property is, as Bentham said, entirely the work of the law").This is of course naught but the purest form of the doctrine "might makes right", as MacPherson does not even make reference to the source if this fundamental right of "society, i.e. in modern times, the state".Besides, and not the be confused with, the problem of discovering the identity of the auctor(s) of a certain means, there is the economic problem (handled in pricing theory) of how to determine the value of the contribution of the various factors of production rented or bought by the auctors. Refer to: M.N.Rothbard: Man, Economy and State. gecit. bij noot p.34, pp. 280–312, 387–428.

It's evident that here too the alternative theories of law/right are a-prioristically identifiable as follows: either each person has the right to dispose over their own means (the fundamental principle of law/right); or some people have the right to dispose over the means of some others; or everyone has the right to dispose over the means of everyone; or no person has the right to dispose over the means of anyone, neither theirs or those of any other. *Quintum non datur;* there are no other options. One could attempt to construct some "mixed" theory of law/right, in which the right to determination of different types of means is decided by different alternative theories of law/right, but it must be built from some combination of aforementioned alternatives. *Prima facie* it's unlikely such a theory can be made believable. Not only is it possible to categorize means according to many different criteria, there is no reason to assume one criterium is provably relevant to the construction of a theory of law/right, while all others are irrelevant. That last fact alone creates an additional source of conflicts. Furthermore even the distinction between somatic and extra-somatic means is irrelevant from a praxeological or a moral point of view, as both are embodiments of the achievements and possibilities of a person.

We may also express the four alternative theories of law using the previously introduced terminology of "masters" and "slaves". The first position is that every person is by right their own master, and no-one else's. No person is by right a slave of another. Every person is a sovereign subject of law/right. This alternative implies that it is meaningful to ask, in respect to each person and each act, if that person has the right to take that action or not. Each person has the right to take any action that does not imply the use of or damage on another's means, acquisitions or possibilities. The second alternative is that some people are "masters"and others "slaves". Regarding the latter, posing the question of whether they have a right to take a certain action is meaningless – about as meaningless as asking the same question in regards

to a tree, a cloud or a dog.

The third option combines something of the previous two. The first posited that each person is their own master, and no-one else's, the second that some people are slaves. The third posits that each and every person isboth master and slave to all other people in other words that each person has the right to dispose over all people. Despite how unlikely and contradictory this third alternative may sound, from the perspective of philosophy of law/right this is in fact the most important rival to the fundamental principle of law/right. However, it is often found buried underneath some version of the fourth alternative. This fourth alternative is: that no person is a sovereign subject of law/justice, no person is by right master of themselves or any other, consequently no person is by right a slave to any other person.

To be able to interpret this fourth alternative meaningfully in the sense of theory of law we may not interpret it as the simple negation of the idea of law/right. Rather, we have to assume that, though no person is a sovereign subject of law/right, this does not imply that there are no sovereign subjects of law/right. To put it another way: we must assume that there are one, or more, super- or extra-human entities which are sovereign subjects of law/right. The acceptance of this fourth alternative theory of law/right thus implies that each person is no more than a means, a slave to one or more of these inhuman sovereign subjects of law, to some god, spirit or personified force of nature, or a personified collective (State, Nation, Community, Race, etc.).

So, the four alternatives are: 1) each person is a master (of themselves), no person a slave (to another); 2) some people are masters (of others), some people are slaves (to others); 3) each person is a master (of all others) and each person a slave (to all others); 4) no person is master (of themselves or others), each person is a slave (to a extra-human sovereign subject of law). As these are the alternative answers to the question of law/ justice/right, they determine the different positions in the "universe of discourse" of the philosophy of law/right. They imply, of course, four different answers to the question of what injustice/unlawful is. The first alternative leads to the answer: there is injustice/unlawfulness when some makes themselves the master of another in some way, thus treating them as a means or a slave, and not as an equivalent (ed: "evenwaardig" equally valuable, equally valent) sovereign subject of law/right. The third alternative -

each person has the right to dispose over all people – has the following definition of injustice as a consequence: no person has the right to do anything without the permission of all others.

When we ask ourselves the question which definition of injustice/unlawfulness corresponds to the second and fourth alternatives, we must come to the conclusion that they are logically ambiguous. Regarding the second alternative we could either say that none of those people who are sovereign subjects of law/right, the "masters", have the right to do anything to any other "master"; or that none of the "masters" have the right to do anything without the permission of all other "masters". Note here the formal resemblance to the first and third alternatives: a) no person (master) has the right to do anything to any other person (master) without their consent, and b) no person (master) has the right to do anything without the permission of all other people (masters).

The fourth alternative as well suffers from logical ambiguity: either none of the (whichever entity specific to the alternative theory of law/right) super- or extra-human sovereign subjects of law/right has the right to do anything with the means of any other sovereign subject of law/right without their consent, or none of these extra-human "masters" has the right to do anything without the permission of all extra-human masters. One should note that here as well the same formal resemblance with the first and third alternatives appears, as it did in the second alternative. A definition of injustice seems particularly irrelevant in the context of this fourth alternative: excepting perhaps the theory of so-called state-sovereignty we normally have little interest in what one non-human entity may do to another non-human entity. In practice these entities are indeed usually only introduced *pro forma*, as the logical keystones for theories that stipulate some Legislation (ed: orig: "Wet" Lex) or the other as the criterion for distinguishing "justice/lawful" and "injustice/unlawful" in interpersonal relations. Yet injustice in the actual sense of the word can only be attributed to sovereign subjects of law/right. To say that the Legislation is the criterion for "justice" and "injustice", is confusing. Legislation can only provide grounds for the distinction "legal" and "illegal". That distinction does not however relate to the behaviour of sovereign subjects of law/right, but the behaviour of the means of a sovereign subject of law/right. A sovereign

subject of law/right (master) has the right to do or not do with their means (slaves) what they will. They have the right to make themselves be obeyed, that is to say they have the right to dictate legislation by which his means should behave.

It should be clear from this enumeration of the logically possible categories of answers to the question of law/right that the fundamental problems of philosophy of law/right are determined by the answers to the following two questions:1) are the sovereign subjects of law/right people/humans, or other beings or entities? and: 2) should we understand "sovereign" to mean that every sovereign subject of law/right has the right to do or not do with themselves, but not others, as they will? Or should we understand "sovereignty" to mean that each sovereign subject of law/right has the right to do anything, not just with themselves but with everything, including the means of other sovereign subjects of law/right? This second question essentially poses the weighty metaphysical problem of the finite versus the infinite. The bounded, ending, finite has boundaries/limits by definition. It is boundable, it has an identity, it is distinguishable as such from the other. The infinite, the unending, has no boundaries, it is not boundable, has no identity and is not distinguishable from the other. To claim that each sovereign subject of law /right has the right to do or not do with themselves what they will is also to claim that the sovereign subject of law/right is not only identifiable by their individual will, but also by their physical bounds. To claim that a sovereign subject of law/right has the right to do or not do as they will, is to claim that it is only identifiable by its will. This last claim presupposes a strict separation between body and mind, and implies that the individual mind and will are faced with the world of material things as an external whole, such that each subject can say: "All the world belongs to me".

This problem of *the infinite* versus *the finite* is connected to the problem of *the one* versus *the multitude/many* (monoism and pluralism), and thus also to the problems in political philosophy between *monarchy* and *anarchy.* Here I would like to remind the reader of the epistemological discussion in the previous chapter. The realistic interpretation of the principle of identity presupposes that there are many things in the world, each of which is what it is. Each of these things is therefore in principle distinguishable/boundable. The order of things is not an order imposed from without, it is not an order alien to the things themselves, but rather a spontaneous order (*cosmos*) which results from the interaction between the things themselves;

an anarchy. The nominalist interpretation of the principle of identity on the other hand presupposes that any distinction we can make exists only as an arbitrary convention of the knowing subject. The world itself is one, vast, unknown X, to which the concepts of *order* and *disorder* cannot be applied. Those concepts apply only to the world of phenomena, which shows no other order than that imposed upon it by the mind. The world behind the phenomena is an indivisible unit and as such unchanging (this is the metaphysical presupposition of determinism). The phenomenological world owes its unity to the ordering of phenomena by the mind itself, according to the principles of that mind itself (a monarchic principle). In Genesis 1, we can find the story of seven days of creation, in which each day brings something totally new. Genesis 2 tells a story in which this pluralism is ignored completely and all familiar phenomena are explained as different forms of the same principle substance (ed: "oerstof"), the earth. ("But there went up a mist from the earth, and watered the whole face of the ground. And the LORD God formed man of the dust of the ground... And out of the ground made the LORD God to grow every tree...And out of the ground the LORD God formed every beast of the field, and every fowl of the air...) We will see that these systematically linked oppositions/contradictions are of fundamental importance to both moral philosophy and the philosophy of law/right.

If we leave aside the specificity and identity of the sovereign subjects of law/right, we can form a concept of the *formal* theory of law/right (as opposed to the *material* theory of law, which is actually characterized by attention to the identity of the sovereign subjects of law/right). In so doing, it becomes evident that each theory of law/right has either the form of "each sovereign subject of law/right has the right to dispose over themselves, no sovereign subject of law/right has the right to dispose over any other without the other's consent."; or to the form: "each sovereign subject of law/right has the right to dispose over all other sovereign subjects of law/right, no sovereign subject of law/right has the right to do anything without the permission of all other sovereign subjects of law/right".

This means that we can transform these two alternative, and thus rival, formal theories of law/right into a material theory of law/right, by signifying who or what we identify as sovereign subjects of law/right.

These can be people, humans (all, or just some), or some different entity or entities (all, or only some of these entities, or only certain types of these non-human entities). The alternative theories of law/right, formally, are "to each their own" and "to each, all". Criticism of these formal structures has no bearing on the identity of the sovereign subjects of law/right, and as such can be formulated in a very general manner. This is not the case when discussing the merits of the different material theories of law/right. To the extent that judgments about justice and injustice have any identifiable content, they can be subsumed into one of the aforementioned alternative theories of law/right. The task of philosophy of law/right can thus be more precisely determined to be the criticism of the various dogmatic theories of law/right. If the end is to be able to judge just* from injustice in a reasoned manner, an insight into the structure and content of the different theories of law/right is required. Furthermore, a choice must be made between the available alternatives. The rational defense of such a judgment presupposes the willingness to connect that judgment to a principle. It will not fly to cast a series of random judgments and afterwards look, a posteriori, for a theory of law/right which allows for the foundation of all those judgments. Such an a posteriori rationalization confuses judgments on justice and injustice with ultimate givens and is thus irreconcilable with the ends of practical philosophy. On the contrary, one should first identify the correct principle, and then render reasoned judgment on particular matters based on that principle.

“SUBJECTIVE” AND ”OBJECTIVE” RIGHT/LAW

The four alternative theories of law/right identified above all express the logical priority of *subjective* law/right, that is to say the *active* conception of law/ right. Regardless of who are designated as sovereign subjects of law/right, the fundamental right is always a right to do or not do. Even those that believe, or claim, that so-called "objective law/right" is primary, in the sense that *to people* the term "law/right" refers first to a given whole of imperative, forbidding, and authorizing norms, must admit the priority of subjective law/right. For if those norms are to be called "lawful norms" (ed: "rechtsnormen" just/right/law norms)

that *presupposes* that there is some agency that, as a sovereign subject of law/right, has the right to enforce their will onto a part of the world, and to extract obedience by force if need be from those people within its domain. Kelsen showed this in his own rather confusing way. Anyone can dictate norms, but only those that have the right to do so can make any claim to lawful validity for those dictated norms.

It is misleading to call those lawfully valid[13] norms as lawful norms. Those lawfully valid norms are norms dictated or authorized by a sovereign subject of law/right in reference to the management of its domain. Only a sovereign subject of law/right can dictate *lawfully valid norms*, and even then only in relation to the use or destination/designation of their own domain. A sovereign subject of law/right cannot dictate *lawful norms*, however, as it is precisely law/ justice/right itself (the totality of lawful norms) that determines who or what is a sovereign subject of law/right, and how to determine what is within their domains and what is outside their domain. The legislation, verdicts, rules and such issued or authorized by the organisation called "state" are by no means lawful norms; and they are only lawfully valid if the theory, that every state has the right to do or not do with theirs what it wills, that every state is a sovereign subject of law/right, is the true theory of law/right. Kelsen did manage to show that this theory must be presupposed if we are to designate said state legislations, verdicts and rules as lawfully valid, but he has not shown the theory of state sovereignty to be true. He has not shown that we *should* want to designate those things as lawfully valid.

The claim that "objective law/right" has logical priority over "subjective law/right" in fact entails the assumption that people are not sovereign subjects of law/right, but rather means, or slaves, of another, non-human sovereign subject of law/right, some Sovereign Legislator. Characteristic to this conception is that people are not primarily considered as

13 Legislation, verdicts, rules, etc. all share the form of commands, prohibitions or allowance: cf. Legis virtus haec est: imperare, vetare, permittere, punire (Digesta, 1/3.7). Lawful norms on the other hand have the form "X has (or does not have) the right...", which is not to be confused with "X has (or does not have) the permission..." If X got Y's permission to do A, it would be fitting to ask the question whether Y has the right to allow X to do A. In casu, to question if that norm is lawfully valid. If someone were to answer that question in the positive, referring to Y getting the permission from Z, they are merely shifting the problem.

subjects of law/right but rather as subjects of duty. This is not an empty distinction: this passive conception of law/right/justice presupposes the existence of a Sovereign Legislator in relation to which people have duties, but no rights. Consequently among people every "right" of one towards another has a mirror image in a legal duty. But there are such duties, such as obedience to the Legislation, which do not have a corresponding mirror image in the "right" of a person. These duties flow simply from the sovereign, actual right of the Legislator to do or not do with their means as they please. The legal duty of citizen A towards citizen B is the cause of the "right" of B towards A, but the right of the Legislator is not caused by the duty of obedience of the citizens. On the contrary, this duty should rather be understood as a consequence of the rights of the Legislator. This asymmetry confirms the priority of subjective law/right of the Legislator over the legal or legislative "rights" and "duties" of the subordinates.

This asymmetry is caused by the asymmetry in relationship of Legislator-Subordinate or Master-Slave, in which the Master is an autonomous, full moral subject and the slave as a heteronomous, partial moral subject. The master, to once again quote Aristotle, is the cause of the virtue of the slave. The slave participates in moral life only as an instrument of the master, who is his legislator. In the best case the slave is a non-actual subject of law/right: as part of the domain of his master, he is protected from the actions of other masters or of the slaves. animals, etc, of those other masters, at least to the degree that his master wishes to protect him. This is the only protection law/right can offer the slave. This is not what is meant by those who ascribe logical priority to "objective law/right" however. They take the people to be slaves and study interpersonal relations as if directed by a given Legislation. This Legislation determines legal "rights" and legal "duties" and as such constitutes what they call "objective law/right". This "objective law/right" is thus nothing but the will of the master. If the master so wishes, he may issue a legislation which proscribes how his slaves should act towards one another. Since this legislation enforces a duty upon the slaves in regard to their behaviour towards each-other, it also gives them a "right". Namely, the right to complain to the master if they are not treated as proscribed, by one of the other slaves. It is clear that this complaint concerns primarily

the other's action as a violation of the legislation/law, or is in any case motivated by the hope the master will choose the side of the complainant. One calls upon the explicit legislation, or the ruling morals, the morals of the ruler or master.

This focus on the arrangement of the "rights" and "duties" in a slave-population by way of the Legislation of the master makes the *actio*, the calling upon the services of the master in settling disputes among the slaves, appear as the essence of the "rights" of the slaves. It rests on the primary right of the master to do with their means as they please, and thus on his right to force his subjects to obey his will, violently if need be. If the Legislation does not provide for such violent enforcement, or if the master is unwilling to intervene, and yet still the subjects have the realization of the existence of a right or duty, this right or duty is by definition outside of the domain of "objective right/law" as determined by the will of the master. As such they have no lawful validity, and this explains the necessity of describing such rights or duties as belonging to a different domain. For convenience, and very imprecisely, this domain is commonly referred to as "the moral". Characteristic to these moral rights and duties is little or nothing more than the fact that they cannot be enforced by violence.

It is immediately evident that it is quite misleading, in this regard, to refer to someone's "right" as *their* right. The "rights-holder" has their "right" only because of the fact some legislation exists that gives others the duty to give them something or to allow them to do something. This "right" is not like the actual right of the sovereign subject of law/right, which is the cause of the duty of others, but rather a consequence of the duty of others. The contents of this "right" are wholly borrowed from the word of the legislation, the will of the master, as interpreted by the master or his agents.

The right of the sovereign subject of law/right is logically of greater weight than the duty of the sovereign subject of law/right to ensure that they do not make use of another's means without permission. It can exist in a situation where such a duty has no practical relevance. This is the case, for instance, when the sovereign subject of law/right finds himself outside of the social context. At such a point they still possess the subjective right to do or not do with what is theirs as the will, but he no longer has the opportunity to take unlawful acts, as that would require the presence of at least one other sovereign subject of law/right. Supernaturalist theories of law/right which point to one single god

as the universal sovereign subject of law are logically forced to posit that this god can do no injustice, whatever he may do. For such a god law/right *only* has a subjective aspect. The subjective "right" of the slave (subject, citizen, etc.) however is wholly derived from the Legislation that imposes duties on other slaves. The subjective "rights" have their origin *outside* of the "rights-holder": they are not *of* him, but *unto* him, they are granted to him. Such a conception implies total moral passivity or heteronomy of the "rights-holder". As such it makes it perfectly possible to speak of the "rights" of animals, plants, insects, lakes, and whatever else, as long as it is something that is mentioned in the moral code of the master (the Legislation) as something people ought to treat a certain way. The fact that the Legislator judges the act of cruelty towards animals to be a punishable act then becomes sufficient grounds to claim that those animals have "rights". To put it differently: the fact that a thing is not a moral subject is totally irrelevant to the question of whether that something possesses "rights" or not. Thus, conversely the possession of a moral nature has no implications in regards to the possessing of "rights". People do not have "rights" as moral subjects, rather only as a consequence of the fact that they are protected by the Legislator. As such the dualism between "right/law" and "moral" is easily deduced. This does not however show that the presupposition on which this deduction rests, which is that it is not people who are the sovereign subjects of law/right, is anything more than a presupposition.

THE CASUISTIC REFLEX

Many will object to the idea, contained in the fundamental principles of law, that law/right must be posited as absolutely as the formulation "as the sovereign subject of law wills/sees fit" implies. This objection is clearly linked to the tendency to interpret the term "law/right" in the aforementioned improper passive sense. If it is the case that "rights" are defined by the Legislation, it speaks for itself that when the Legislator assigns a "right" to someone, that assignment in no way entails the limitation on the right of the Legislator. The "right" is only valid under the circumstances determined by the Legislator, and these can be changed whenever the Legislator deems it useful. "Rights" are not absolute, they say.

The prevalent positivist approach to law/justice/right has accustomed us to the idea that law/justice/right is not absolute. This idea certainly speaks to the fear that many experience when confronted with absolute, uncompromising formulations. This fear explains why so many have such distaste for mathematics and logic. They would rather say nothing than commit themselves to yet unknown consequences, or in order to avoid giving up favoured ideas, even if it requires the most contradictory contortionism. They only feel at ease when they know that at any time they can avoid or ignore any consequence. They fear all theory, for all theories have consequences. They prefer to trust their intuitions on a case by case basis, while theory is exactly an attempt at disciplining heterogeneous intuitions.

Can this casuistic reflex be the basis for a valid criticism against the "absolutist" formulation of the formal fundamental principle of law/right? Imagine we were to weaken the formal fundamental principle of law/right to something like "every sovereign subject of law has the right to do or not do with what is their as they wish, as long as what they choose to do is acceptable, reasonable, not too scandalous, morally or socially responsible." We would soon find that there exist irreconcilable differences of opinion regarding those qualifications, both regarding their abstract meaning as well as regarding how to weigh them in concrete applications. As such we would be once again faced with the necessity of explaining who has the right to decide and make the authoritative decision: whose measures of reasonableness, acceptability, morality and social responsibility are decisive? Who has the right to have the final say?[14]

Though the casuistic reflex is often no more than an expression of intellectual inertia, often what the proponent of a casuistic approach is saying is that *they* have the right to decide what is acceptable, reasonable, morally or socially responsible, how much scandal

14 That this question demands an absolutist answer is underscored by Rousseau's refutation of the idea that the so-called Social Contract would not require the denouncing of all individual rights:
"Nul associé n’a plus rien à réclamer, car s’il restait quelque droit aux particuliers, comme il n’y aurait aucun supérieur commun qui pût prononcer entre eux et le public, chacun, étant en quelque point son propre juge, prétendrait bientôt l’être en tous.” (J.-J.Rousseau: Du Contrat Social. I/6)
"no associate has anything more to demand. To see why the association has to be done in this way, consider what the situation would be if the individuals retained certain rights. In the absence of any superior to decide issues about this, each individual would be his own judge”

is just a little too much, etc. Or at least, they claim that they have the right to decide who is to be the judge of such matters. Is this *meant* as a rejection of an absolute fundamental theory of law/right, it is clear that it presupposes exactly such a theory. This claim can therefore not serve as a criticism of the absolute form of the formulated fundamental principles of law/right. Specifically, it may be subsumed under one of the negations of the fundamental principle of law/right. The casuist claims their intuition, in any case, is authoritative. Not merely in the case of what they themselves should do with their means, but also in respect to the answer to the question of what others should do with their means. Their intuition is the ultimate source of knowledge (ED: "kenbron" ken: know; bron: source) of the Law, and thus requires no further justification. At least, this is what the casuist would dearly like to believe.

The casuist game can of course be played with any theory of law/right. If the prevailing theory of law/right is undoubtedly still the theory of state sovereignty, this is still usually supplied with vague qualifications about so-called "human rights". This concept of human rights is however very flexible, and what is more, it can easily be integrated within the theory of state sovereignty. It is as such not surprising that the so-called "human rights" actually only serve as elements that every legislator should insert into their legislation, that is to say, as moral ideals. If the theory of state sovereignty is correct, the legislator indeed has the right to do this. The right, though not the duty: one cannot say that the legislator does not have the right *not* to insert these "human rights" into their legislation.

Against the fundamental principle of law/right, which is the fundamental principle of human rights themselves -each person is a sovereign subject of law/right- the casuists object. They retort: "Every person has the right to do or not do with their means as they wish, but only if what they're doing is "moral"", or as it is put these days "socially" responsible. What is meant by this is anyone's guess. Depending on the convictions of the casuist in question the conditions will be one thing on one case, and another entirely in another. The expression "Property is service", which is often used, immediately elicits the questions: "What service?", "Service to whom?". These questions are virtually never answered clearly. It is apparently assumed that people have rights, not categorically, but under certain terms and conditions. This is plainly a negation of the fundamental principle of law/right, as it implies that a person may only dispose over their means

as long as and to the extent that others agree. This effectively means that those others, whoever they may be, are attributed the right to dispose over those means. This once again is a passive conception of right/law as a consequence of another's disposition of will: a "right" is something one is given, as a favour or reward. The giver of said reward or favour may immediately rescind it, when they deem it useful or necessary, or if they merely change their mind. This negation of the fundamental principle of law/ right does not introduce a new type of non-absolutist theory of law/right. The theory of law/right implicit in the opportunism of the casuist is as absolutist as the fundamental principle of law itself.

RIGHT/LAW AND UNITY

Which of the aforementioned alternative theories of law should we choose? This is the essential problem of philosophy of law/right. Before starting the positive defence of the fundamental principle of law I would first like to make something clear. Two of those alternatives, the second ("some are master, others slaves") and the fourth ("none are masters, all are slaves"), are best interpreted as possible but alternate solutions to the contradiction contained within the third ("each person is both master of and slave to all others"). It don't doubt that both the second and fourth alternatives' main purpose is to justify rule[15]. This justification can however never be very convincing if it rests on the simple declaration that some by nature have the right to rule over others, either in their own names or as chosen representatives of some transcendental authority. Rule implies unfreedom and inequality, and as a result can only be justified if it can be shown that people who are free and who have equal rights should want rule.

15 This is evident for the second alternative. The fourth is usually introduced as if it were a limitation of rule, but is of such indeterminate contents that it only has use to the degree that the ruler gives it contents. “Bien des auteurs de théories de la Souveraineté ont eu l’un ou l’autre de ces desseins (d.w.z. de macht beperken, richten, controleren). Mais il n’est aucune d’elles qui enfin, lentement ou rapidement détournée de son intention première, n’ont renforcé le pouvoir, en lui fournissant la puissante assistance d’un Souverain invisible auquel il tendait et réussissait à s’identifier. La théorie de la souveraineté divine conduit à la Monarchie Absolue; la théorie de la souveraineté populaire conduit à la Souveraineté Parlementaire d’abord, et enfin à l’Absolutisme Plébiscitaire.” B.De Jouvenel: Du Pouvoir/ On Power. Genève 1947, p.40

"Many writers on theories of sovereignty have worked out one or the other of these restrictive devices. But in the end every single such theory has, sooner or later, lost its original purpose, and come to act merely as a springboard to Power, by providing it with the powerful aid of an invisible sovereign with whom it could in time successfully identify itself. The theory of a divine sovereignty led to absolute monarchy; the theory of a popular sovereignty led at first to parliamentary supremacy, and finally to plebiscitary absolutism. "

We have seen that there are in fact only two formally differing possibilities for constructing a theory of law/right: A) every master (sovereign subject of law) has the right to do or not do with what is theirs as they please; B) every master has the right to do or not do as they please. Both formulations conform to the idea of equal freedom, even though the "freedom" in one is clearly different from the "freedom" of the other. One of these conceptions of freedom is contradictory, the other is not. It is obvious that those who wish to justify rule will call upon a contradictory concept of freedom, in order to be able to point to rulership as the most reasonable state of affairs. They will start from the position that each person has the right to do or not do as they wish, or they will postulate the existence of a "state of nature" in which each person has said right. They will call it something like "natural freedom", after which they will show that this "natural freedom"does not provide any principles for the ordering of interpersonal exchange.

If we were to assume the fundamental principle of law/right, there would be no problem. To say that each has the right to do or not do with theirs as they wish, and that none have the right to do anything with the means of another without the other's permission, is a logically coherent statement. The fundamental principle of law/right indicates unambiguously what is lawful and what is unlawful, and this is such a way that nothing which is lawful when judged by the principle can be considered unlawful when judged by that same principle. Accepting that people are at every moment objective limited/bounded, it is in principle possible to determine whether an action is lawful or unlawful. The alternative theory of law/right is however based precisely on the rejection of this finitude. Each person can make a claim to all things at any time.

This position is contradictory: if each person has the right to do anything, it follows that no-one has the right to do anything without the permission of all others. In this case everything a person does is both lawful and unlawful, bar in those probably exceedingly rare cases where there is an actual, spontaneous and universal consensus. Even in very small groups this would be and exceptional event. The resulting contradiction can of course be considered to be a *reductio ad absurdum* of the starting position (the infinitude or indeterminability of a person), but because this position is taken to be fact, the contradiction is interpreted as

a refuation of the normative significance of human multiplicity, of ethical pluralism. If we were to assume there was only one human, or that spontaneous universal consenus was guartanteed – that is to say that there is only one will driving the multiple human bodies – this theory would definitely be logically coherent. In that case we would be able to claim that each person has the right to do or not do as they please, and that no person has the right to do anything that is not assented to by all. To put it differently: a person can only be free in a way that is not contradictory if that person is alone; or: people can only be free in a way that is not contradictory if they are all subjected to the same will. There can only be *right/law/justice* if there is only one will.

What should we make of this? It's quite evident that there are many people, and that it is untrue that there is only one will, shared by all. It is exactly because of this that people have a need for law/right. There is a need for law/right when there are *many* people, each with their own judgments, goals, feelings, etc., all cohabiting in the same word, and consequently faced with the phenomenon of scarcity of means, more particularly ecological scarcity. Scarcity is a necessary concomitant of human existence. A means is scarce because it can be used for differing *alternative* goals, but not for all those goals at the same time. A means will only be able to be applied when, in some way or the other, it is determined towards which of these alternative goals the means will be applied, according to which plan it will be applied, etc.

Robinson Crusoe is also confronted with scarce means. Even if we were to assume he ended up in some abandoned lazyland, where nature immediately and without complaint serves his every want, still he would not be able to avoid scarcity. He would find that even in such conditions the necessity to choose would still exist. He himself remains a human being after all, a doubly limited being[16]: he is mortal, his time is limited, and his capacity for consumption

16 To an immortal being (in an environment of material abundance) postponed is not lost. To a being with a limitless capacity for consumption (in aforementioned environment) all is consumable now. Such beings in such an environment would not need to act: action presupposes finitude (and thus scarcity) of at least two scarce "factors of production" (time and capacity for consumption are factors of production in the broad sense). Those referring to "the economy of abundance, in which scarcity is overcome"simply don't know what they are talking about. Scarcity is a necessary consequence of human nature, not some product of "irrational social relations" and also not a mere technological problem see: L.Mises: Human Action. gecit. footnote p.4, p. 69 (“The Limitations on Praxeological Concepts”).

is limited, such that he cannot consume all different things at the same time, even if all that he wants is immediately available. This means that, even if he were to stay on this wondrous island for the rest of his life, the satisfaction he can achieve is limited. There is in other words a *maximum* of satisfaction he could ideally achieve, if he uses his time well and makes no errors.

The problem of scarcity which confronts Robinson, in Lazyland or elsewhere, is a purely economic problem and thus a purely moral problem. Robinson can, even under the best external circumstances, waste his life by making bad choices. This is why he requires a moral code, which allows him to orient his choices systematically and in relation to certain fundamental principles, thus avoiding the negative consequences of a way of life which consists of going on every whim. The mere having of a moral code, any code at all, is not the issue here, and since Robinson needs one, that clarifies the issue as finding the right moral code. The one which allows him, Robinson, to make the best there is to make of his life. There is no reason to assume that every moral code is equally suited to every person.

But, even though Robinson needs a moral code, he does not need law/right. The only question relevant to him is the moral question "What should I do with this means? What is the best thing I could do with this means (my life)?". Scarcity as an economic problem generates an intra-individual problem of choice, a psychic conflict in which one goal must be sacrificed for another. The resolution of such conflicts requires moral deliberation.

Scarcity of course also has an ecological aspect, and from this arises the political problem: who controls what? This problem too is independent of material wealth. For, as soon as Friday arrives in Robinson's Lazyland, the possibility exists that Robinson will want Friday to tell him hunting stories, while Friday wants Friday to solve crossword puzzles. Solving these problems requires law/right.

Who has the right to decide what Friday will do? Robinson, or Friday? This problem cannot be reduced to a moral problem.

If A wants to use a certain means M for either goal S or goal T, then he must determine for himself what goal he will use M towards. That is a moral problem for A. If B also wants to use that same means M for either goal U or goal V, that poses a moral problem for B. But even when both make their choices, the use of M was not determined. Say A prefers S, and B prefers U, the problem remains that M cannot be used towards both S and U. The choice between S and U is however not a moral problem, since S and U already represent "best choices", one of A, and the other of B. There is no choosing subject in whose mind S and U are yet to be ordered alternatives of action. There are two moral codes at play that each offer a different answer as to what should be done with M. No moral theory is equipped to solve this problem. For this we need a theory of law/right which tells us who, A or B, has the right to dispose over M, whose moral code applies. Such a theory is only required if differences in opinion are possible.

This is all rather evident. What then can the meaning be of a theory of law/right that is only logically coherent is we assume a condition exists in which there is no need for law/right? Such a theory posits that problems of ecological scarcity are only solvable if they can be reduced to problems of economical scarcity, that is to say to *moral* problems, to intra-individual situations of choice which must be solved by resorting to a single moral code. Such a theory therefore implicitly assaults human multiplicity. It must deny that there is any value in the fact that there mare many people, each with their own individual personality. This fact is deemed to be dangerous, because this theory identifies each person with their insatiable, unending cravings, desires and needs. A person, this theory seems to presuppose, is infinite, unboundable, without foundation or finality. This means: they cannot find in themselves any "moral" principle other than the maximal satisfaction of needs, the full satisfaction of all their needs/desires, whatever they may be. This explains the contradiction in the "natural" state of affairs. By nature each person has the right to do or not do as they wish, and thus by nature none has the right

to do anything without the assent of all others. This contradiction can only be resolved if all obey the same will. This reduces the problem to a mere moral, intra-individual problem of choice, which can be resolved by adhering to a unique moral code, a unique legislation. Freedom and equality in the normative sense, that is to say justice*, are incompatible with plurality and diversity.

The preceding analysis suggests that all people *should* subject themselves to one will, one legislation, in the sense that this is a requirement of justice* itself. This demand can be understood in two different ways though. Some will conclude that all people should subject themselves to one will, any will at all, while others will claim that there is one specific will all should subject themselves to. In both cases rule is justified, in the sense that rule is a reduction of human multiplicity and diversity – many must live under one legislation. However, only in the first case is factual rule justified, rulership of some over others, regardless of the origin or finality of that rule. Some have the right to dispose over others, and with that all has been said. In the other case however, factual rule as such is not justified: only such rule is justified as conforms to some "higher" legislation or other. The factual rulers only have the right to rule if they limit themselves to obeying this "higher" legislation, and applying it.

The second and fourth alternative theories of law/right can thus both be interpreted as implications of the third. Both fulfil the conditions which must be met for the third to be logically coherent. We could easily do without these alternatives and content ourselves with the principle that all have the right to do or not do as they wish, if it truly were the case that all people think, feel and judge as one. In such a case there would be no need for rule, and no need for law/right. All would be free and equal. If this is not the case, rule is required and people need an external legislation to be able to coexist in an orderly manner. For some this legislation was an expression of a divine will. For others, like Rousseau, it was the expression of a socially immanent, general will, a will valid for all members of a society. For others still, like Hobbes and Pascal, it was just the expression of the will of the strongest.

Some have been of the opinion that history would lead to such a universal, spontaneous consensus, in which each individual would become a universal person, that is to say qualitatively equal to all others and thus free to do or not do as they please without ever entering into conflict with another. Yet others still believe that dominion will always remain necessary, even if in the form of direct rulership by God (eg in the early Christian faith in the millennium).

Clearly these conceptions, despite their differences and the conflicts between their proponents, are all equally opposed to the fundamental principle of law/right. They reject any and all expression of individuality and personality as being a threat to others. Obedience to the legislation and abnegation are in this conception the highest virtues of humanity, they are the essential prerequisites for the existence of the state of justice* as defined above. The fundamental principle of law/right on the other hand is nothing more than the position that each person has the right to be themselves, and implies that obedience to an external legislation and self-denial are anything but virtues, and must rather be rejected as unworthy of humanity. Considered in this light, justice* is that state of affairs where everyone is fully themselves, without having to reliquish any part of themselves. This is a very fundamental contrast, which shows how radically different the methods for resolving interpersonal conflicts must be, that can be formulated from these different positions.

The cause of these conflicts is indeed the fact that many people identify themselves with their unending, insatiable cravings, desires and needs, and that they consider the entire world, or at least their entire environment, to be something they have a right to, as something they are allowed to claim as their right by any means. There are indeed only two ways in which this conflict can disappear: either when each person learns to respect the objective boundaries of all others, or when each person willingly submits themselves to a coherent, well-made external legislation. We must choose between an upbringing into a *human/person* and an upbringing into a *citizen*, as Rousseau clearly was aware. We must choose between the fundamental principle of law/right and a society* without masters and without slaves on one side, with on the other the principle of a society* where everyone is master and slave to all. In the end, this is the problem of choice the philosophy of man and society* must be able to resolve.

CONSENSUS

If a person is identified with their needs, desires and cravings, and it is believed that everyone has a right to all that they need, desire or crave, then you cannot designate the people themselves as sovereign subjects of law/right. Those who accept the fundamental principle of law/right however, start from what a person is, not what they imagine themselves to be. The fundamental principle of law/right declares as unlawful any *physical* intervention of one person in the domain of others, the *physical* invasion of another's praxeological body (the totality of concrete things, means, representing the capabilities/possibilities and achievements of the other – the material substrate of their lives). The fundamental principle of law/right "protects" the physical integrity of each person. Each person has the duty (not the right) to internalise the effects of their actions, in which "effects" is to be understood as: physical effects. Nobody has the right to use the means of another to cushion themselves from the physical consequences of their actions. Nobody has the right to strive to attain their own goals with the means of another, unless the others consents.

It may seem arbitrary at first glance to protect only the physical integrity of every person by law/right. This is a false impression: this decision is not arbitrary at all. It is obviously true that human action is or can be coincident with all kinds of external effect, not merely physical ones. Human action "moves/touches" the lives of others in the most varied ways. Some external effects are "negative", others "positive", depending on the appreciation of those undergoing those effects. It is certainly not the case that external effects are negative or positive *in se*. The same effect may be experienced positively by one, and negatively by another, or one person may appreciate the effect positively at one time and negatively at another. The people that appreciate the effect positively will undoubtedly happily assent to the continuation of the actions that causes these effects. This is why people like to be in the presence of others whose actions provide for them positive external effect. Some find that they have to pay but little attention

to internalising the effects of their actions, that they don't need to "isolate"their actions. Others will see that they can enjoy or use certain positively valued elements in their environment at no cost. Both groups experience and advantage, both experience the presence of the other as costsaving. Positive external effects are what provides living together with all that extra attractiveness.

Of course there aren't only positive external effects, there are also negative ones. It is not very likely that people that judge the external effects of an action negatively will simply give their permission for the continuation of that action. It is however also not likely that the person taking the action, who thus judges the effects to them to be positive, will simply cease and desist from taking that action. There is a conflict: when is the permission of others required for the taking of an action? This is the question that the fundamental principle of law/right answers by positing that only physical external effects make such permission necessary, and thus that purely *psychic* effects are not unlawful per se. The fact that someone suffers psychic damages by an action they consider to be scandalous, objectionable, distasteful or offensive while their means are in no way affected, does not mean that person is treated unlawfully. The fundamental principle of law/right has nothing to do with the principle proposed by J.S. Mill, that no one has the right to harm another. On the contrary: the fundamental principle of law/right guarantees to everyone the right to harm others psychically (this right is required because it cannot be excluded a priori that someone may be morally obligated to harm others: how would, per example, the upbringing of children be possible if the educator does not have the right to do or say things experienced as negative by the child?).

It might be shocking to claim that everyone has the right to have others undergo negative psychic effects, but it is inescapable. If A finds satisfaction in doing X, while B thinks it's disgusting and abhorrent that A does X, even though B's means are not modified by A's action (and thus does not constrain B's possibilities), why should we say that B's emotions are decisive in determining the answer to the question of whether A has the right to do X?

Why not A's emotions? Why not the feelings of C, or D? Even though there is at times a moral grounds for accounting for the feelings of others,

there are also times when there are moral grounds for accounting for one's own feelings: moral decision-making is a matter for reason. There is nothing inherently moral about being led by emotions, neither one's own or those of others. There is no ethical grounds for the position that it is unjust to do things other people don't like.

That position *cannot* be the foundation for a coherent theory of law/right. One can say that that which pleases the Prince has the force of legislation, and thus in the terminology of so-called positive law/right, that no-one has the "right" to do that which displeases the Prince, but in doing so one implicitly or explicitly accepts a theory of law/right that posits that the Prince is a sovereign subject of law, while his subjects are mere means which the Prince may freely utilize in the attainment of his ends. In no case can it be said that that which pleases each sovereign subject of law/right has the force of legislation for all sovereign subjects of law/right, except when there is only one single sovereign subject of law, or because through some metaphysical miracle a spontanteous universal consensus rules amongst all sovereign subjects of law/right. I have already discussed this presupposition. To say that everyone has a right to have all others behave in a manner that pleases them is logically equivalent to saying that all means belong to everyone. To claim that law/right must protect everyone's feelings is exactly the same as claiming that each person has the right to do or not do as they please, and that no person has the right to do anything without the permission of all others. It is impossible to protect everyone's feelings if not everyone shares the same feelings, making the demand nonsensical.

Many will undoubtedly be inclined to approach this problem of protecting feelings in a very casuistic fashion, but this was handled earlier in this work.

The previously noted equivalence casts a clear light on the similarities between "conservative" theories of law/right, and "progressive ones". The former often attempt to justify legislation on the grounds of the argument that the citizens have a right to be protected from offensive or sinful behaviour that may hurt their feelings or offend their sensibilities. The latter call upon legislation to embody the right of all to dispose over all means. The "moral" and "economic" arguments used in said justifications

are, in a strictly logical sense, inseparable, and often coalesce into "social" considerations. The "social" is a category which can encompass arguments of either kind, and which brings forward, moreso than the "moral" and "economic", the element of consensus.

It is remarkable how indestructible appears the idea that no-one has the right to do anything at all without the permission of all others. This idea that only that which is the subject of a universal consensus can truly be "right/ law". It is of course true that *if* there were a spontaneous universal consensus, about many a thing, the world would in certain respects be a more pleasant place than it currently is, though not in all respects. Differences of opinion and conflicts cannot always be judged to be purely negative, and there is probably no situation more disastrous than one characterised by a spontaneous, universal but *wrong/false* consensus. Differences of opinion and conflicts increase the chances of someone realizing their error. As such, the existence of many "models" gives people the opportunity to compare and to learn from the mistakes and successes of others.

The idea of consensus also plays an essential part in the theory of law/right that is based on the fundamental principle of law/right, only here it is a spontaneous and particular consensus. Applying the fundamental principle of law/right enables cooperation, as the principle does not impose many obstacles towards such cooperation. The idea of universal consensus does, however, as a consensus between two parties is not sufficient for them to commence cooperating. First, they must get all others to agree; a task that is rendered impossible not merely by the multiplicity of ends and preferences, but because of the different ways people judge a situation. ("I agree in principle, but I do not believe this is the appropriate time", etc).

Even if a universal consensus were an undisputed and indisputable ideal, it would still be absurd to reason that no-one has the right, or should have the right, to do anything without the permission of all others simply because in this ideal, but utopian world, no-one would or could do anything that is not permitted by all others. The idea of a world in which all people at all times think, feel, expect, etc. exactly the same is totally irrelevant to the solution of

the problems of a world in which this consensus is nowhere to be found. In an ideal world everyone would be the picture of health, and there would as such be no need for doctors and nurses, but who will conclude from this that forbidding medical practice is an essential step towards achieving this ideal? In the marxist utopia[17] there is no need for individual property, not merely because it presupposes the overcoming of scarcity, but also because all people are supposed to live in a spontaneous consensus with each-other. One may doubt this, but even if one does not, it would be difficult to seriously maintain that abolishing individual property-rights before humanity ascends to this blessed "higher stage" of abundance – that is to say before the reasons for the existence of individual property rights has disappeared – would have any positive effect. Sober ratiocination and cool observation point to the opposite: if there is no spontaneous consensus, one will have to be artificially fabricated by suppressing differences of opinion. To do so entail having to accept corruption, and terror, and the idea that everything that makes life pleasant will not be available, or will only be available on the black market. One *can* always simply refuse to face reality – this is the privilege of being human – but this does not mean that reality will be so kind as to conform to anyone's delusions.

The normative interpretation of the idea of universal consensus rests, in my opinion, on an error in thinking which entail switching cause and effect. In casu, it rests on the position that the institutions which humanity develops in order to maintain themselves in

17 Aside from any foundation of the right to determination in philosophy of law or morals, the economic concept of property relates to effective control, which is to say the power of determination. Cf Carl Menger, cited in footnote p16 Ch 1, par6. Effective control over means of production, or even the granting of credits, can never truly be exercised by the entirety of the community. As such even in the communist society private ownership of the means of production is the rule. Unless there truly is a universal, spontaneous and concrete consensus, the collectivisation of the means of production can only be a juridical fiction. Cf. A.Bajt: “Property in Capital and in the Means of Production in Socialist Economies.” Journal of Law and Economics. 1968, 1–4 It should be noted that in communist societies the "separation of ownership and control" conforms even more to the criticisms Berle or Galbraith levy against large companies than to the market-economy. This is because in the market-economy no-one is forced to buy stock in a company whose management they disagree with, and as such the separation of ownership and control is clearly in accord with the preferences of the stock-holders. In a communist society however, no-one has any choice regarding the companies or undertakings the legislation makes them partially responsible for. ld. Cf. A.Alchian: “Corporate Management and Property Rights” in H.Manne (ed.): Economic Policy and the Regulation of Corporate Securities. Washington D.C., 1969, 337–360. I.Kirzner: “Capital, Competition and Capitalism”, The Ludwig von Mises Lecture Series. Hillisdale College, 1974, 69–91.

an environment characterized by scarcity and differences of opinion (multiplicity), are in themselves the cause of the fact that there is no abundance and no unity. The "communist" utopia based on the idea of spontaneous universal consensus is undoubtedly far more utopian than the "individualist" utopia in which all people spontaneously respect the right to self-determination of all others, and in which there is therefore no need for locks, policemen, alarm-systems, soldiers, tanks or rockets. More importantly however: the normative implication of the first utopia is that everyone is invited to bring about an artificial consensus, while the normative implication of the second is no more than the invitation for everyone to respect others, and to be tolerant towards people with different priorities and convictions.

To strive for universal consensus when there is no spontaneous consensus requires time and effort, while there is no guarantee that this striving will be crowned with success[18]. If decisions cannot be made before a general consensus is reached, most decisions will be made too late or even never. To give everyone the right to veto over all decisions is to encourage each to sell their own vote as dearly as the can, and it certainly is not the best means for encouraging everyone to participate responsibly in the collective decision-making. It's also unlikely that any decision that does end up being made will be more than some compromise which no-one takes very seriously at all, since everyone realizes that it was inspired more by the desire to end the palaver everyone is so sick of. The result, if we are dealing with people that respect the rules, and who do nothing before acquiring the consent of all, is that nothing at all is done other than discuss and deliberate. If we are dealing with people whose desire to survive is greater than their respect for the rules of universal deliberation, the result is that all that happens is unlawful. It is

18 W.H.Riker: “A Confrontation between the Theory of Social Choice and the Theory of Democracy.” in R.L.Braham (ed.): Social Justice. Boston–Den Haag 1981, 95–119. D.Roe: “The Limitsof Consensual Decision” American Political Science Revue, 69, 1975, p.1270. J.S.Fishkin: Tyranny and Legitimacy: A Critique of Political Theories. 1979. Ook H.Kliemt: Zustimmungstheorien der Staatsrechtfertigung. Freiburg 1980 The rule of unanimity does not just generate high costs of negotiation, it also favours the status quo. That is to say, the more "conservative" or "pessimistic" elements in society. For a good understanding of the fundamental problem of the aggregation of the plural into the one, both in relation to "social choice"as in relation to "knowledge" see: Phil. Van Parijs: “Logique inductive et théorie du choix collectif.” Revue philosophique de Louvain, 73,1975, 628–642.

rather clear what people will choose when confronted with the choice between law/right without living, or living without law/right. This choice is the *reductio ad absurdum* of the doctrine of consensus, and thus both of the view that people have a right not be psychically harmed, and the equivalent idea that all belongs to everyone. It is absurd to pit law/right and life against each-other.

It speaks for itself that the doctrine of consensus has no practical significance. It implies a so-called fundamental principle of law/right that is not a practical fundamental principle at all, but merely serves as a theoretical basis of rule in some form or another. Which form exactly is not something one can derive from the consensus-principle. The unrealistic demand for universal consensus (unanimity) must by necessity make way for all kinds of suggestions for "practical" solutions. These usually maintain some weak connection to the "theoretical" ideal through the fiction that a part "represents" the whole, that some speak for all – the fiction of rule in the common interest. For some said rulership belongs to the "representatives" of a certain god, for others to the "representatives" of a certain race, and for yet others to the "representatives" of a certain class, or even of the majority. All these people have a wide variety of often contradicting convictions and ideas on how these "representatives" can be recognized or chosen. Some claim certain policies to be such that anyone who is not malicious or malinformed ought to agree to them, while others make the same claim for wholly different policies.

The doctrine of consensus does not offer an answer for resolving these differences of opinion, on the contrary: it only fans the flames by maintaining that a universal consensus is necessary and desirable in se. The psychological effect of the propaganda surrounding the doctrine of consensus is the spread of the idea that anything can, may and should be negotiated, the idea that everyone must "have a say", whether that be directly or indirectly through their leaders or "representatives". The idea that a desire to meddle and a paternalistic attitude are positive things, and that everyone is generally responsible for everything, and particularly responsible for nothing.

Taken strictly, the doctrine of consensus implies a truly universal

consensus encompassing all of humanity. "Practically" it is only held up in the context of discussion on the conditions of *given* communities or states, that is to say in *given* rulerships (ed: unconventional use, I know, but think analogous to "township"). However, such a local consensus, even if it were to exist, is not a universal consensus. Even if there is no need for law/right in a given community, because there is a total local consensus amongst the members of this community, then there would remain the need for law/right for ordering the relations between different communities. This is the wellknown paradox of so-called market-socialism[19]: praxeologically considered, there is merely a reduction of the number of participants in the market process, not an elimination of the market-process. As such, all objections to market-relations remain undiminished. On the contrary , these objections are fortified: the fewer the number of independent participants in the market-process, the more indeterminate are prices, and the greater the weight of differences in positions in negotiation in the determination of price. The same paradox is to be found in theories like Rousseau's Social Contract, in which not a word is uttered on international relations. Hobbes left it at the claim that states among themselves are left in a state of war of all against all. The difficulty inherent in a truly universal, world-encompassing consensus has led many to plead, on the grounds of the demand for consensus, for small communities. This of course implies that there should be many small communities, so that the chances for a general consensus diminish. The whole argument presupposes autarkic communities with little or no external relations. However, even in small communities, there is no, or barely any, consensus. Nor are the differences of opinion so minimal that the search for a consensus becomes achievable. (In many cases, a seeming consensus is merely a faux-consensus, based on intimidation and submission/subjugation) The question that must be asked

19 The solution of convenience to this paradox is "the state must resolve the relationships among the different decentralized living- and/or working-communities". But, the socialist author W.E. Connolly warns “the problematic of the state remains even in a well formed socialist polity", with all that entails in regards to alienation, conflicts between the interest of an individual as member of a local community and of a state, etc. “Unless the advocates of socialism revise its ideals to provide secure space for freedom…as socialists conceive it, socialist criticisms of the prevailing order will merely contribute to wider acceptance of corrupted forms of the capitalist state.” W.E.Connolly: “Freedom under Socialism” Political Theory. 5,4, 1977, 461–472 Connolly correctly points to the system-perpetuating character of most criticism of society that calls itself "socialist", whose practical message seems to always be: more of the same.

is the following: if one accepts, for reasons of the chances for consensus, that the relevant "communities" may well be small and numerous, then why would you not posit each and every human being to be such a relevant unit. If that position is taken, within each praxeological unit consensus is assured, and there is no room for rule. Furthermore, any individuals that truly agree/ get along to a great extent can form as many and as varied a bunch of communities as they wish. The question is purely rhetorical: the doctrine of consensus *is* contradictory, but as it seems to conform to a popular but improvident definition of freedom, it is useful to many as a general framework for the justification of rule in some form or another.

MYSTICISM

The incoherence of the doctrine of consensus, regarded as an alternative fundamental principle for the ordering of interpersonal relations constrains the choices for the philosophy of law/right. Besides the fundamental principle of law/right, the options that remain are: that some have the right to dispose over the means of others, that is to say some are master, others are slaves, or the sovereign subject of law/right are non-human beings or entities, who have the right to dispose over humans, that is to say whose will, to man, is legislation. Either some people are slaves, or all are slaves.

The *prima facie* attractiveness of the doctrine of consensus as a principle of law/right rests on three pillars: a) it answers to a popular notion of freedom; b) it starts from a fundamental equality, or equal application of the law/legislation to, all people; c) it is rational, at least in the sense that it assigns as sovereign subjects of law/right entities whose existence no sensible person can doubt. The great disadvantage is that it is contradictory in every context in which there is more than one person.

The two other alternatives to the fundamental principle of law/right cannot lay claim to the same advantages. To say that some people have the right to dispose over others is to claim the sovereign subjects of law/right to be people, but it also entails the claim that some people are natural masters and others natural slaves, to whom the law cannot be applied equally. Moreover this principle, as noted above, is ambiguous: are

the natural masters sovereign in the sense that each of them has the right to do or not do as they wish *with what is theirs,* or are they sovereign in the sense that they have the right to do or not do as they wish? (Which means that none of them has the right to do anything without the permission of all other masters) This ambiguity is in some sense already resolved, by the demonstrated inconsistency of the latter interpretation. The proof of inconsistency holds for any population of sovereign subjects of law/right whose members number greater than one. To say that only non-human entities or beings are sovereign subjects of law/right does indeed re-introduce an initial equality in application of the law among people, but also hangs law/right on a mystical hook. This alternative theory of law/right is also ambiguous, but here too we can a priori exclude the "consensus"-interpretation. It is the case that some supernaturalist theories of law/right are monotheistic, thus only recognizing one sovereign subject of law/right. In those cases the "consensus"-interpretation is coherent, but also superfluous. To claim that X has the right to do or not do with what it theirs as they wish, is the same as saying that X has the right to do or not do as they wish if X is the only sovereign subject of law/right, for there are no other sovereign subjects of law/right whose boundaries X could unlawfully exceed.

From the perspective of a rational theory of law/right, the supernaturalist and collectivist theories of law/right[20] that posit the existence of non-human, transcendental, supernatural or collective moral subjects with a will, may all be excluded on the basis of the methodological principle usually called *Occam's Razor.* "*Entia non sunt multiplicanda praeter necessitatem"* It is philosophically impermissible to solve problems by postulating the existence of entities whose existence cannot be shown/ proven, when one

20 B De Jouvenel: op cit with p63, remarks that sovereignty, defined as “le droit de diriger les actions des membres de la société avec pouvoir de contraindre, droit auquel tous les particuliers sont obligés de se soumettre sans qu’aucun puisse résister” (the right to direct the actions of the members of society with the power to coerce, a right to which all individuals are obliged to submit without anyone being able to resist), cannot be the right of any person or group of people, because of its unlimited and absolutist character. “Il suppose un titulaire assez auguste pour que nous nous laissions entièrement guider par lui, pour que nous ne puissions songer à marchander avec lui. Ce titulaire, c’est Dieu, ou bien c’est la Société. Nous le ver-rons, les systèmes qui passent pour les plus opposés, comme ceux du Droit divin et de la Souverai-neté populaire, sont à la vérité branches d’un tronc commun, la notion de Souveraineté, l’idée qu’il y a quelque part un droit auquel tous les autres cèdent. Derrière ce concept juridique, il n’est pas difficile de déceler un concept métaphysique. C’est qu’une Volonté suprème ordonne et régit la com-munauté humaine, une Volonté bonne par nature et à quoi il serait coupable de s’opposer. Volonté divine, ou Volonté générale.” (pp.39–40)(It presupposes a holder august enough for us to let ourselves be entirely guided by him, so that we cannot think of bargaining with him. This holder is God, or it is Society. We will see that the systems which appear to be the most opposed, such as those of Divine Right and Popular Sovereignty, are in truth branches of a common core, the notion of Sovereignty, the idea that it somewhere there is a right to which all others yield. Behind this legal concept, it is not difficult to detect a metaphysical concept. It is because a supreme Will orders and governs the human community, a Will which is good by nature and which it would be guilty to oppose. Divine Will, or General Will.) See also: J.Maritain: Mens en Staat. Tielt–Den Haag, 1966, hk 2.

cannot prove that postulating the existence of those entities is necessary for solving those problems in a way that is reconcilable with the totality of our knowledge. If one were to start from the doctrine of consensus, and ascertain its contradictory character, one may be led to believe that the existence of an external legislator ruling over all is presupposed in the idea of law/right itself. However, the existence of alternate theories of law/right (as expressed in the rule that no-one is a master of another and no-one is slave to another or the rule that some are masters and others slaves) which do not appeal to mysterious entities makes clear that even then there really is no need for aforementioned supernaturalist and collectivist theories of law/right.

Everyone is of course free to believe in the existence of gods or collective beings, (states, nations, etc.) and to ascribe to these any properties at all (a will, a destiny, omniscience, immortality, omnipotence, omnibeneficence, etc.). But, as long as one *cannot* show that it is unreasonable to not believe in the existence and activity of extra-human *moral* subjects, that someone that respects themselves as a rational being *should* believe in said existence and activity, these fictitious, not existentially identifiable entities have no place in the catalogue of philosophical grounds for explanations.

Occam's razor is not the only argument against supernaturalist and collectivist theories of law/right. If they are not internally inconsistent, then their contents are indeterminate. There is no method available to determine what God wants, or what the Community wants. Even if there were a way to ascertain these wants, that would not imply that a person does not have the right to not obey that external will of God or Community. Not even if one were to succeed in showing that what this God or Community wants the person to do, is actually what this man or woman *should* do (as the fulfilment of a moral duty). For showing that God or the Community or Whatever is a sovereign subject of law/right is not sufficient grounds to claim that people are not sovereign subjects of law/right. If people are themselves sovereign subjects of law/right, they are well within their rights to refuse to obey any other sovereign subject of law/right, as long as they do not wish to make use of the latter's means. Some supernaturalist

theories of law/right simply assume that people are means belonging to God or the Community, on the grounds of the argument that God created man, or that people are a product of the Community. This argument, however, is invalid. The fact that children are "made" by their parents, does not mean that these children are means for the parents to disposes over at their whim. In the same way, the theory that humans were made by other entities (which has of course in now way been proven) does not imply that these entities have a right to these humans. If people should ever succeed in constructing a robot that meets all the prerequisites an entity must meet to be considered to be an autonomous moral subject, and thus a sovereign subject of law/right, then it would be just that, a sovereign subject of law/right. As such no-one, not even their maker or designer could dispose over this robot as if they were merely their means. Yet other theories of law/right are content with claiming that even though people are sovereign subjects of law/right, all material things in their environment are means belonging to some God or collective entity. This means that whenever someone wishes to use something, they first must ask God, or this collective entity, for permission. In effect, this means asking the "representatives" of God or the collective entity.

This last strategy would be convincing if it could be shown that a) said God or Community exists as an autonomous moral subject, and is thus a sovereign subject of law/right with a will of its own b) that the things in the environment of the people were in fact already put to use by these mysterious subject of law/right, and were not abandoned by it c) that the will of these entities of beings regarding how people may use they means, can be known d) that it it provable which means belong to which extra-human entity, so we can determine which will is lawful in a *concrete* case. To believe that it can be *proven* that these conditions are met, is to take a lot on faith. Who could doubt that what we are dealing with here is pure faith, pure belief, and as such these theories of law are purely *dogmatic*.

It possible to make an image of God that is antropomorphic. To believe that the mind of God is like ours in nature (just infinitely more powerful and disciplined), and thus to believe that God is a being with which we could, in principle, communicate rationally. This is not the case for those collective entities which are postulated in collectivist

theories of law. It is true that modern religions are very reluctant to accept this anthropomorphic image, the concreteness of which stimulates curiosity and which is also too exclusive to fit the universalist claims of modern religious movements. In any case they must adhere to this anthropomorphism in regards to the mind (ed: geest: mind, spirit, ghost). If they didn't, they would deny any possibility of communication between man and God, and thus negate the ability of man to learn and enact the will of God.

As Hayek notes:

> "We cannot recognize "mind" in the abstract. When we speak of mind what we mean is that certain phenomena can be successfully interpreted on the analogy of our own mind, that the use of the familiar categories of our own thinking provides a satisfactory working explanation of what we observe. But this means that to recognize something as mind is to recognize it as something similar to our own mind, and that the possibility of recognizing mind is limited to what is similar to our own mind. To speak of a mind with a structure fundamentally different from our own, or to claim that we can observe changes in the basic structure of the human mind is not only to claim what is impossible: it is a meaningless statement."
>
> "To recognize the existence of a mind always implies that we add something to what we perceive with our senses, that we interpret the phenomena in the light of our own mind, or find that they fit into the ready pattern of our own thinking. This kind of interpretation of human actions may not be always successful, and, what is even more embarrassing, we may never be absolutely certain that it is correct in any particular case; all we know is that it works in the overwhelming number of cases. Yet it is the only basis on which we ever understand what we call other people's intentions, or the meaning of their actions; and certainly the only basis of all our historical knowledge since this is all derived from the understanding of signs or documents. As we pass from men of our own kind to different types of beings we may, of course, find that what we can thus understand becomes less and less. And we cannot exclude the possibility that one day we may find beings who, though perhaps physically resembling men, be- have in a way which is entirely unintelligible to us. With regard to them we should indeed be reduced to the "objective" study which the behaviorists want us to adopt towards men in general. But there would be no sense in ascribing to these beings a mind different from our own. We should know nothing of them which we could call mind, we should indeed know nothing about them but physical facts. Any interpretation of their actions in terms of such categories as intention or purpose, sensation or will, would be meaningless. A mind about which we can intelligibly speak must be like our own."[21]

21 F.A.Hayek: The Counter-Revolution of Science, Indianapolis 1979, p.134

As long as religions apply this spiritual anthropomorhpism at least, it is still possible to give some meaning/sense to expressions such as "God's will", "God's wisdom", etc. Leaving existential problems aside, we can say it is not a priori impermissible to indicate a god as sovereign subject of law/right.

Collectivist theories of law/right, on the other hand, cannot even claim to meet the minimum prerequisites, unless they admit to simply transforming the transcendent God of traditional religions into a socially immanent God. It is unnecessary to criticize collectivism thoroughly again here: in regards to a primitive, closed, autarkic society one could probably lend some credence to the claim that something like *the* community exists[22], even if it must also be admitted that this community is not a thing outside of and apart from its individual members, does not have a will or opinion opposable to that of the members. But, what is *the* community in an open, or more developed society? To which community belongs the Waloon , that lives in Turnhout (ed: That's in Flanders, not Wallonia), works in Eindhoven (Ed: That's in the Netherlands, not in Belgium), cruises around in a Japanese car, and who adores French wine and American Country & Western music, who is a member of a party, a church, a chess-club, etc.? When this man speaks of *the* community, he is likely referring to a juridical entity that has no other principle of unity than the fact that it is ruled from a single point. Sociologically and economically, inhabitants of a border-region often form a much more intensive "community" across these border than people living within the same state, with one on the northern border of the state, and one on the southern. Intellectually, a man from Antwerp can have much more in common with a number of Americans or Japanese, than any of his fellow "Antwerpenaren", or countrymen. Neither sociologically, nor economically, nor artistically, nor intellectually is there such a thing as *the* community. The are a multitude of overlapping communities, in that sense that most people belong to various

22 D.Norton: Personal Destinies. Princeton 1976, 97e.v. “In my own case I was born a St.Louisian, a Missourian, an American, of predominantly English ancestry … My vital tradition is none of these, but is instead the grand tradition of Western philosophical thought. From it I daily draw inspiration, and daily I strive to conserve and carry forward its precious but precarious values. But how did the history of Western philosophy become “my tradition”? It came to be such by my choice of philosophy as my life work. Thus my chosen future has chosen my past, and such is inevitably the case, for living time is an unbroken continuum of which past, present and future are but modalities. Were I the living exponent of ‘St.Louisism’, no less would my tradition be the product of my choice.”

"communities". These "communities" interact in the sense that choices an individual makes in the sphere of activities of one will have an effect on their possibilities for action in the other spheres. What constitutes this community, is the sum total of meanings people ascribe to certain actions, both their own and other's. New "communities", or social entities, regularly come into being when certain people develop new forms of interaction, start striving towards new ends and discover how to realize these ends by reorienting their activities, by reducing contact with some and increasing contact with others. Other social entities disappear, for example sects, religious communities, branches of a company, or even regional communities. The cause of this is people losing interest in the doctrine, activity or region. This does not mean that it the social entity *itself* evolves, ages, or dies, but that the people involved choose different priorities, and find other, newer alternatives to be more interesting.

The problems that arise in studying the coexistence of different social entities, such as families, companies, churches, states, parties, etc. can only be resolved by methodological individualism. It does not do to pretend that these social entities are individuals themselves, that is to say systems (in the sense of eg cristalography) or organisms (in the sense of biology).

The typical patterns of interaction that we give substance when speaking of families, states, nations, etc. are never concrete entities or things, but only aspects of parts of all that which is happening in the spatial-temporal domain which forms the frame of reference of our utterances. These patterns of interaction (and social entities if that term is preferred) are constituted by a particular constellation of opinions and expectations, ideas and judgments, interpretations and preferences. These are of course not a given, but rather result from the critical, innovative, or uncritical and conformist, actions of individuals attempting to solve their own problems and achieve their own ends, and from interpersonal contacts or lack thereof, and many more factors besides. No-one denies the reality of these patterns of interaction, and the meanings and intentions which are expressed therein. No-one denies that individuals take these patterns of interaction into account when deciding to do or not do. Nor does it do to argue against the fact that in many, but certainly not all

cases, the best way to achieve personal ends is indeed to become a part of these patterns, in a manner creating as little perturbation as possible, and as such to do exactly what others expect so that in turn, one can expect others to also behave in a predictable, familiar manner.

For reasons of economy of language it is often useful to substantise these patterns of interaction ("the family is...","the state does..."). Regardless, it is nonsensical to believe that there are concrete entities that *make* people follow these patterns of interactions (if they do actually follow them, that is), and to believe that these are the actual proper objects of study for the social sciences.

Such a conception of the social sciences had a defender in August Comte, in the 19th century. It got him the honorary title of "father of sociology". This caused the truly great sociologists of the 18th and early 19th century to be largely forgotten for a long time. Ferguson, Millar, Charles Comte and even Tocqueville, Spencer and many others[23].In "*Cours de philosophie positive"*, August Comte claims that, in relation to social phenomena, "the whole object is here certainly know to a far greater extent, and is much more directly accessible, than the elements that constitute it"[24]. In "*Système de politique positive*" he makes the claim that "a society is not decomposable into individuals, just as a geometric surface is not decomposable into lines, or a line into points"[25]. These claims show that to him, the aim of social sciences is not to render social reality more understandable in terms of human intentions, ends, ideas, etc (such as when the banking-apparatus is explained by showing which activities it facilitates, and why banks usually supply certain services and not others). Rather, the aim is to explain social reality by means of objective "laws of movement" of the social body, without referring to the importance and meaning of the patterns of interaction to the people that attempt to uphold, or change it.

As soon as one commits to ascribing these patterns of interactions to the

23 On Tocqueville, see a.o.: P.Birnbaum: Sociologie de Tocqueville. Paris 1970. J.Lively: The Social and Political Thought of Alexis de Tocqueville. Oxford 1962.b On Spencer, see a.o: R.L.Carneiro: “Spencer as an Anthropologist”, Journal of Libertarian Studies, V, 2, 1981, pp.153–210. S.Andreski(ed.): Herbert Spencer Structure, Function. and Evolution. Michael Joseph 1971. Over Ferguson: D.Kettler: “History and Theory in Ferguson” Political Theory. 5,4. 1977, 437–460.

24 A.Comte: Cours de philosophie positive, 4°uitgave, dl.4, 258

25 idem: Système de politique positive. 1851. dl.2. 181.

action of a non-human entity, social science loses all relevance to acting man. We may say that "Knowledge is power", but even in the context of the natural sciences we should not take that to mean that a perfect knowledge "of nature" would enable us to control the movement of Earth, or the solar system. Knowledge of nature does not give us power over nature, it merely allows us to cause certain effects in our environment that would not otherwise have occurred. In the same manner, a "holistic" social science does not give us power over society. The natural sciences allow us to effect micro-changes to our environments, which we (based on our knowledge) can only hope will not cause any macro-effects that might render our entire environment (eg Earth) unlivable. In contrast with this, a "holistic" social science does not even enable us to use our immediate social environment in a more useful/productive manner, as it refers only to the whole, and not to the constituent parts or components. The physical laws are universal (or are supposed to be), in that sense that the falling of an apple and the movement of the celestial bodies are instances of the same law/pattern, even though the falling of the apple is an event on such a celestial body, within a system of celestial bodies. The holistic social science resulted in something which was claimed to be a science of the whole, but specifically not of the events *in* the whole.

Paradoxically, the natural sciences are practically relevant, as they promise each individual the means to more fully and more efficiently attain their ends, while social sciences (in the previously mentioned sense) are totally irrelevant. The only way out is to interpret said science as having some sort of normative implications[26], that is to say: as the revelation of the destiny of society, the nation, the race, or whatever "whole";

26 For Comte, the goal of the institution of social philosophy is to restore order to society, and to enable "true" freedom, which exists in subjugating oneself to the laws of nature as they are established by a government of competent science-people. Cours de philosophie positive pt4. p48. 147. This is to be understood in light of his haughty and dogmatic rejection of the political economy of the French School (ibid, 195, 196) which had identified individual liberty as the basic prerequisite condition for an orderly society*. (See also P-J Proufhons famous saying that "freedom is the mother, not the daughter, of order", and Herbert Spencer's sarcastic remark in Principles of Sociology 3 pts New York 1900, 3:411 that "a fly seated on the surface of the body has as good a conception of its internal structure as one of those schemers has of the social organization in which he is embedded.")

and to suggest that people are somehow morally obligated to acknowledge and bring forth the historical necessity of the evolution of the whole of which they are part. This interpretation transform the social entities into anthropomorphic moral subjects (and, from a human perspective into moral authorities), beings with their own destination, will, reason – Socially immanent gods. This immediately gives rise to the problem of unifying the individual and the common interest, which has occupied theologians since ancient times. This problem had found its solution in the 18th century, when people began to realize that, when certain general rules were applied, the striving towards personal interest by each does not have to be to the detriment of others. This grand achievement was, before it reached completion, pushed entirely into the background by the triumphant obscurantism of the new way of thinking about man and society.

The meaning of the theory of the "harmony of interests"was not that people live in harmony, always and everywhere. Nor was it the idea that a state, nation, class, or any other social entity, is composed of unified, solidary individuals of like mind, as the collectivist interpretation of the idea holds. It is rather that disharmony and conflict are not direct consequences of the individuality and diversity of people, nor of their love for themselves, but of a lack of insight into well-understood self-interest. Because of this, the fact that insight into those institutions that could reconcile the interests of each with the interest of all is also lacking, is easily explained. The notion of the interest of all is of course distinct from that of the common interest. The latter is only cited when it is clear that whatever is claimed to be in the common interest is certainly not in the interest of a certain individual or group of individuals. The common interest is never the interest of all, but a "higher" interest which may be in opposition to the interest of all. The harmonisation of the self-interest of each with the self-interest of all is declared to be totally irrelevant, by the introduction of the notion of the common interest, which is no-one's self-interest. This notion answers to the terrible contradiction between "individual"and "community" which plays such a major part in the social *discours*, and to the personification of the community as a moral subject.

No matter how unbelievable this personification may be, even if we accept

that social entities have their own minds, of the same structure as ours, such that we can interpret their evolution as a moral drama, as a struggle towards the fulfilment of their own destinies, even then, these collectivist theories of law/right bring us no further than the supernaturalist theories of law/right of old. There remain unsolvable problems, that of *representation* and of the foundation of *obedience* of people regarding the will of these supernatural or collectivist entities (the problem of duty to obey the legislation). One could of course say that if someone does not find it problematic to accept super-, or extra-human entities with an anthropomorphic mind, they will likely find it easy to ignore the relevance or the unsolvability of these two problems. Still, I must say something about it. The unsolvability of these problems proves that these theories are indeterminate in content, that is to say they are completely incapable of generating the principles required for a rational ordering of society*, and are thus disqualified as philosophically adequate theories of law/right.

With their disqualification, the problem of choice of philosophy of law/right is reduced to either the fundamental principle of law/right, or the theory that some have the right to rule over others. The latter theory need not be handled separately. Even if it were to succeed in avoiding the problem of representation (eg by claiming that the strong have the right to rule the weak, that is to say by claiming that the factual rulers are also the lawful rules, the pure "might is right"-positivism), then it must still stumble over the problem of duty to obedience. If it does, it loses any normative meaning, as it shrivels into the mere tautology "might is might". As such, only the fundamental principle of law/right remains. A positive proof of the validity of the fundamental principle of law/right will follow in the next chapter. The simple elimination of the alternative theories of law/right is not sufficient[27], as this in itself does not explain the logical necessity of introducing the concept of law/right.

27 The elimination of these alternatives is of course sufficient to refute all "mixed" theories of law/right, that encompass any of the mentioned alternatives (potentially next to the fundamental principle of law/right)

THE LEGAL ORDER

(ed: The legislative order)

The theories of law/right which are being discussed at present all have a commonality in the fact that they deny individual people the right to self-determination. At least some are slaves, in the sense that they would not have the right to dispose over their own means (perhaps not even their somatic means), As such these people would partially or wholly be means for others, or for some non-human subject of law/right, a master. This master is purported to have the right to enforce their will on those slaves, to dictate to them his *legislation.* The question must be asked: what is the meaning of this legislation to the slaves (or subjects, or citizens, or whatever one wishes to call these non-sovereign people)? Why should they obey the will of the master?

For the fundamental principle of law/right, this whole notion of legislation has no meaning, excepting this one: every person has the right to be their own legislator, which implies that the addressee and the legislator are identical. The theories of law/right we are discussing here however, say to people: here is your master, his will is legislation to you – and in doing so, they suggest that the addressee is obliged to obey this master and his legislation in some way. In doing this, they introduce a problem that does not truly belong in the philosophy of law/right, since the notion of law/right only applies to a population of sovereign subjects of law. Law/right orders the society*/living together of sovereign subjects of law in one world (whatever the nature of those subjects may be), and does this precisely by positing that each sovereign subject of law/right has the right to do whatever they wish with their own means (and thus does not have the right to do anything at all with the means of another without consent/permission). From this follows that if we were to assume that there is only one sovereign subject of law/right, we must also assume that this subject has the right to do anything. If we lose sight of the existence of a multitude of sovereign subjects of law/right, and occupy ourselves only with the relations between a sovereign subject of law (master) and their means (slaves or subjects), we are no longer engaged in a theory of law/right (ed: Rechtstheorie), but in legal/legislative theory, which is of a whole different order, with completely different problems.

Undoubtedly there is some analogy. The theorem of legal theory is that each slave may do and not do as they please, within their own domain as designated or recognized by legislation, as long as the slave obeys the legislation and rules and other

prescriptions and commands decreed by, or in the name of, their master. This shows a certain analogy to the theorem of theory of law/right, which is that every sovereign subject of law/right has the right to do or not do with what is theirs as they please, as long as they respect the right to self-determination of other sovereign subjects of law/right. This analogy is superficial and misleading. It is true that the just master will tend to treat slaves as equals. Not *their* equals, but as "equal before the legislation". This equality is not like the equality which exists among sovereign subjects of law/right.

If we assume the master has many slaves, it is clear that one of the large problems of management the master will face will be the regulation of the relations among the slaves. This applies to those relations and interactions directly relevant to the coordination of their labours in the framework of the ends of the master (eg, "national" goals: strengthening the army, industrialisation, the construction of a colonial empire, etc), as well as those that are not directly relevant to the realisation of the ends of the master. The resolution of conflicts within the slave-community, that is to say conflict of no immediate consequence to the master himself, constitutes one of the problems of good management facing the master. Upholding peace and order among the slaves is a precondition to the good functioning of the slaves in the production of the ends that are near and dear to him. The solution of attempting to develop a uniform "private law/right", is an obvious one. This will treat all slaves as equals, and will allow the master to reduce his expenditures on control, by encouraging the slaves to regulate their own interactions, on the basis of said prescriptions, without having to bother their master in each individual case. The essential prerequisite for this is of course that the master devises a coherent individual "property-regulation", such that the slaves know exactly where they should stand and sleep, which means are at their individual disposal, and there aren't continual conflicts among the slaves about which of them is allowed to dispose over a certain means, or who should answer for loss or damages to one of their "personal" possessions.

This "property-regulation"can give slaves the impression that they, among themselves, constitute a *order of law/right*, even though they are not sovereign subjects of law/right: they have no other "rights" than those ascribed or allowed by their master. Their "property" is composed, not of material things,

to which they are uniquely but factually connected and which embody their own possibilities and achievements as moral subjects, but bundles of "rights" granted to them by the master. In other words, among themselves, the demarcations are not real, but conventional and arbitrary, and what is more, these "rights"do not apply counter the master himself. Their opposability is limited, relative, and conditional. Beside this "private law/right" exists, of course, the "public law/right" (the legislation that regulates the master-slave relations). This "public law/right" entails that the master can, at any time, act to change the "private law/right" or its modalities of application. This continuously reminds the slaves that "equality under the legislation" presupposes inequality in the position of the slaves counter the master. This is the case even when the slaves come to believe that the "private law/right" has an immanent form, dictated by the implications of the idea of their mutual equality.

As Machiavelli[28] emphasised with such verve in his manual for the master, one must take into account the nature of the materiel when managing one's domain, especially when this domain includes people. The goal of the master is to use his means optimally in the attainment of his end, and this requires knowledge. The master himself must judge whether the realisation or promotion of his ends under given circumstances are best served by a "liberal", or a "totalitarian"policy, by an "authoritarian" or a "democratic" structure of governance. In this are there are no truly universal rules, everything is dependent on the specific circumstances of time and place and people, and of course of the ends of the master himself. The organisation of the domain is not an end in itself. The problem of management the master faces is a technical problem. The manipulation of human materiel may be more difficult and more risky than the manipulation of resources, machines, cattle and vegetation, it is, as far as a theory of law/right that acknowledges as lawful the existence of masters and slaves is concerned, not a problem of a different category.

In the *Instructions to Managers*, a handbook often used by plantation-owners in the southern states of the USA in the first half of the 19th century, we may read the following fascinating quote:

> "Nothing in more important to the proper management of niggers,than the feelings and attitudes of the overseer towards the slaves. Of course he must be strict and

28 Cf. P.Veyne: “Preface”, in Machiavel: Le Prince et autres textes. Paris 1980, 9–11.

> impartial in executing the rules, and in controlling the performance of the word, but it is no more than just and humane to treat the slaves with kindness and even indulgence, when they have done their duty. In any management, reward and encouragement are as necessary as punishment, and often far more effective. Take note: those that do their best, should be encouraged and rewarded. Even a friendly remark, used judiciously, can accomplish much. In other cases one can lend reprieve of service for a few hours on any day, or at the end of the week, if it has no important effect of the working of the plantation at least. Or one can distribute additional rations or allow favours for the holidays, etc. "
>
> "The slaves long to be appreciated by a good master, and to this end the overseer must regularly report to the master the names and attributes of all those who have been of service because of an understanding of their duty, so that they may be rewarded..."
>
> "The goal of punishment must be 1) to improve, by keeping the transgressor from repetition by having them fear a like punishment and 2) as an example to all others, so that it is made clear that, when they transgress, they too will surely be punished. These goals of all punishments can be better achieved by the certainty of punishment than by its severity"
>
> "Thus, never neglect to take note of the breaking of a rules, nor to administer a just punishment to the transgressor, in line with the nature and circumstances of the transgression. Never punish, nor utter threats when you are excited, but wait until you are completely calm, until you can punish with regret rather than anger."[29]

The rewards mentioned, in that context, can entail not just money or other consumer goods, but also the "right"to own certain pieces of land as "private property", or even to share in the profits of the plantation, as well as, of course, advancement in the social and governmental hierarchy of the plantation.

Many of the people that have examined the problems of good governance and good management mention the same conclusion: "liberalising" or "democratising" can increase the revenue of the domain. As such it is often much more efficient for the masters, to give their slaves or subject more "freedom". Examples include the fact that lowering the tax-rates

29 Cited in R.W.Fogel & S.Engerman: Time on the Cross: The Economics of American Negro Slavery. Boston 1974. p.240

can lead to increased tax-revenues[30]. Such an attitude reveals a rather business-like vision of the master towards the slave, and will not be very palatable for masters with more paternalistic conceptions who feel it their duty to educate, and care for the slaves, in accordance with such a master's own moral principles. As previously mentioned there are no universal principles in this regard. The master can pay homage to a democratic or an authoritarian liberalism,or a democratic, or authoritarian totalitarianism[31]. In any case, the policy, the"politics" of the master do nothing to change the fact that he is a master and, in the theories of law/right under discussion, has the right to conduct whichever politics he pleases.

This remains to be the case even if the slaves drive out their master, yet retain the hierarchical structures, eg by creating a representative body, chosen from among the slaves and representative of the majority of them. Such a "democracy", in which mastery or rule is enacted by such elected personnel, can just as easily be totalitarian and authoritarian as democratic and liberal, as is well know. In other words, the structure of policy can have many or few possibilities for participation, and the slaves as subjects may have many, or few, personal "freedoms". Whatever the particular case may be, such a system entails the institution of rule, despite the fact that in this case "the master" can be a very impersonal institution.

Which policy the master will enact depends on concrete circumstances and goals. That X is *de jure* the master of Y, does not mean that X is *de facto* master of Y. It merely means that no-one else than X has the right to dispose over Y without X's permission. The master is responsible and liable for his slaves, but he may also fear them. It speaks for itself that the threat of unrest, violent resistance or sabotage can influence the policy of the master, but, as Kelsen so explicitly emphasized, none of these factors do a single thing to change

30 A recent example is the discussion regarding the so-called Laffer-curve Cf. A.B.Laffer: De fiscus onder het mes. Brussel 1980

31 Cf. J.L.Talmon: The Origins of Totalitarian Democracy. London 1952. "A democracy" refers to a rulership in which the question of who rules is decided through "free and regular" elections. "Democratic" refers to the attitude of the bearers of authority (in the state, but possibly also in the church, the family, companies, etc) and is opposite to "authoritarian". "Liberal" refers to a relatively small scope of matters in which the government actively intervenes and is opposite to "totalitarian" Cf. F.A.Hayek: Studies in Philosophy. Politics and Economics. Chicago 1969. p.161

the fact that the "rights"and "duties" of the slaves are only *lawfully-valid* on the grounds of the fact that they are defined by the rightful master.

Within the framework of a legal theory, the distinction between "public law/right" and "private law/right" plays a major part (even when the "private law"is not a significant element in all legal regulations). In 19th century continental legal theory it was even invoked to give form to a so-called juridical individualism. As Portalis expressed the basic idea: "Au citoyen appartient la propriété, et au Souverain l'Empire" (Property belongs to the citizen, the Empire belongs to the Sovereign). This clearly refers to the Roman legal concepts *dominium* and *imperium*, as two separate but equal principles. This reference is not just problematic, it is also rather evident that such a dualistic approach cannot lead to a coherent theory of law/right. This clear from the famous (or infamous) article 544 of the Code Napoleon: “La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu’on n’en fasse un usage prohibé par les lois ou par les règlements.” (“Property is the right to enjoy and dispose of things in the most absolute manner, provided that one does not make use of them in a manner prohibited by laws or regulations.”)[32] What the article's author is trying to express is the simultaneous affirmation of two radically different and contradictory ideas. These are the idea that each person has the right to do with theirs as they wish, and the idea that the sovereign (the master, the state) has a right to self-determination that includes the right to regulate the application of all means within the territorial domain of the master (the state). The means in question are obviously the same as those which are the object of the rights of self-determination of the "citizens".

In fact, the article expresses the old idea of “une copropriété pour les souverains sur les biens de leur territoire” (co-ownership for sovereigns over the assets of their territory), the only new element was the addition of the word "absolue", which only serves to shine a spotlight onto the contradiction in the theory. There were many despairing attempts to circumvent the contradiction by emphasizing the acceptance of a rigorous dualism between "private law/right" and "public law/right". This was of course to no avail. Furthermore, the whole matter was obfuscated by attempts to explain the right to individual property (*dominium*) as equivalent to the right to determination of the state regarding its territory and subjects (*imperium*). This gave property-rights the same absurd and

32 See a.o B.Bouckaert: De Exegetische School. Antwerpen 1981. 246–266. for an overview of the 19th century discussion in France regarding this subject. Also sei infra text p.184 and following

mystical character as the right of the state. It wasn't just "absolute and exclusive", but also "perpetual". Furthermore the notion was still linked to the phenomenon of ground-, or land-property to such an extent (and from this, to the territorial organisation of the state) that property-rights were difficult to regards as anything but a conventional, legalistic creation, and certainly not as an aspect of the right to self-determination belonging to each and every person. This isn't a surprise: legislation is not made to make law/justice prevail, but to protect interests. "Private law" was no exception to this rule. Its aim was not to guarantee the right to self-determination of reach person, neither in conception nor in application. Rather, its aim was to protect existing "titles to property", regardless of lawfulness. In a legal order, only their legality can be relevant.

Even though the jurists of those times very much liked to emphasize that the nature of property-rights were those of "natural law/right" (after all, it was only on by doing so that they could ascribe equal value the principles of property-rights and state-sovereignty, after all), one could ask themselves, as Frédéric Bastiat did:

> “if this declaration was not introduced into our charters so to speak instinctively, as phraseology, as a dead letter, and if above all it is at the bottom of all social convictions?”[33]

Bastiat identified himself as "un économiste". He belonged to the intellectual opposition that continued the tradition of Say and the *Idéologues.* To him *la propriété* was truly nothing else than the individual right to self-determination. Like many of his kindred spirits, such as the fascinating Gustave de Molinari, a Belgian economist who was active in Paris, he opposed

> "this empirical definition of property, jus utendi et abutendi, a definition which only has relations with the effects, and not with the causes, not with the origins, because the origins, they were indeed forced to keep obfuscated"

And, he continued:

> "it is sad to think that the science of law/right (ed” “Droit” same as Dutch “Recht”), among us, in the nineteenth century, is still considering the ideas that the presence of slavery must have given rise to in antiquity; but that can be explained. The teaching of Law is monopolized in France, and the monopoly excludes progress."

The attempt of the jurists to connect this empirical definition of property-rights

33 F.Bastiat: “Propriété et Loi”, cited with note p.29.

to purely conventional or legislatively determined titles was not only attacked by the rare representatives of the individualist philosophy. In fact, the debate mainly raged between the representatives of the rising socialist and the conservative ideologies, while the jurists occupied themselves increasingly with "positive law/right", and the "technical"aspects of the contradiction between "private law"and "public law". Socialist authors correctly pointed out the hypocrisy of the conservative defence of the "private law" conception of property-rights, with its beautiful principles on one hand, and their foundation-less clinging to the validity/legitimacy of existing property titles. Their criticisms had more volume than coherence however, and almost immediately degenerated into sloganeering and ill-conceived formulas for "abolishing" private property. Not all socialists strove towards this radical *Endlösung*. From the Saint-Simonist corner, more particularly that of the positivists, the idea was presented that ever citizen was in fact "un fonctionnaire public" (ed: public functionary), and that property-rights should be connected to “une indispensable fonction sociale, destiné à former et à administrer les capitaux par lesquels chaque génération prépare les travaux de la suivante” (ed:an indispensable social function, intended to form and administer the capital by which each generation prepares the work of the next). These ideas of August Comte, penned in his *Système de politique positive*[34], were destined to have a great career. This is not surprising, considering the success of the collectivist social sciences and of the collectivist theories of law/right in the 19th and 20th centuries. We can find them in figures as diverse as a Leon Duguit, a theoretician of law/right, Hendrik de Man, a figure on the border between socialism and fascism, and C.B. Macpherson, a contemporary philosopher with marxist sympathies. In fact, they may be found in some form or another in all the great ideological currents in Western Europe in the 20th century: conservatism, christian-democracy, social-democracy, fascism[35].

34 A.Comte: Système de politique positive. Part.1. 154 and following.

35 "Property is not a right, it is a social function. The owner—that is, the holder of wealth—has, because he holds this wealth, a social function to fulfill; as long as he fulfills this mission, his actions as owner are protected. If he does not fulfill it, or fulfills it poorly,...the intervention of governments is legitimate to force the owner to fulfill his social functions as owner, which consist of ensuring the use of the wealth he holds in accordance with their destination." L.Duguit: Les transformations générales du droit privé depuis le Code Napoléon. Paris 1912, heruitgave 1920. Duguit: Le droit social. Paris 1908. De Man's Plan van de Arbeid (Labour Plan) Chapter 4 provided for an emasculated private sector, and specified: “This private economy will nevertheless be a managed economy because it will be conditioned in the same way as the nationalized sector by the directives indicated in chapter vi." E Weber Varieties of Fascism. New York 1964, 51, displays the core of the conceptions of De Man very well: “…the crux of nationalisation is not the transfer of property but the transfer of authority— which means that the problem of management takes precedenee over the problem of ownership.” In other words, De Man advocated the confiscation and destruction of the value of private property to the owner (since this value is a function of the scope of right to determination) by proscribing what they are to do with their property, rather than by taking away those things to which the right to property relates. This is in fact a duplication of the principle of Zwangwirtschaft applied by Hitler, of which Mises correctly remarked: “This is socialism under the outward guise of the terminology of capitalism” (Mises: Human Action, Chicago 1966. 718) For comments regarding Macpherson, see above note with 55. Macpherson too complains that the usual conception of property-rights is one of “a right which is not conditional on the owners’ performance of any social function”(p.10) It is true that this right is not conditional on the owner exercising this "social function" in a manner conforming to the use another would make of the means involved. This is precisely the reason that in any and all cases someone must have the ultimate right to determination. Remark that neither Duguit nor MacPherson see the right of the state as "conditional upon the fulfillment of a social function". They seem to deem this precondition to be axiomatically met when the rights of the state are in jeopardy/question.

The positivism of Comte of course meant a negation of the dualism of "private law/right" and "public law/right", and was thus a solution to the contradiction in the legal theory this dualism had caused. Still Hans Kelsen would be the first to be able to clearly state this. Kelsen very clearly saw that a coherent theory of law/right could not be constructed as long as one attempted to maintain *dominium* and *imperium*, "private law" and "public law", as principles on equal footing in the theory of the legal order. Consequently, he considered it a great success to have shown that in formal legal theory "private law" also should be considered to be an instrument of "public law":

> "If the decisive difference between private and public law is comprehended as the difference between two methods of creating law; if the so-called public acts of the state are recognized as legal acts just as the private legal transaction; if, most of all, it is understood that the acts constituting the law-creating facts are in both cases only the continuations of the process of the creation of the so-called will of the state, and that in the administrative order just as much as in the private legal transaction only the individualization of the general norms are effected – then it will not seem so paradoxical that the *Pure Theory of Law*, from its universalistic viewpoint, always directed toward the whole of the legal order (the so-called will of the state), sees in the private transaction just as much as in an administrative order an act of the state, that is, a fact of the law-making attributable to the unity of the legal order."[36]

That is the logic of the doctrine of legislation, of state sovereignty: the individual disappears as an autonomous moral subject, and becomes merely a

36 H Kelsen: Reine Rechtslehre 1967. par 38 p285 (H Kelsen: Pure Theory of Law 2009 p281)

means of the state. As such the individual is only interesting to the doctrine of law/right either as an instrument for the exercise of the state's will (the obedient citizen, acting within the bounds of legality), or as a direct object of the exercise of the will of the state (the disobedient citizen acting illegally, to be punished as per the dictates of legislation). Strictly speaking, the behaviour of the citizen (of the slave) can only be judged to be legal or illegal; only the state (master) can act lawfully/rightly or unlawfully, though the master cannot make unlawful acts against his subjects, only towards other states/masters. The citizen is, in relation to the state, "un fonctionnaire public", an instrument, a means.

Kelsen's theory of the legal order is of course a general and formal theory of the right of the master to do or not do with their slaves as they please. "Positive law/right" can have any contents whatsoever, justice (ed: "rechtvaardigheid") is not a prerequisite for the lawfulness of the legislation, etc. It is beyond doubt that Kelsen has succeeded in delivering a masterful analysis of the legal order, that is to say, of the common structure of all theories of law/right that accept the master-slave relationship as lawful. Kelsen has pointed out, justifiably pleased with himself, that his analysis also applies to all those theories of natural law/right that indicate God as Lawgiver, and that found the rights of humans in duties flowing from Divine Legislation[37]. However, from this he drew the unwarranted conclusion that he had succeeded in formulating a general theory of law/right. This conclusion is unwarranted, because Kelsen's theory does not account for the fundamental principle of law/right, and is a formalisation of the negations of this principle. Furthermore it can be considered as a reductio ad absurdum of all those theories.

One of the conclusions of Kelsen's analysis is that the slave that kills another slave or his master, or the citizen that kills another citizen or the head of state, is probably acting illegally but certainly not unlawfully. From this it is nigh irresistable to conclude that the slave or the citizen has the right to kill and murder. This step cannot be taken however, as long as we accept the theory's presupposition that at least those people that are slaves or citizens, are not subjects of law/right, which means that the concepts "right/lawful" and "unlawful"

37 H.Kelsen: Essays in Legal and Moral Philosophy. Selected and Introduced by Ota Weinberger. Dordrecht 1973 (“The Idea of Natural Law” 27–61; “The Foundations of the Theory of Natural Law” 114–153)

do not apply to them. This presupposition is counter-intuitive, and must therefore be explictly defended. If it is accepted however, the problem of the normative significance of the will of the master or legislator to the slave or citizen poses itself, as it is unclear why a person that is supposedly not a subject of law, but a means of a subject of law, would pay more heed to the master than any other natural disaster or danger. Is the way in which the legislation obliges different from the way cold weather obliges people to warm themselves lest they fall ill, or from the way a herd of bison running wild obliges people to make way? If this is not the case, then the legislation is simply *not* lawful/lawfully valid, and it has nothing to do with law/right. As such, the negations of the fundamental principle of law are done for. To put it differently: in that case, these theories have no relevance, neither to practical philosophy, nor to acting man.

DUTY TO OBEDIENCE, AND REPRESENTATION

It's easy to see that, if the master has the right to do or not do with the slaves as he wishes, the fact that the legislation the master enforces on the slaves is not "morally" justified does not mean that it is not lawful. It is quite possible that the master owes it *to themselves* to treat their slaves in a certain way, but then they certainly do not owe it *to the slaves* to treat them in that fashion. The slaves cannot assert rights towards the master. Counter to this, as Kelsen justifiably stated, the legislation has the meaning of a "should": from the master's standpoint the slaves *should* obey the master. As modern-day positivists such as Hart and Kelsen, each in their own way[38], posited: socalled "positive law", legislation and its particular elaborations, must be considered "from the standpoint of positive law" or "from the internal standpoint", if one is to understand the *normative* character of "positive law".

It is to emphasize the normative character of the legislation that Kelsen gave his fundamental norm of law the form, even if only visually,

38 H.Kelsen: Reine Rechtslehre. par.14 H.L.A.Hart: The Concept of Law. Oxford 1961. 79a.f., 97a.f.

of a *moral norm*. The citizens should obey the legislation, the citizens should treat each-other as legislation prescribes, etc. Kelsen was careful not to state outright that this norm is a morally valid norm. He did at one point make note of the fact that it is impossible to speak of the validity of positive law, if one does not succeed in proving the validity of this fundamental "grondnorm". In "The General Theory of Law and State" he remarks that if the lawful validity of positive law/right is dependent on the validity of this fundamental norm, then the fundamental norm itself must depend on content. "As in a norm of natural law... the idea of a purely positive law/justice/right has its boundaries just like the idea of natural law/right"[39] He later dropped this idea and returned to the sterile formalism of Reine Rechtslehre (Pure Theory of Law), to the conception that the "normative" science of law/right is not concerned with determining if positive law is lawful, and should on the contrary simply pretend that it is. To him, it suffices to establish that this duty to obedience must be presupposed if we are to be able to indicate positive law to be normative, and even more: normative in the "objective" sense. Everyone has ideas on the way others should live and the way they treat others. Everyone has the ability to formulate norms. The practitioner of the science of law/right cannot take into account all these normative systems: they are, so Kelsen claims, only subjectively valid, and as such all of equal value to the objective practice of science. If their contents do not provide for a criterion for selection, then objective law must be identified in a different way, by checking to "effectiveness" of all these different normative systems, all of whose contents are only subjectively valid[40]. For some reason, according to Kelsen, the practitioner of the science of law/right only needs to presuppose the objective validity of the most "effective" system.

We can presuppose the validity of any normative system whatsoever, but that, Kelsen says, is not the aim of the positive science of law/right. This study limits itself to studying effective normative systems, that is to say, to studying the ruling morality, the morality of the

39 H.Kelsen: The General Theory of Law and State. Cambridge, Mass. 1945. see 3°ed. p.401

40 See the extensive discussion in H.Battifol: Problèmes de base de philosophie du droit. Paris 1979, 67–111

rulers. This is an absurd conception of science. It would do just as well to claim that the positive natural science must limit itself to studying only the most effective, that is to say, the most popular or prevalent conceptions of nature, and must presuppose their validity while doing so. This amounts to the absurd claim that it is unscientific to question whether these conceptions are true, that nothing can be objectively scientific that does not limit itself to studying our knowledge of nature "as it is" rather than questioning what that knowledge ought to be. If we were to construct the natural sciences analogously to what Kelsen claims of the science of law/right, the epistemological presupposition of natural sciences would have to be formulated as "things are what ruling opinion says they are", which is to say "one should believe ruling opinion". This is certainly not a formulation that expresses the spirit of the scientific endeavour.

Kelsen's fundamental norm (grondnorm) is, as previously remarked, the general formulation of those theories of law/right that accept the master-slave relationship as lawful, and which thus deny that each person has the right live by their own legislation. The addressees of the legislation (of the will of the master), are not people/humans in the full praxeological and moral meaning of the word, but "citizens", "subjects", "slaves".

We will see that it is impossible to prove the validity of the fundamental "grondnorm" in relation to *people*: it is not true that people ought to obey a foreign will. The norm, that *citizens* or *subjects* ought to behave as the legislator wants them to, is a purely analytical expression. The "validity" of this norm cannot be endangered by the subjective moral considerations of any person, as it relates not to people as such, but to people *as citizens, as subjects.* The "natural" person is left out of consideration. His convictions are no more than *factual* data, which a wise legislator might account for if need be, but which to which he *owes* no special consideration. Conversely: the citizen *qua citizen* ought to obey the legislation, since it is precisely this duty to obedience that defines the concept "citizen". The real human being, the real person, however, is not defined by the legislation. Their personal moral code does not contain any structurally necessary rule of obedience to a foreign legislation. It is thus not as a physical person

that someone must obey the legislation, but as a "citizen". The legislation defines the citizen, and one who considers himself only as a "citizen" accepts the definition legislation ascribes to him. The ideal society or state, like the ideal slave-community, comprises solely people who have renounced themselves completely, and who accept the moral code of the community, at the very least in all "social" matters. They can no longer be considered as "natural" people, they must be conceptualised as abstractions of the concrete unity, society, as "citizens". This transformation of people into "citizens", that is to say into entities that hold no principle within themselves but obedience to legislation, is the ideal to strive to for any opponent of the fundamental principle of law/right. A modern expression of this may be found with Rousseau:

> "Someone who ventures to tackle the task of making a people needs to have a sense of being able to change human nature, so to speak—to transform each individual, who on his own is a complete and solitary whole, into part of a greater whole from which he in a way receives his life and his being; to alter man's constitution in order to strengthen it; to replace the physical and independent existence that nature gave us by a partial and moral existence ("rechtspersoonlijkheid" personhood before law). In short, he must deprive man of his own resources, replacing them by new ones that are alien to him and that he can't employ without help from others. The more completely those natural resources have withered and are annihilated, the greater and more lasting are the new ones that he acquires, and the more stable and perfect are the new institutions.
>
> If you find that last statement extravagant, consider: If each citizen is nothing and can do nothing without all the others, and if the resources acquired by the whole are equal or superior to the natural forces of all the individuals put together, it can be said that legislation is at the highest point of perfection."[41]

Only society should be real, individuals should only exist as abstractions of the societal unit, as *citizens.* The civil ideal is that of the fully socialised person, that knows no other moral truth than that proffered to him by legislation. As long as this perfect society does not exist, as long as there is a divide between person and citizen, the relationship between individual and society will necessarily be authoritarian. For (in this conception) there is no rational

41 Rousseau: Du Contrat social 1762) ii/7

argumentation possible capable of convincing someone that, on the basis of one principle (their own individuality, their personhood as a real physical human) they should accept the truth of a contradictory principle (their citizenship, their legal *persona* as a partial, conventional "legal person"). Because of this it is pointless to defend the fundamental norm of "civil morality", that one should obey the legislation, in moral argumentations with individual physical persons: such argumentation can only be satisfactory to the "citizen", who, by definition, accepts this norm.

We can well understand Kelsen's ambivalence regarding his so-called grondnorm[42], if we consider that its validity cannot be shown in regards to the citizen as a person, and that its validity does not need to be shown in regards to the person as a citizen. If the person is a morally autonomous subject, a sovereign subject of law/right, then this fundamental grondnorm is invalid, and thus useless to the science of law/right. If the person is a morally heteronomous subject, a slave by nature, whose principle of action is outside of themselves, then this norm (in its general form) is valid by definition.

Whoever defines themselves as a citizen, will voluntarily subject themselves to the legislation, but whoever defines themselves as a unique, individual person, will experience the legislation as something foreign and forceful. Those who define others as citizens, will be able to join Rousseau in saying, without scruples: "whoever refuses to obey the general will will be forced to do so by the whole body: which means nothing other than that he will be forced to be free"[43]. Indeed, they will admit no value in the individuality of the other.

Kelsen’s fundamental norm expresses very well the connection between the theory of the legislation (of the legitimacy of master-slave relations) to a certain ethical theory, namely the theory of moral heteronomy. This theory is required to lend contents to the idea that so-called positive law has normative meaning to those that legislation is addressed to. Merely to say that a sovereign subject of law/right (master), has the right to do or nor do with their means (slaves) as they please, is not sufficient to conclude that those means (slaves) ought to behave as the sovereign subject of law (master) wants them to. The only thing that follows from that premise is that the sovereign subject of law (master) has the right to, using any and all possibilities

42 Sometimes he refers to a "presupposition", sometimes a "hypothesis", other times a "fiction".

43 Rousseau: Du Contrat Social. ii/7

at their disposal, to force obedience from their means (slaves). But that is not the same as claiming that the means (slaves) owe the master obedience. The fact that a farmer has the right to do or not do with his cows as he pleases, or that a car-owner has the right to do or not do with their car as they please, does not mean that the cows owe obedience to the farmer, or the car to the owner.

This is obvious because the majority of people rightly don't consider cows and cars to be things "obligations" can meaningfully be ascribed to. It is hard to see why we shouldn't be able to if, such as in more primitive forms of modern positivism)examples are Hobbes and Austin), it is posited that "to have an obligation" means nothing other than that there is a greater power/force capable of exerting effective control and coercion. Most farmers effectively master their cattle, as most owners master their vehicles. If we are still not inclined to state that cows or cars owe obedience to their masters, that effectively means that we tend not to accept the primitive positivist definition of "having an obligation".

As such it seems absurd and dishonest to claim that the duty of obedience of people towards the legislation has a normative meaning, despite it not having any other grounds than the superior power/force of the legislator. When referring to people, the word "obligation" inevitably gains a *moral* connotation. Even if one explicitly states that the obligation to obey the legislation is, unlike moral obligations, constituted by the fear of or prospect of punishment or vengeance from a stronger power, this does not change that fact. It is precisely this moral connotation that forms an obstacle to the attribution of "legal obligations" to animals and machines. Even people that have no qualms speaking of the *rights* of the animal or the environment, do not have the courage to also couple this to obligations for the animal or the environment.[44]

44 D.L.Phillips: Equality, Justice and Rectification. London 1979, 146: “But the idea of rights applies only where there are also subjects who know what it is to have a right, who are able to make judgments and choices concerning these rights, and recognize that the notion of rights involves mutual obligation.” A whole literature on the "rights" of animals has cropped up: a.o. T.Regan & P.Singer: Animal Rights and Human Obligation. Englewood Cliffs, 1976; P.Singer: Animal Liberation. New York 1978. B.E.Rolin: Animal Rights and Human Morality. New York. S.Clark: The Moral Status of Animals. Oxford 1977. A.J.Povilitis: “On Assigning Rights to Animals and Nature” in Environmental Ethics. 2, 1980. 67–71

Very critical is: R.G.Frey: Interests and Rights: The Case Against Animals. Oxford 1982. It is not surprising that most of the proponents fail to advance beyond the notion of a "passive right", which is obviously without much meaning, as it would be required to prove the absolute and universal validity of a moral law that regulates human behaviour in relation to animals: that is to say it must show that a) each person should obey this "law" and b) that all or some people have the right to enforce obedience to this "law", by force if need be, either in their own name, or in that of some other, "higher" authority. No such evidence is available, or even conceivable. (See text above, p. 56 (orig) and following). It is of course impossible to exclude a priori that (some) animals do indeed have rights, that is to say that they are subjects of law/right. There is however little reason to presuppose that, beside humans, there are other animals that meet the prerequisites of rationality which will be specified in the following chapter (the ability to engage in an argumentative dialogical relation with another). See, a.o. Mortimer Adler: The Difference of Man and The Difference It Makes. New York 1967.

The relationship between man and animal expressed in the sense of "Jan has the right to dispose over Fido" does not imply that Jan has any right in relation to Fido, not that Fido has any obligations in relation to Jan. One might suspect that the claim that animals have rights implies that these rules are opposable to humans, and that humans consequently do not have the right to do anything to the animals (without their permission?). This makes animals privileged in relation to humans, so that even the proponents of "animal rights" recognize the special place humanity has in the animal kingdom. A new version of The White Man's Burden? Furthermore, the "rights" of the animals, though opposable to humans, are clearly not opposable to other animals, or should we say that a lion does not have the right to eat a gazelle? Or that the swallow that eats insect is a criminal? Between man and animal, only affective relations, and those based in power, can exist, just as between animal and animal, but no right-relations/law-relations. (ed: orig "rechtsrelaties").

That which applies to cows and machines, applies also to slaves. Just as cows and machines cannot be said to owe obedience to their masters, and even though the master can force ("oblige, mandate") both the slave as well as the cow and machine to obedience, the slave does not owe it to the master. The right of the master has no normative meaning for those means or slaves. Those that wish to make a distinction between *moral* and *legal* obligations have no other choice than to reduce legal obligations to pure coercion. The claim that the legislator has the right to enforce their will on people implies that these people are not sovereign subjects of law, but mere means, and therefore do not have the right to live by their own legislation. In the relations with the sovereign subjects of law/right (God, the state) they are merely things, without moral significance. To put it differently: "legal obligations" can only be explained if one does not account for the fact that people are morally autonomous subjects.

This insight is clearly expressed in the following quotes from texts which are foundational to modern positivism. The first belongs to Hobbes:

> " To those therefore whose Power is irresistible, the dominion of all men adhaereth naturally by their excellence of Power; and consequently it is from that Power, that the Kingdome over men,

> and the Right of afflicting men at his pleasure, belongeth Naturally to God Almighty; not as Creator, and Gracious; but as Omnipotent. And though Punishment be due for Sinne onely, because by that word is understood Affliction for Sinne; yet the Right of Afflicting, is not alwayes derived from mens Sinne, but from Gods Power."[45]

The second quote belongs to John Selden:

> "I CANNOT fancy to myself what the Law of Nature means, but the Law of God.* How should I know I ought not to steal, I ought riot to commit Adultery, unless some body had told me so ? Surely 'tis because I have been told so ? 'Tis not because I think I ought not to do them, nor because you think I ought not ; if so, our minds might change, whence then comes the restraint ? From a higher Power, nothing else can bind. I cannot bind myself, for I may untie myself again ; nor an equal cannot bind me, for we may untie one another : it must be a superior power, even God Almighty."[46]

The implication of this position is that, in order to prove the obligatory character of a piece of legislation, it is not sufficient to prove that this legislation maps onto the will of a sovereign subject of law/right, not even if this sovereign subject of law is God. The obligatory character of a legislation is wholly and totally a function of the power of the legislator, not of their status, nor of the morality of the legislation they issue. It is because God is almighty that man *must* obey, it is not the case that man *should*. What people should do is totally irellevant to the determination of their legal duties. Consequently, their practical reason is likewise irrelevant in relation to their legal obligations.

Selden puts a finger on the sore sport in the old voluntarist theories of positive law when stating that the constraints implied by legislation cannot come from the person itself, since the person would be able to unilaterally free themselves from said legal constraints. Put differently: I don't owe it to myself to obey God, because then I would be able to free myself from this obligation. Consequently, the obligation cannot have its cause in the fact that I see that I should obey God on the basis of content or morality, For, in that case, I would be acting as judge, and my own judgment would still be the foundation of my obligation to obey God. We must either drop the idea of an external legislation, or we must

45 Hobbes: Leviathan (1651), hk 31.

46 J.Selden: Table Talk. in Selden: Opera Omnia. Uitgegeven door D.Wilkins. London 1726, 111, kol.2041

assume that such a law binds not through any moral quality, but simply through physical effectiveness. Neither Hobbes nor Selden chose the first alternative. The obligation to obedience to the legislation, which they accept, must therefore be without moral meaning/content: the *moral* norm, that people should obey the legislation (even the legislation of God), is invalid. The duty to obey the legislation is itself a *legal* obligation.

So, what remains of the so-called "normative" character of positive law? Contemporary positivists, such as Kelsen and Hart, have gone to great lengths to secure this normative character, but Hart's attempt is clearly inconsistent[47], and Kelsen's attempt amounts to a claim that we can, if we want, *presuppose* the normativity of positive right/law (but we cannot prove it). But if we do not succeed in showing people why they should obey the will of the legislator, then we cannot show they should respect the right/law of the master or legislator, and then this right has no bearing on the formation of practical deliberations. Only the *power* of the master/legislator, as a factual obstacle, plays a part, but this is a part of the same kind as that played by the power of a lion, best not provoked.

At this juncture it seems appropriate to remind the reader that, though the fundamental principle of law/right excludes the existence of an external legislator that has the right to force people's obedience, it does not imply that people do not have the right to believe there to be a god (or who- or whatever) that all people should obey. To believe that everyone owes it to themselves as a rational being to live by God's law, is not grounds for claiming that no-one has the right to not live by this law. It is quite possible to have religious convictions without believing the God one serves has the right to dispose over all people. The Late-Medieval conception of the relationship between man and God being a relation between equals, which is the foundation for the work of a seminal thinker in philosophy of law, Jean Gerson (De Vita Spirituali Animae, Definitiones Terminorum Theologiae Moralis), provides a good illustration

47 Cf. Rodger Beehler: “The Concept of Law and the Obligation to Obey the Law” American Journal of Jurisprudence, 23, 1978, 120–142, vooral 132. Ook C.J.Groudine: “Authority: H.L.A.Hart and the Problem with Legal Positivism” Journal of Libertarian Studies 4,3,1980, 273–288. M.Payne: “The Basis of Law in Hart’s The Concept of Law” Southwestern Journal of Philosophy,9,1, 1978 11–17. In this regard also A.H.Goldman: “The Obligation to Obey the Law” Social Theory and Practice 6, 1980, 13–31.

of this point.[48]

No limitation of individual sovereignty is introduced by posing that a person owes it *to themselves* to obey another. This was precisely the reason why Selden came to the conclusion that legal obligation must be wholly disconnected from any moral obligation. It's not inconceivable for the slave to owe it to himself to obey his master, but even if this were the case, this fact cannot be the foundation of the right of the master. A person has the right to obey another (as long as this other is not ordering the execution of unlawful acts). This however doesn't give anyone a right to the obedience of another. Both of these facts are direct consequences of the fundamental principle of law/right: when one does not obey another, but goes their own way, no-one is treated unjustly. Even parents do not have a right to obedience from their children, as such[49]. The children of course have a duty to follow the "house rules" of where they are staying, but this applies to everyone. Children are not property of their parents, which of course does not mean that they are some else's property, not even those who call themselves "government". The moral and economical dependence of children in relation to their parents does give the latter the possibility of exerting heavy pressure, but this pressure must be applied within bounds of law/right.

Besides the problem posed to collectivist and supernaturalist theories of law/right by the duty to obedience, there is also the problem of representation[50]. Even if it was successfully shown that people should put the will of God, or the community, above their own, this does not

48 See o.a. R.Tuck: Natural Rights Theories: Their Origin and Development. Cambridge 1979, 25–30

49 See H.Spencer: Social Statics. New York 1970, 153–173. W.M.Evers: “Rawls and Children” Journal of Libertarian Studies. 2,2,1978, 109–114.

50 Cf. B.De Jouvenel: “From the Supreme Sovereign, God or Society, concrete Power must emanate; he must embody this Will: to the extent that he realizes these conditions, he is legitimate. And he may as delegate or agent exercise sovereign right. It is here that the systems, in addition to their duality regarding the nature of the Sovereign, present great diversity. How, to whom, and above all to what extent will the right to order be communicated? By whom and how will the exercise be monitored so that the agent does not betray the Sovereign's intention? When will we be able to say, by what signs will we recognize that the unfaithful Power loses its legitimacy, and that, reduced to the state of a simple fact, it cannot argue for a transcendent right?” op.cit. with p.63, p.40. For an overview of the discussion, see J.Pennock & Chapman: Nomos X: Representation. New York 1968.

gain us anything if we do not know what this god or community is, and what it wants. The problem is that these collective or supernatural entities do not appear to have a self-representing personhood, and must thus be represented by a human mouthpiece. Who are the legitimate representatives? How can one determine if a legitimite representative exceeds their authority? As David Hume remarked, soberly: " These problems are less capable of solution from the arguments of lawyers and philosophers, than from the swords of the soldiery".[51]

The problem of representation is not rationally solvable, and cannot be. The same circumstances which require a representative to make known the will of God or Community, to oversee its execution, make it impossible to directly call upon the represented when the identity of the representative, the nature of their assignment, or the length of their mandate are in question.[52] Dwelling upon this fact for long would be unproductive. History provides plenty of examples of the veracity of Hume's dictum. Both the problem of representation, as well as the problem of duty to obedience, suffice to disqualify the supernaturalist and collectivist theories of law as rationally acceptable theories of law.

This leaves in the running, besides the fundamental principle of law/ right, only the position that some people have the right to rule over others. Some are "masters", some are "slaves". Here

51 D.Hume: A Treatise of Human Nature. iii/2,x

52 Rousseau: Du Contrat Social. iii/15 is categorical: "Sovereignty cannot be represented... The people's deputies are therefore not and cannot be its representatives....The English people think they are free: they are very wrong; it is only during the election of members of parliament: as soon as they are elected, he is a slave, he is nothing." Kant: Die Religion innerhalb der blossen Vernunft, with chapter 4 (second part, paragraph 1) writes that the sovereign (in case: God), is necessarily a construction, a hypostasis of a personal ideal, not an objective entity and common datum. : "For in whatever way a being is made known and described as God by another, even if such a being appears to him himself, he must first of all hold this idea together with his ideal in order to judge whether he is qualified to to consider it a deity and to worship it." The idea of representation does not relieve people of their responsibility for themselves. This same idea can be found in Locke, in The Reasonableness of Christianity: "Reason is natural revelation, whereby the eternal Father of light and fountain of all knowledge communicates to mankind that portion of truth which he has laid within the reach of their natural faculties. Revelation is natural reason enlarged by a new set of discoveries communicated by God immediately, which reason vouches the truth of by the testimony and proofs that it comes from God. So that he who takes away reason to make way for revelation puts out the light of both."

the problem of representation does not necessarily pose itself. It certainly doesn't when one posits that the strong have the right to rule the weak, or the majority the right to rule the minority. Whoever makes such a claim is unlikely to tire themselves looking for a moral basis for rulership, in the form of a foundation for the duty of obedience of the weak or the minority under rule. For them, rulership is a self-justifying *fact*. It should be clear that such a theory is not an acceptable alternative theory of law/right, from the standpoint of practical philosophy. It does not introduce any criteria for the ex ante classification of actions as lawful or unlawful. If another position is taken, for example that the "good" have the right to rule the "bad", or the "wise" over the "foolish", the problems of representation and duty to obedience pop up once more. Here too, they are not rationally solvable. Who has the right to decide who is "good" and who is "bad", who is "wise" and who is the "fool"? Why should anyone accept the judgment of another in these matters? This alternative does not provide any prescription for an orderly, rational society*. It is therefore high time to take a look at the fundamental principle of law/right itself.

3 The Fundamental Principle of Law/Right

"The only right is what is after my constitution."

R.W. EMERSON

"Peace rules the day, where reason rules the mind."

W. COLLINS

THE VALIDITY OF THE FUNDAMENTAL PRINCIPLE OF LAW/RIGHT

Is the fundamental principle of law/right valid? This is the question I will attempt to handle in this chapter. None of the alternatives we could identitfy turned out to be acceptable, but the elimination of the alternatives alone is not proof of the validity of the fundamental principle of law/right.

The first part of the task at hand will consist of showing that the fundamental principle of law/right is not an empty principle. That is to say: there is at least one means a person has the right to dispose over in a sovereign manner (this is assuming it is meaningful to consider people as subjects of law/right) Proving this proposition clears the way to proving the validity of the principle itself.

The fundamental principle of law/right, the principle of moral autonomy, implies that each person has the right to decide for themselves what to do with their lives. It implies that each person has the right to be their own legislator, each person has the right to decide for themselves what the best use of their lives is. Does every person have this right? Does every person have the right to decide what they should do, believe or desire? If this is not the case, if not every person has the right to dispose over their own capability to judge, there are only two other alternatives (assuming discussion on law/ right to be meaningful). Either some have the right to dispose over their own capability to judge, and some do not, or everyone has the right to dispose over the capacity to judge of all others. Even if we were to wholly discount the argumentation provided above, still it remains clear that both alternatives are absurd. It is senseless to ascribe the right to determination over the critical abilities of one person to another.

Indeed, every person, as a rational being, can render judgment, ask questions and attempt to answer these questions. But, no person can render another's judgment, ask another's questions, or decide what another would consider a satisfactory answer to any of their question. It is an immediately evident metaphysical impossibility for A to render B's judgments, or B those of A. If we pose the question of who has the right to render A's judgments, we can only answer: A themselves. Every other answer is manifestly absurd. This is not an arbitrary value-judgment, but a necessary precondition we must accept if we wish to use the expression "X has the right" in a meaningful manner.

It would be nonsensical to claim that A has the right to render B's judgments, because it's impossible to presuppose that A has the right to do what he is incapable of doing. In the same way, it would be nonsensical to claim that A does not have the right to do something he is incapable of not doing, or what no-one is capable of doing in his stead. It is an immediately evident given fact that – if it is meaningful to say that people have rights -every person has the right to render their own judgments, and that no-one has the right to render the judgments of another. Every person has the right to dispose over their own critical abilities,

no person has the right to dispose over the critical abilities of another. The least we can say is that every person has the right to dispose over themselves, if "themselves" is understood to be no more than their ability to judge, or the organic structure in which this ability is embodied. Given this restrictive definition of the scope of each person, we can posit the fundamental principle of law/right to be a necessary truth. The alternative theories of law are reduced to utter nonsense when they are applied to the human capacity to judge. The freedom to judge cannot be taken from a person without also taking away their capacity to judge, their rationality. It is possible of course, to trick a person by feeding them false information, but this is not the same as controlling their judgments.

Each person being responsible for their own judgments, does not mean that every person is the author of the contents of all the presuppositions accepted or confirmed, or denied and negated, by their judgment. It merely means that the person in question is the author of the acceptance or denial of those propositions, and is therefore responsible for the fact that they accept certain propositions and rejects others, for the fact that they make some propositions their own, and thus use said judgments as a basis for reasoning, reacting and acting. Every judgment refers to the judging subject: "*I* think...", "To *me...", "I* believe...",etc. A judgment can never be presented as a proposition preceded by the impersonal modal expression "it is untrue that...", or others of that nature, for it will always be a valuation bound to the subject: "*I* find that...". As Nietzsche puts it in his *Wille zur Macht*: "the valuation "I believe that this is so, and that is as such" is the essence of truth"[1]. Truth, beauty, good, are categories of judgment and have no meaning when decoupled from a judging subject.

It would be absurd to posit that each person creates the content of all propositions judged by them. This is evidently not the case: most people, in most cases, merely assume the positions of others, and often remain uncritically loyal to a judgment once rendered, even in the face of mounting evidence of its error. Many people avoid the burden of judgment by orienting themselves towards the judgments of

1 F.Nietzsche: Der Wille Zur Macht. p.275 in the translation by W.Kaufman en R.J.Hollingdale: The Will to Power. New York 1967

others they consider to be authorities in some domain, but even in that case, they make the judgment on who to consider an authority, whose judgment they will lend more weight than their own in a certain matter.

Many people trust their intuitions and emotions. That is to say, they trust the cognitive and evaluative judgments resulting from the rapid processing of the perceived circumstances by their subconscious.[2] These emotions and intuitions are not opposed to critical judgements, as they are themselves the product of past judgments and schemes of interpretation stored in the subconscious, and thus of past judging activities. Even though they may seem to be spontaneous, non-rational impulses in the moment they occur, still their source is rational through and through. It is therefor absurd to believe that intuitions and emotions can supply a direct, authentic, "animal" knowledge, a pure knowledge, unsullied by the intervention of reason. Intuitions and emotions are, on the contrary, automatically or spontaneously generated conclusions regarding present events or circumstances, on the basis of past judgments. Those who let themselves be guided by their emotions or intuitions are letting themselves be guided by the child they once were, or the judgment of the authorities they once accepted. The quality of the conclusion is dependent upon the quality of those past judgments, in no cases can it be better than the latter.

This spontaneous judgment is vitally important, of course. It relieves people of the necessity to engage in critical evaluation in each and every situation. It allows a person to, in most cases, never be without premises, and that they always have some idea of what they must do, even when they have no time to deliberate. But the reliability of these intuitive and emotional responses can never be greater than the

2 N.Branden: The Psychology of Self-Esteem. 1969, New York 1981, 64–94. The "cognitive" approach towards emotions and intuitions applied here regards these exclusively as factors in the explanation of actions, not merely as physical "afflictions". Cf. P.Breggin: The Psychology of Freedom. Buffalo, N.Y. 1980, p.43: “What we usually call emotions have many highly intellectual and even rational colorations to them…Despite the complexity and little understood nature of emotions, it is important to underscore their more or less automatic nature, and, in the case of the more highly developed emotions, such as love, hate, and happiness, to understand their dependence upon specific volitional thoughts, or the choice–making–process.” J.Beloff: Overzicht van de moderne psychologie. Utrecht–Antwerpen 1976, p.196 refers to the fundamental motivation for this approach: "Maybe the current preference for cognitive psychology is not more than an acknowledgement by psychologist of the fact that people have brains, and that these brains are more than switchboards that connect receptors and effectors." Ditto in Branden, op. cit-1-15

reliability of the process of judgment which is at its basis. If one grows the habit of judging critically, one will find their intuitions and emotions to be relatively trustworthy. Those not of this habit will find little solid support in their emotions and intuitions. The relevant point here is that the emotions and judgments of a person are dependent on their own past judgment, and as such they are responsible for these intuitive and emotional reactions/responses as well. Naturally, they remain responsible for the decision to follow their emotions and intuitions, or rather to determine if the specific case might not warrant questioning them. Neither the judgments of others, nor the spontaneous cognitive and evaluative valuations generated by the subconscious are more than givens/data to be evaluated. The same is true for the so-called "voice of conscience", which is the expression of value-judgments which were strongly emphasized during upbringing. In any case, man has no biological necessity to blindly and unconditionally follow their emotions, intuitions or the "social betters". Luckily, this insight is gaining ground once more, in the form of the unmasking of the concept of "mental illness". Since Charcot and Freud[3], this concept had grown into a unity encompassing nearly all forms of behaviour. and was mostly put to use for getting past moral judgements. After all, succeeding in characterising certain behaviours or actions as symptoms of a disease, shows that it is inappropriate to believe the perpetrator to be morally responsible for their actions, or even to believe them to be a moral subject.

It is evident that most propositions people base the organisation of their lives and actions on are simply copied from other people. The main goal of upbringing and education is to impart knowledge or opinions onto others (the same is true for propaganda). But the fact that A claims, in the presence of B and with great emphasis and authority, X to be true, or even the fact that B believes X to be true because A claims it to be, do not mean that B's judgment on the truth of X is rendered by A. The judgment "For me too, X is true" must come from B themselves. B must decide if X is a believable proposition to them. Even if B has taken to following the general rule of believing everything A claims, this is still *their*

3 See: Thomas Szasz: The Myth of Mental Illness: Foundations of a Theory of Personal Conduct. Revised edition, New York 1974, 17–43. also: P.R.Breggin: “Madness is a failure of free will; therapy too often encourages it.” in Verdiglione,A.: La folie dans la psychanalyse. Paris 1977.

decision. It only remains B's decision, until *they* decide otherwise. There is no magical transplantation of A's judgment into B's consciousness.

People are themselves, personally, responsible for the policy they implement in this regard. Even when this policy consists of thinking as little as possible, to ask as few questions as possible, to trust "authorities" or emotions and intuitions as much as possible[4]. To many people that are used to enacting a cognitive and evaluative policy of this sort, and who are not very choosy when it comes to the contents of their minds, it will undoubtedly be quite the task to subject themselves to the self-discipline required when they finally do reach the conclusion that thinking seriously is a vital necessity, that an open mind, the willingness to question interpretations and commonplaces handed down to us, is an absolute precondition to making something out of life (instead of simply suffering it). Someone who has never practised the controlling of the activities in their minds, should not expect it to be easy for them to free themselves from mental lethargy when they finally find control over their lives slipping from them, their plans systematically failing, or that they cannot derive joy even from success.

For some this effort will likely prove too great. They will reach the conclusion that it's all too difficult and will quickly give up on any attempt to live critically. This does not change a thing about the fundamental given of freedom of judgment and decision. It speaks for itself that basing your life on certain judgments (such as the judgment that it's better to follow the judgments of others than to judge for yourself) has consequences. There is nothing paradoxical in the possibility that those who base their lives on certain judgments will find, after a time, that they are nigh incapable of independently judging situations they are confronted with. This is not an unlikely consequence of a policy of fleeing responsibility for oneself. But this flight, too, is a decision made for oneself, and its consequences are thus those of one's own decision. There is no way for a person to escape their self-responsibility. As Camus said: "Even suicide comes one decision too late."

4 Branden: op. Cit with 130 (note intuitions).

It is man's lot to judge.[5] People can choose, say yes or no, and so they must choose – and so they choose. The form of consciousness specific to humans is conceptualizing: people *understand* (ed: Dutch "begrip" is a synonym of "concept", "begrijpen" is to understand) their world by means of concepts. These concepts are not some uncontrollable glandular secretions, rather they are constructions, products of mental activity. In and of themselves, concepts are perfectly passive, inert things. They are what people make of them. They don't independently attach to the human consciousness, they don't form any theoretical combinations, they don't cause any action, even though every action is nothing but the execution of a conceptual plan. Conceptual consciousness is volitional consciousness: it does not function automatically according to a biogenetic, preprogrammed pattern. The operations of the conceptual consciousness relate to logical entities and must be controlled and checked critically, in light of conceptual norms. A complex theory is a construction, not an organic growth: concepts don't grow into one-another to form propositions, nor do propositions naturally cluster to form theories or stories. When a person under the influence of alcohol or other drugs utters nonsensical or incoherent speech, it is because *that person* is drunk or high, and nor because alcohol or other drugs work to disrupt concepts or propositions and their "natural" tendencies to combine. The critical effort required to logically organise thoughts is an act of will, not an automatic reflex.

The fundamental question facing each person is: "To think or not to think?" and this is a choice which cannot be avoided.[6] People have

5 Branden: op.cit., 28–35. Breggin: Op.Cit. bij p.116, 43–52. J.M.Boyle Jr., G. Grisez,O.Tollefsen: Free Choice, A Self-Referential Argument. Notre Dame, Ind. 1976, 20–23, 153–184. W.I. Matson: Sentience. Berkeley, Cal. 1976, 116–184. H.B.Veatch: Rational Man. Bloomington, 1962, p.153: “…we find ourselves, with respect to the objects of our wishes and desires always caught up in an interplay of free judgment and free choice.”

6 A.Rand: Atlas Shrugged. New York 1957 p.1012; gecit. in Branden: op.cit., p.37. “Man’s capacity to default on the responsibility of thinking is too easily observable. He must choose to focus his mind; he must choose to aim at understanding. The act of focusing pertains to the operation of a man’s consciousness, to its method of functioning —not to its content. A man is in focus when and to the extent that his mind is set to the goal of awareness: clarity, intelligibility, with regard to the object of his concern. To sustain that focus with regard to a specific issue is to think. To let one’s mind drift in will-less passivity: directed only by random impressions, emotions or associations, or to consider an issue without genuinely seeking to understand it, or to engage in an action without a concern to know what one is doing—is to be out of focus. What is involved here is not an issue of the degree of a man’s intelligence or knowledge…It is an issue of the basic regulating principle that directs the mind activity…Thus, the choice to focus does not consist of moving from a state of literal unconsciousness to a state of consciousness…(but) to move from (relative) mental passivity to purposeful mental activity—to initiate a process of directed cognitive integration.” pp.40–41.

critical abilities, but these do not work "automatically": they must be used, applied, deployed. Each must decide for themselves if and when to use their critical abilities, and must continually make this decision. To live thoughtfully with an open mind requires a constant effort. As soon as attention wanes, the thinking-process grinds to a halt. When the mind is closed to new information, new questions, new insights, the only option remaining is to use old information, old insights, and old answers to old questions.

To those that prefer not thinking over thinking, all this talk of choosing and deciding may seem to be at least greatly exaggerated, because they themselves have never ventured into critical deliberation, preffering to follow the spur of the moment. Still, their lives too rest on a concatenation of choices and judgments, their lives too are no more than the consequence of their continually repeating choice not to think. As mentioned earlier, a judgment is no less a judgment because it stems from an uncritical, unintelligent process. Unreasonableness is just as much a show of rationality as reasonableness.

Undoubtedly there are people whose brains are damaged to such an extent that they can no longer be considered to be rational beings.They, however, are only capable of surviving in artificial conditions, where others take care of them, and render the judgments and make the decisions on which their survival depends[7].

To think or not to think. Each person, as a rational being, faces this choice at all times. "Choosing" is a difficult and unusual concept. It defies the usual rules of modal inference, which allow deriving "can" from "must", but not "must" from "can". Necessity implies possibility, but the reverse is not generally true, choosing being an exception. Having the possibility to choose between two or more alternatives, means that making a choice is necessary. Those who can choose must choose, and those that must choose, will choose, no matter what they do, no matter how they reach their choice. Animals choose too, but as they do not possess a conceptualising consciousness, merely a perceptive one, their choices are intertemporal: a choice between data/givens

7 It speaks for itself that people/humans (in the biological sense, members of the species Homo Sapiens) whose rational capacity has been irrevocably destroyed fall outside the scope of this book. They are not acting beings, a fortiori not moral subjects, a fortiori not subjects of law/right.

which are available at the same time. This is not like intertemporal choices where an immediately available satisfaction might be sacrificed for satisfactions available only later. These sorts of choices are not possible without the ability to envision and evaluate multiple differing future sequences of actions and events, which are not perceptible[8]. Every person has the ability to choose how to judge, which concepts to make their own, which propositions to accept, and which criteria to apply in doing so. To think and to judge are *free* activities. They relate to logical entities, to objects of what Popper called World 3, the world of "objective" knowledge, not to physical or psychic entities and events[9]. These objects are objective in the sense that we can discover in them certain properties: for example, we might discover a certain theory to be inconsistent, or that we could reformulate one theory in terms of another, using a certain number of rules of correspondence, etc. All this, these discoveries, presuppose a certain lawfulness (ed: in the "laws of nature" sense) in World 3. Since it is actually possible to randomly combine logical objects (eg a nonsense poem, or using certain linguistic particularities of a language to show "deeper" connections between very divergent disciplines), all this lawfulness in World 3 can only be of a normative nature. These norms themselves are World 3-objects, not ex post or a posteriori regularities discovered in the interaction of a multitude of given, previously extant, objects.

There are no given, pre-existing objects in World 3: concepts, theories, questions, problems, etc. are human constructions, even though people can discover in these constructions an objective, non-intended order if they start critically questioning said constructions. The laws of logic do not exert any physical, mechanical force/coercion. Nobody finds it impossible not to follow the rules of logic. When it is stated that a person is "logically obliged" to believe, claim, or do something, it is a *moral* obligation that is referred to. A *should,* rather than a *must* or an *inability-to-do-otherwise.* Implicit in this statement is the

8 Cf.M.Adler: op.cit.with p.105, p. 153 a.f. and Don D.Davis: The Unique Animal.

9 Cf. K.R.Popper: Objective knowledge. Oxford 1972. K.R.Popper: Autobiografie. Utrecht–Ant-werpen 1978. K.R.Popper & J.Eccles: The Self and lts Brain. New York 1977. E.D. Klemke: “Karl Popper, Objective Knowledge and the Third World” Philosophia 9, 1979, 45–62 A.O’Hear: Karl Popper. London 1980.

position that people should respect the laws of logic. To render judgment always presupposes the conviction that, in light of the available data, a certain alternative is objectively better than another alternative. That is to say, the conviction that this certain alternative should be preferred, in light of the available data.

What is believed or desired always traces back to a choice, and eventually, to the choice between thinking and not thinking, between critically analysing data and uncritically accepting emotional, intuitive, or socially generated judgments. This choice is the primary, fundamental choice. It is a choice without causal antecedent, the only choice that is absolutely free. Most of the choices we make are *consequential* choices, eg conclusions of deliberations, or consequences of the choice to give in to the behavioural tendencies produced by our emotional and intuitive responses. The fundamental choice, however, the choice whether or not to deliberate, is without antecedents. It is not the conclusion of a deliberation, and indeed cannot be. Nor is it the consequence of the decision whether or not to deliberate. In other words it is completely "willekeurig" (ed: the word means as much as random, but is made up of "keur" which is a form of "to rate", and "wil", "will"), completely dependent on the will, but not "willekeurig" in the sense that one alternative is as reasonable as the other. Nathaniel Branden wrote, very aptly:

> "Man's freedom to focus or not to focus, to think or not to think, is a unique kind of choice that must be distinguished from any other category of choice. It must be distinguished from the decision to think about a particular subject: what a man thinks about, in any given case, depends on his values, interests, knowledge, and context. It must be distinguished from the decision to perform a particular physical action, which again depends on a man's values, interests, knowledge, and context. These decisions involve causal antecedents of a kind which the choice to focus does not."
>
> "The primary choice to focus, to set one's mind to the purpose of cognitive integration, is causally irreducible: it is the highest regulator in the mental system; it is subject to man's direct, volitional control. In relation to it, all other choices and decisions are subregulators."
>
> "To recognize that man is free to think or not to think is to recognize that,

> in a given situation, a man is able to think and he is able to refrain from thinking. The choice to think (not the process of thinking, but the choice to think) and the process of focusing his mind are an indivisible action, of which man is the causal agent."[10]

The cause must be the person themselves, that is to say, it is the person themselves that chooses.[11] For, this choice is an answer to a question, to the awareness of life/living as problematic. The fact that this question exists, even when unspoken, can probably be explained causally, but if it is a question, then it cannot be that it automatically or spontaneously causes its own answer.

The precise localization of human freedom in the workings of the ability to judge underscores the distinction of each person. It explains why a person is responsible for what they desire and believe; why they are responsible for the alethic, aesthetic and ethical premises on the basis of which they organise their lives and face the stream of occurrences, even when they are not themselves the author of the

10 Branden: op.cit. p.43

11 There appears to exist a considerable amount of confusion surrounding this concept of "agent-causation"or "agency". The source of this seems to me to be the fact that the concept "cause" as it was used in the natural sciences in the past is the only one considered "scientific". This is in error: the concept of "cause"plays no part in mathematical physics (refer to the ground-breaking works of K.Pearson: The Grammar of Science. London 1892, en E. Mach: Die Mechanik in ihrer Entwicklung historisch–kritisch dar-gestellt. Prague 1883.): the ultimate causes of natural phenomena is unknown, such that nothing is gained by claiming "nature makes it so that..."or "God causes...", and we must content ourselves with tracking down the functional coherence of phenomena. But human action, that is to say acting humans, cause a couple of things here and there. What the "causes" of human existence are, is an open question in the natural sciences, but the fact that I am producing this text in concordance with a goal, chosen by me, taking into account norms that I accepted, etc, is not an open question. In the field of physics we can do nothing but note relationships between "effects", since we can never know whether or not we truly know everything there is to know about some system or another. In the sciences concerned with human action, however, we do not move from the most superficial to the most hidden effect, but from the cause (the fact that people do things in order to achieve their ends, and this on the basis of judgment) to the consequences. There is no deeper cause for the sciences of human action, since there is no "lower"level in terms of which we could explain the specific characteristic of action, its connection to judgment.

The aim is rather exactly “to make the world around us intelligible in terms of human action and the pursuit of plans,… to trace the unintended consequences of such actions.” L.Lachmann: “Sir John Hicks as a Neo-Austrian” South African Journal of Economics 41, 1973. 204. Zie ook Hayek: Studies in Philosophy, Politics and Economics. New York 1969. hk 2 en Hayek: Individualism and Economic Order. London 1976: hk 3, pp.67–68, en hk 2. To try to analyse human action in terms of a concept of causality reimported (and thus warped) from the natural sciences, or to measure the notion of "agent-causation" with the rod of the emacerated "event-causation" which has been able to hold out the longest within the natural sciences, is to flip matters on their heads.

propositional content of those premises. The fact that *they themselves* have to accept these premises, no matter how uncritical the acceptance may be, the fact that they only become *their* premises on the basis of *their* affirmation of said premises, is sufficient grounds to establish the person's responsibility for them.

The fact of human freedom of judgment is the fundamental starting point for the philosophy of law/right. If speaking of law/right has any meaning at all, then on the grounds of this fact alone we could claim that each person is a sovereign subject of law/right. Every person having the right to decide, to judge, for themselves, what *they* will consider to be true, good beautiful, is a necessarily true proposition, in the sense that, if the concept of law/right has any meaning, it would be absurd to negate this proposition. This right *cannot* be ascribed to anyone other than the person that judges for themselves.

From this follows that each person has the right to dispose over their own critical abilities, and thus over the body that embodies these abilities. To use another idiom, each person is by nature the owner of their own will, that is to say, of the ability, embodied in their biological organism, to organise the behaviours of that body on the basis of judgments. *As a means,* this body, with these abilities, necessarily belongs to the one whose body it is. If it obeys, it is only Their will that is obeyed. Some people (eg yogi's) have much more positive control over their body than many other people, but no-one can disposes over/control the body and rational abilities of another person, other than with that persons permission. Of course one might kill, sedate, or grab another person, but this does not give one positive control over the rational abilities of that body.

To state that each person has the right to do or not do as they please with all their means is thus never an "empty" statement. The expression "with their means" *always* has reference, as long as humans, as rational being with a critical, questioning-judging consciousness are the subject under discussion. There is always a means we can wholly consider to be a means specific to a certain person. If the concept of law/right is meaningful, there is always something that a person has the right to do or not do with as they please. The ascription of it is dictated by the nature of man, as a rational being.

Up until this point, I have only discussed the conditional proposition. that, *if* the concept of law/right/justice is meaningful, people most certainly have the right to judge for themselves.

Next, I will attempt to show that this condition may plainly be accepted. First however, I would like to comment on the ambivalence of living in an organised society* in relation to the development of the ability to judge, and the use of this ability. The fact that people live together in a network of bonds of community, and are able to communicate, has as a consequence that many people can survive without thinking much. This by relying on the judgments of others, of "authorities". Those who systematically choose to follow the authorities, or their own intuitions or emotions or conscience, which are all merely reflections or traces of the judgments of others, can usually survive well in a community. This while a Robinson Crusoë, in an isolated context, would have no choice but to solve all problems himself, if he is to have any chance of survival. The circumstance that judgments of others can be relied upon for a large portion of problems, means that people in a social context can make economical use of their mental energy, and can focus on the problems most important to them. They can fully commit to the elaboration of a personal contribution. Even the act of thinking follows the law of progressive division of labour. Knowledge is an economic good that must be produced and maintained in order to be of service. On the other hand, this same circumstance means that many people have the occasion to make intellectual laziness and intellectual parasitism into a second nature, without any direct risk to themselves.

Paradoxically enough, for may people the social context enables a manner of existence in which precisely their most characteristically human abilities are given a subservient role. The communicability of knowledge relieves them of the necessity of thinking themselves. Their reason, the most essential instrument for survival of the human as a biological species, is left mostly unemployed. Presumably, it was this phenomenon that spurred Aristotle to speak of "natural slaves". There are people that participate in the rational nature of humanity, in the sense that they are perfectly capable of understanding what is desired of them, but still never deign to reason for themselves, nor ask themselves questions. It is misleading, however, to designate these people as "natural" slaves.

They might parasitize the knowledge and wisdom of others, thus sinking into a total dependence of others, of the "authorities",

which they follow blindly and uncritically, thus making them into *leaders*. They degrade themselves into practically will-less instruments; they supply the physical work which may be utilized by the authorities or the leaders at their whim, and as such they enable the concentration of political power in the hands of a few. They form the frightful "mass", the class of *Untermenschen,* who renounce their most specifically human trait – the "anti-individuals", as Michael Oakeshott calls them.[12] They supply the violence which allows some to violate the rights of others, undisturbed and unpunished, and as such they form the basis of rulership. It would be possible to think that this "mass", so omnipresent in history, jeopardizes the generality of the principle of freedom of judgment, by its manifest heteronomy. Nothing could be further from the truth however. This heteronomy is a *freely chosen* heteronomy, and thus is but a perverse manifestation of human autonomy.[13]

The natural slaves are the voluntary slaves, which is what Etienne de la Boétie called them. They illustrate the moral and political risks that flow from the human freedom of judgment: the people have the choice to think or not to think, to affirm themselves or renounce themselves. The social organisation of society creates a context in which intellectual parasitism can supplant intellectual cooperation and division of labour, thus undermining the order of law/right. It is obvious that those who define themselves as the executors of the will of some leader or authority will tend not to be very enamoured with the aversion or disobedience of another in relation to that leader.

12 M.Oakeshott: “The Masses in Representative Democracy” in K.S.Templeton Jr.: The Politicization of Society. Indianapolis 1979, p.326: “From the frustrated ‘individual manqué’ there sprang the militant ‘anti-individual’, the ‘mass man’…Although the ‘mass man’ is specified by his disposition—a disposition to allow in others only a replica of himself, to impose upon all a uniformity of belief and conduct that leaves no room for either the pains or the pleasures of others—and not by his numbers, he is confirmed in his disposition by the support of others of his kind. He can have no friends (because friendship is a relation between individuals), but he has comrades.”

13 Cf. N.Branden: op.cit.bij p.116. hk 4. par.2 (“Volition and Social Environment”). Intellectuals often have the tendency to paint those people that live in conditions in which they (the intellectuals) would not feel at home as "victims".(see supra note with p.51). This mentality, which gives rise to paternalism and other forms of institutional violence, completely misses the fact that different people can have different values, priorities, horizons of time. Equally, the fact that some people prefer to live an intellectually passive life (just as some intellectuals live a physically passive life, and even avoid any and all physical exertions as much as they can). Refer to, a.o, the following passage from M. OAKESHOTT: op.cit., 325–326: “The ‘Godly Prince’ of the Reformation and his lineal descendant, the ‘Enlightened Despot’ of the eighteenth century, were political inventions for making choices for those indisposed to make choices for themselves.” Also, text infra, Chapter 5 and 6.

This tractable mass only participates in the human moral life by identification with its leaders. For them the distinction between the one and the other (person), and thus the distinction between justice/right and injustice, is not a very real or rational distinction. Rather, it is a matter of habit, convention, and authoritarian decree. Considered in this light, the concentration of social power in one authoritative centre is an emanation of voluntary slavery of the many that try to escape their responsibility as rational beings.

CONTINUATION

The fact that a person has an objective nature – that is to say, is a person, and nothing else, is of course not sufficient grounds to justify ascribing this fundamental right to self-determination to people. Everything is what it is, and everything behaves according to its nature. What something is determines what it can do, and in concrete circumstances, what it will do. Nothing can behave in contradiction to its nature. That is the general law of causality, the application of the principle of identity in the domain of action, activity, workings, behaviours, proceedings, etc. Pointing out that something is subsumable under the fundamental principle of causality (which, like the fundamental principle of identity, is completely general, and as such very abstract) is not sufficient for adequately explaining the normative, moral notion of law/right.

The concept of law/right/justice is a metaphysical one, in the sense that, though it relates immediately to the existence of humans, it is not a physical concept, not a concept from the natural sciences. This means it cannot be defined in terms of physical manipulations or operations (measuring, heating, cooling, colouring, etc). Human nature encompasses more than can be made visible when man is only considered as an organism, as a purely passive body, reacting to certain operations according to a fixed pattern, as something knowable in the sense of the natural sciences (mechanics, chemistry, optics, etc.) We can consider each person both as a "soul" and as a "body", in a functional and in a structural sense, to use a modern terminology. It speaks for itself that we are dealing with two aspects, not two seperate entities. A person is not just a soul, nor is he just a body, or a collation of body and soul. A person/human, as a person, is simultaneously both an indivisible "ensouled" (ed: org "bezield" with soul, inspired)

body and an embodied soul. A body without a soul is not a person, nor would a soul without a body be: a person is neither a cadaver nor a ghost. The idea of human nature can only be understood when both these aspects are kept in mind. The fact that each person is simultaneously both indivisible ensouled body and embodied soul, is what makes them into an individual, an atom, an indivisible whole/unit. To understand man is to understand him in his entirety.

So, we can claim that each person is a sovereign subject of law/right because of the fact that each person is forced, by necessity, to make their own judgments. However, we cannot generally derive from "It is necessary that X develops activity A" the fact that X has the right to develop activity A. This deduction is logically invalid. If we were to consider it valid, then we would have to claim that everything which has an objective nature -the sun, moon, viruses, plants, animals, you name it- should be noted as a sovereign subject of law. Such a spinozic expansion of the area of application of the concept of law/right makes the ascription of rights meaningless. Everything that happens could then be called lawful/right, for no other reason than that it happens. The deduction of the fundamental right to self-determination of people from human nature is not reducible to the simple repetition of the fact that there is a human nature. To claim that people have rights is to ascribe them a consequential property, which we can only conceive, not perceive (not desribe in purely physical or physicalistic terms).

The specific ability of people/humans is their ability to control the actions of their intellect, to ask questions, to take these questions seriously (or to repress them from their consciousness), to seek answers using all critical means and techniques (or to settle for the first inspiration). Each question is a confrontation with a situation involving choice, a yes-no, an either-or, a why-this-not-that, a confrontation with what is essentially a moral problem: What should I think? What should I believe? What should I desire? What should I do? Each question, in other words, is a manifestation of the rational, and thus moral, nature of man, evidence for their normative mode of existence. The solutions to a person's problem aren't merely a given, provided as part of their biological programming. Nor are these solutions inescapables, or givens without alternatives. They are product of a critical judgment

and can at any time be made into the subject of a critical judgment once more. That is to say, they remain permanently embedded in a system of alternatives (even though not everyone at every time is equally conscious of these alternatives or the system in which they are connected). They are and remain factually contingent. The only necessity they can aspire to is the rational or logical necessity of a provably correct solution to a well-formulated question.

Man is by nature a moral subject. The moral question "What should I do?" is eminently meaningful to him. People have a need for a moral code, a system of values, to solve their practical problems.[14] They do not posses an innate, instinctive, naturally built-in code. A moral code is essentially a cultural object, a contingent construction which is the product of the human activity of judgment. That people are moral subjects is an immediate implication of the recognition of the fact that people, because of their conceptualizing relationship to the world (including themselves), can choose and so must choose. Whatever a person might do, their action is always an engagement, a commitment, a choice. Every action has the character of a commitment. Every action carries the meaning: "This is my choice, my answer, to the question of what I should do". It expresses a certain belief, the belief (conditional or not) in the correctness of an opinion about what is and should be, of a number of causal and normative or evaluative hypotheses. As an acting being, each person has a need for a moral code, and cannot escape the fact that all that they do affirms such a code. Of course, these codes differ. That is precisely the problem of ethics and moral philosophy: which code is best, most appropriate? Which code gives people the highest chance of a successful life, a good life?

Each separate person has a need for a moral code, to each person separately, the moral question has meaning. Each person is different. This is an elementary biogenetic given. People are all unique,

14 Cf. A.Rand: “Objectivist Ethics”, in Rand: The Virtue of Selfishness. New York, 13–34. A.Donagan: The Theory of Morality. Chicago 1977. p. 80: “Common morality demands of every human being that he adopt some coherent plan of life according to which by morally permissible actions, his mental and physical powers may be developed.” These passage is slightly paradoxical. One way of interpreting it is that our regular morality demands that we choose a moral code. The issues seems to me to be that it seems impossible to have a practically useful moral code that is not derived from some life-plan. In this regard refer to: D.Norton: Personal Destinies. Princeton 1976, hk 6

not just in appearance, in build, complexion, voice, fingerprint, etc. Tastes differ. What tastes bitter to one can taste sweet or bland to others, which is a pretty strange phenomenon, What one finds a visually appealing patterns, fills another with revulsion. People's rhythm of living differs as well. Another strange phenomenon: some people experience the best period of their day in the morning, while others only really get going in the evening, or at night. It goes further: some people experience their peak very early in life, and then basically stall, while others are late, sometime very late, bloomers. Even the specific talents and abilities differ between people: there a people with a knack for language, as people with a mathematical mind, some people have a special talent in estimating distances, or performing precise manual operations, etc.

This uniqueness of each individual, though sometimes stubbornly opposed for reasons of ideology, was of course a generally known fact long before the development of neurosurgery, neurological, genetic and biochemical research; before the DNA-revolution and the discovery of so-called TEs ("transposable elements") legitimized the conclusion that the number of genetic possibilities is limitless: the number of genetically possible individual far exceeds the number of actual individuals that will ever, or has ever, lived on earth. H.L Carson writes:

> "It is difficult to have any intuitive sense of the number of possible hereditary combinations. Even when we accept the impermissibly low estimate of only two mutually different gene-pairs per chromosome, then each potential parent should be considered to be able to produce more than 19,000 bilion genetically different kinds of sperm or ovum. It is extremely unlikely that even one of these thousands of billions of gene-sequences would be an exact duplicate of that of any of its ancestors."[15]

It is also unlikely that all these differences are unimportant, in the sense that they may be ignored in practical matters. Leo Loeb, one of the most famed specialists in the area of biological

15 H.L.Carson: “Human Genetics” in Encyclopaedia Britannica 15° edition., vii.998, s.v. “Genetics, Human”. This remark of Carson considers people to be primarily biological entities. But, unless one is willing to claim that the good life for a human has nothing to do with their physical constitution, one is forced to admit that this biological individuality is one of the clearest instances expressing that each person is what they are, and not necessarily what other people are.

individualisation, writes:

> "From a phylogenetic point of view, we note a progressively increasing complexity in the activities of organisms and increasing differences between members of the same species – an increasing individualisation that has reached its highest development in humans."[16]

It is obvious that all people, as living beings, have "needs". Which is to say they cannot survive if certain conditions are not met.[17] Not all people have the same "needs", however. All humans require food (or rather, nutrients, carbohydrates, protein, minerals, vitamins, etc.), but not all humans require the same food, the same amount of nutrients of a certain type or composition, etc., or to eat or drink with the same frequency. It is certainly not the case that nutrients have the same effect on everyone. There us no such thing as a standard diet for humans. Not only is it true that some prefer to eat their proteins, vitamins, etc. in the form of bread or fish or meat, while others prefer fruit and vegetables. Additionally, there's the fact that what nauseates one gives the other a feeling of wellbeing, what weakens one may strengthen another. This does not just hold for food, but also for rest, temperature, and to an even greater degree to the so-called "higher" needs, such as safety, security, education, etc. The latter cannot even be determined in reference to the referential frame of the biological organism, though it is quite objective, since they are dependent on the different ends of different people. There is no reason at all to presuppose that all people hold the same views on the relative weight of these "needs" for themselves or others. Nor is there reason to presuppose that these "needs" have the same relative weight for everyone, despite

16 L.Loeb: gecit. in R.J.Williams: Free and Unequal: The biological basis of individual liberty. 1953. Indianapolis 1979, 45.

17 Cf. D.Norton: op.cit. with note p.129. 171–172: Norton points out that "needs" too must be identified through a process of judgment: The satisfaction of needs is not an automatic or instinctual process; needs are relative in relation to a chosen lifestyle. This is immediately clear when we attempt to delineate the relative importance of the satisfaction of different needs in concrete situations, rather than formulating lists if categorical "needs" (as is done by, for instance, philosophers of natural law/right in the Aristotelian-Thomistic tradition, who try to answer questions such as "What is good for man?", or by the exponents of humanistic psychology, Maslow, and others). Related and relevant are: F.A.Hayek: “The Non-sequitur of the Dependence Effect”, in Hayek: Studies, cited. with not p.123, en Hayek: “Nature vs. Nurture Again” in Hayek: New Studies in Philosophy, Politics, Economics and the History of Ideas. London 1978, hk 19.

the opinions of the different individuals in this regard. On the contrary: the facts of biological variability and individualisation make those presuppositions quite unbelievable. The biochemist and dietician Roger Williams correctly noted:

> "Ignoring the facts of human variability, we have talked far too glibly about many an abstraction that implies uniformity, and have understood, and sought to understand, far too little about men...Instead of becoming better acquainted with the underlying causes of such attitudes in the past two hundred years, we have throttled our curiosity by a sentimental avoidance of noting inborn differences. We have erroneously thought that attention to such differences would breed misunderstanding, instead of the reverse, and that our highest goal is to understand "Man", a creature who causes no trouble because he doesn't exist."[18]

This sentimental blindness Williams refers to, is in my estimation closely tied to the idea of a universal, absolute and objective moral code. A moral code that both determines and ranks all human values, and which applies to all, regardless of their individual differences. This idea nicely fits into the supernaturalist and collectivist conceptions (and generally, positivist conceptions of law/right) which we discussed in the previous chapter. All these conceptions premise that the moral code or law which people ought to live by has its origin outside of the people. As such this code is indifferent towards the individual differences between people. Implicit in this conception is the idea that the morals (the law/legislation) does not find finality in the beauty of the life of those for whom its prescriptions are meant, but rather in the completion or fulfilment of the destiny of God, or some collective entity.

If, however, we realize that the need for a moral code is an individual need, then we have no reason to presuppose that there is one moral code which applies to all people. I will return to this question of moral philosophy later in the text. In any case, it should be evident that the question "What should I do?" presupposes the questioner can do multiple things, that they are in a position of choice with multiple alternatives. "Which alternative should I actualize?" is a question which would make no sense if there were only one option, if all that is possible already existed as potentiality and all that was left was a matter of time. The moral question presupposes

18 R.J.Williams: op.cit. with note p.131. p.37, 80.

an answer to the question "What can I do?". As previously stated, someone's possibilities depend on the available means. Possibilities are not free-floating entities which can be plucked from the aether, or which exist only because they are thought to exist. They are contained in concrete things; they are embodied in material means. The moral question can thus be reformulated into: "What should I do with the available means?". Expressed in that way, it clearly presupposes an answer to the question: "Which means are available?".

As long as our attention is focussed on a single person, a single moral subject, we can take peace with these formulations. As soon as we account for the fact that there are a multitude of people, many moral subjects, a problem of the very first order poses itself. It is clear that if this moral question is asked by two different people in relation to two different, but partially overlapping, collections of possibilities (or means, which amounts to the same thing), it cannot be excluded that the only way for one subject to do what they think they should consists of stopping the other subject from doing what they think they should do on the grounds of their own moral code, and vice versa.

This possibility cannot be excluded, not even if we assume that each of these two subjects acts on the basis of what, to them, is the objectively valid moral code.

In other words: in that case there it is out of the question for there to be moral compatibility or reconcilability of all subjects involved, since such a situation excludes the compatibility of individual moral perfections. In then becomes impossible to show the consistency of a world of morally perfect individuals, a world where everyone does what they should. This impossibility would imply, for everyone, the following: everyone must be willing, if they wish to be loyal to their own moral code, to subject all others to themselves, or, that everyone must be willing to deny their own moral codes in order to allow others to realize their values. In any case, under such condition it is impossible to give any content to the idea of a morally perfect world, a world of morally perfect individuals, because of the incompatibility of moral perfections. There is after all no way to create a coherent interpretation of the idea of a world where everyone respects everyone. One must either

neglect respecting others, or one neglects respecting themselves.

The cause of this situation is of course the fact that we assumed that the possibilities or means of different people cannot be determined in an exclusive manner. Different people ask themselves the question: "What should I do? Which possibilities should I actualize?", but these questions are clearly not wholly determined. It is here that the need for law/right makes itself felt. If I ask myself what I should do with means M, then I'm presupposing that I have the right to dispose over M. And if you ask yourself what you should do with means M, you are presupposing that you have the right to dispose over means M. But M is a real thing, that cannot be applied to difference ends at the same time: either M will serve your ends, or mine, or those of a third party. We can fight for M, or we can call upon a third party, or one of us can give in to the others – or we can ask who has the right to dispose over M. If the latter is our choice, we are assuming that our claims in relation to the right to dispose over M are rationally determinable, and hence, we are assuming the existence of something like philosophy of law/right.

If we formulate the moral question simply as "What should I do? Which possibility should I actualize?", this is compatible with the idea of a war of all against all. This either in the form of open conflict, in the form of a system of compromises which demands of each that they sacrifice their own self-perfection in order to avoid conflict with others, or in the form of a constant flux between conflict and compromise, war and diplomacy. This contradiction between peace and morality does not need to be accepted, however. Its foundation disappear immediately when we specify the moral question: "What should I do with my means? Which of my possibilities should I actualize?".

To do so, we must of course make some assumptions. Particularly, we must assume the following questions to be answerable: "Which are my means? Which are my possibilities?". We have previously seen that, in principle, there questions are indeed answerable, since the concept of a means itself implies the existence of someone, a producer, to whom a certain means belongs. Means don't simply exist, they must be produced – by someone.

This question "Which are my means?", of course means the same thing as

the question "Who am I?" – a question which naturally refers to the principle of identity: I am what I am. As stated previously: I am my means. My means are the embodiment of my accomplishments and possibilities, of my past and my future. It is only when an answer to this question is available that we can consider the moral question to be wholly determined. Only then is it possible to ask the question "What should I do?", and answer it. As long as this is not the case, the moral question is unanswerable, since its grammatical subject, that little word "I", does not have a well-determined reference. We can now determine the sense/meaning/purpose (ed: Orig "zin") of the question "What do I have the right to do?". We've seen that the presupposition of the moral question is that the questioner has the possibility to do multiple different things, and that he has an answer to the question "What can I do?"[19](19). This latter question is also only determined if I know who I am.

If I know who I am, then instead of asking "What can I do?", we can ask "What do I have the right to do?". Though I certainly don't have the right to do all that I could do, I do have the right to do all that I can do. Not all achievements are my achievements, not all possibilities are my possibilities. As such, we can also formulate the moral question as such:"Which, of all the things that I have the right to do, should I do?" This immediately shows that law/right is a structurally necessary presupposition of the moral question.

To say that I have the right to dispose or decide over M, is to say that decision concerns only my own possibilities/means, not those of others. It might change the situation, the context in which the others live, but it is rather evident that if people were to presume to dispose or decide over their context, they would in doing so also dispose/decide over others, thus making those others into slaves. From the given fact that each person is an identifiable, real individual, that can be distinguished from all others, follows the fact that it is in principle possible to determine the possibilities of a given person as exclusively theirs. Consequently, there is no reason to make peace with the situation in which the extensions

19 The logic of "I have the right to do X" is thus identical to the logic of "I can do X"(or, also, "I can do X with my means"). There is here some analogy with Spinoza: Tractatus Politicus ii/4, though it is usually assumed that to Spinoza "I have the right to do" is equivalent to "I can do" and not of "I can do".(!ERROR!) Which is the correct interpretation of Spinoza, I do not wish to venture on here.

of different people overlap – an idea which, given the individuality of all people, excludes the simultaneous realization of the moral perfection of all people. People, as moral subjects, have a need for law/right, for a delineation of the domain within which their personal moral judgments are exclusively valid, within which they can be themselves.

As such, it is clear that the delineation/demarcation of these domains, the definition of the scope of each person, cannot be a matter of a subjective judgment, of a personal moral conviction. We cannot settle for the position that each (or a certain) individual would have the right to decide themselves which available means, which real possibilities, are theirs, to decide according to their own measures which domain their moral authority extends to. This position would allow for each to claim any means at all, and as such it is incompatible with the idea of a world that gives everyone the space to realize their moral perfection. Here is to be found the boundless absurdity of those who wish to assign logical priority to the concept of distributive justice. They consider the world from a dualistic standpoint, as a juxtaposition of two collections of objects. A collection of people on one side, and a collection of means on the other, without in any way accounting for the fact that these means only exist as product of the creativity, ingenuity, thrift and perseverance of certain people, and not some community or class.[20] The fundamental idea that all theories of distributive justice* share in common, is that there is some "proper" distribution, that is to say a "just" projection of the class of means onto the class of people.

It goes without saying that if everyone would consider the same distribution to be the most proper, that distribution would be made reality, spontaneously at that, since in that case all would work, within their abilities, towards creating this distribution. If there is universal consensus, as we have seen before, right/law has no part to play at all. But there is no consensus about this ideal distribution. Not even among those people that are convinced that it must be possible to objectively prove the existence of such a distribution. In the best case, there is a false consensus, hidden behind unspecified concepts

20 See infra Chapter 7

like "equality", "merit", "need", etc, that disappears immediately when discussions about more concrete situations start. This reminds the proponents of those "theories" that they are supposed to be speaking of the real world, with all its diversities, incommensurabilities, and unknowns, both on the side of the means, as on the side of the persons. Certainly, once it is realized that not all people are contemporaries,[21] that there is not a single moment when all living people are the same age, and the fact that not all means are simultaneously available, and that not all means exists for the same length of time, then it is clear that there cannot be even a conceptual determination of an adequate key of distribution. Means and people aren't just a given, and means are not independent data, nor spontaneous excretions that people produce involuntarily, and independent of the "distribution" these means will fall under. Not even birth- and death-rates are independent of the current "distribution".

The motive behind all these "theories of distributive justice" is that morals must determine what the people have a right to. This implies that there is a moral that determines which distribution should be. Consequently, though this is often left implicit, in this view there is an authority that encompasses all people and means (in the world or in a locality), whose valuations and insights justify said code. With this, the question of law/right is answered, since this authority is a supernatural, or collective, socially immanent Ego that designs its moral code as an answer to the question: "Which things, of all the things I have a right to do, should I do?". Theories about distributive justice, regardless of their contents, presuppose one of the negations of the fundamental principle of law/right, which we have weighed and found to be too light in the previous chapter.

The absence of a universal consensus about a theory of distributive justice would not be such a problem, if it were possible to show that there is a distribution (other than "to each their own") that everyone should accept. This possibility is, however, excluded a priori.

21 It is not even the case that, from a praxeological point of view, all people living now are contemporaries. On the praxeological concept of time, refer to: Mises: Human Action. Chicago 1966, Chpt 5. and Mises: Theory and History, New Rochelle N.Y. 1969. The recent work of practitioners of the natural sciences, such as I. Prigogine shows that even in the study of physical systems "time" is a system- and process-dependent phenomenon, and not an all-encompassing frame of reference. I.Prigogine: From Being to Becoming. San Francisco.1980: Such result are a fundamental challenge to the respectability of the positivistic conception of science, even when one constrains himself to the natural sciences.

The reason is that in order to prove the existence of such a distribution, which should be accepted by all regardless of whether everyone actually accepts it or not, one may not use arguments that presuppose the propriety of a distribution, or that assume that a certain moral code should be accepted by all participants in a discussion. The only norms the participants should subject themselves to, are those that prescribe respect for facts and logic. But it is not possible to prove that, e.g. a blind person, ceteris paribus, is more, less or equally needy as someone with a different handicap, or that a welder is more, less or equally meritorious as an accountant, or even how we should define "need", "merit", "equality","the interest of the community", or how to weigh these concepts against each-other. These are matters that may only be resolved by a decision. This means that, if there is no spontaneous consensus, one must undergo/suffer the decision of another, even though this other cannot prove that the one should accept this decision. It's even quite evident that it cannot be proven that the minority should accept the decision of the majority: it is after all impossible to prove why there should be one, non-unanimous jurisdiction encompassing majority and minority, rather than two unanimous jurisdictions (one for the majority, and another for the minority).

If there should be one decision, even when there is no unanimity, then one may ask the question who could lay claim to repressing the judgments of all those who hold a different opinion? Who has the right to determine the boundaries of all others? Who has the right to decide who those others are? Whose moral convictions give them the right to define others? This question, for the delineation of the domains, cannot be interpreted as a moral question without getting caught in a vicious circle. For the moral question is only wholly determined when the boundaries of the questioner are already determined. Consequently these boundaries cannot be define by any decision that depends on a personal evaluation, or insight of the questioner. The moral significance of law/right can thus not be founded in a personal morality, in a morality that refers to particular circumstances of person, time, or place.

If the compatibility of moral perfections is a moral value, then

it cannot be true that a person has a right to call upon their moral convictions as a grounds for determining the identity of themselves and others. It cannot be true that a person has the right to decide themselves what they or another have the right to do. The judgment of whether something is lawful or unlawful can then not be dependent on a personal moral code. As we have just seen, any who claims the opposite would not just destroy the possibility of a rational theory of law/right, but also the very intelligibility of the moral question itself. A fortiori the judgment on just* and injustice cannot be dependent on any conformity or discomformity of an action with a legislative prescription.

This all is evident, even though it is often overlooked. The purpose of a moral code, is to enable a person to solve their problem of choice, to allow the answering of the question "What should I do? What is the best I can do?". Given human diversity, there is no reason to suppose the answer to be identical for all, so that we must account for there being a different moral code for each person. This can be the case even if each person find the moral code which is objectively right to them, the code according to which, objectively speaking, they should live. In relation to these statements, it makes sense to remind the reader that moral truths may be relative without being subjective, just as they may be objective without being absolute (valid for everyone). I do not wish to deny the existence of absolute truths, I will even attempt to prove that they do exist. Still, I am convinced that most moral truths are personal truth, which is to say relative in regards to that person, and objectively valid for that person. (In doing this I reject and any all forms of absolutist or relativistic moral subjectivism). The fact most deserving of emphasis here is that the answer to the question "Who am I?","What can I do?","Which means are mine?", in short: "What do I have the right to do?" must in all cases be objectively and absolutely valid. It must be an answer that everyone should accept, regardless of their personal preferences and convictions. Otherwise no community of morally perfected people is possible (not even in a logically coherent hypothesis).

This makes clear in what sense people, as rational beings, have a need for law/right/justice. Law/Right/Justice is not just a necessary precondition for the realisation of the condition of unifiable moral perfections, which is posited here as a moral value (without proof, for now),

of a world in which everyone has the chance to do what they should do, thus making the best of their lives that can be made of them. It is also a necessary precondition for the completion, or self-actualization of all individuals lives, separately. By giving each person the right to dispose over themselves, and by denying any person the right to make themselves the master of the means or achievements of another, law/right stipulates the conditions under which each person has the chance to be themselves to the fullest, and to enjoy that joy-of-life free from contradictions that characterises life in beauty – and this free of interference of others, and independent of the answer to the question of whether or not those others are using their own possibilities to the fullest.

All this seems to me to be reason enough to claim that it is meaningful to speak of law/right. We've already seen, however, that if the concept of law/right is meaningful, the conclusion that in all cases a person must be ascribed the right to make their own judgments imposes itself. Consequently each person has the right to dispose over their own critical abilities. Their critical abilities, their conceptual, intellectual abilities, and the organs or means that embody these, are so perfectly specific to each person that it would be absurd to deny this right of disposition, or to ascribe it to another.

This, in fact, proves the validity of the fundamental principle of law/right. Each person has the right to do, or not do, with their means, anything they wish; no-one has the right to do anything with the means of another, and each person, as a rational being, has their own means. Of course, from the proof as it has been given up to this point does not prove a person to have means other than those that embody their critical abilities. We will see, however, that the basis we have just reached is sufficient to be able to show that people can also have other means at their disposal. In any case, it has been demonstrated that each person is a sovereign subject of law/right.

What I have not yet shown is that this is an absolute, objectively valid moral truth, this claim that each person should respect the right to self-determination of all others. We have previously seen that no-one has the right to violate the right to self-determination of another – this is a trivial conclusion from the notion of the right to self-determination itself; and we have also seen that without the notion of law/right, the moral question is indeterminate. We have not yet seen that this moral

moral question should be determinate, that is to say, we have not yet concluded that the compatibility of moral perfections is an absolute, objective moral truth.

Before tackling these two issues, I would like to clarify that the right to judge definitely implies the right to do. This because it would be possible to argue that the entire preceding proof is irrelevant, precisely on the grounds that it is impossible for anyone to make themselves the master of the ability to judge of another, while this is possible for another's means. If every person, as a rational being, has the right to judge for themselves what they consider to be true or believable, as beautiful or desirable, or as good and worth doing, then of course each also has the right to answer their own moral question of "What to choose?". Moral autonomy is the fundamental right of each person. The right to moral autonomy, the right to be your own legislator, is the right to decide for yourself which of your possibilities you should actualize. But, if each person has the right to decide for themselves which of their possibilities to actualize, then of course each person has the right to actualize any of their possibilities – the right do or not do with their means as they please.

If the moral question is a real question its answer cannot be a given. In other words, it is not possible to a priori or ex ante, before deliberation or the decision-making process, determine which of their possibilities should be actualized, what they should do with their means. Each of their possibilities at that time, is potentially the possibility they would consider to be the best after deliberation, the one they should actualize. So, for each of their possibilities the following holds: if it is the possibility that is identified, after deliberation, as the one that should be actualized, then they have the right to actualize this possibility. If this were not the case, then the person would have the right to decide for themselves what to do, but not the right to do what they should do according to the one authority that is the sole holder of the right to decide what they should do. This would be manifestly absurd.

It is absurd to claim that A has the right to decide what B should do, that A decided that B should do X, only to follow this with denying that B has the right to do X (assuming A has the right to do X, and that B is capable of doing X). It does not matter whether A and B are different persons or

not. If A and B are different persons, then it cannot be said that B has the right to do X, before A prescribes or allows them to do X. Before the deliberation has been completed, it can only be claimed that A has the right to point to any of their possibilities as the one that B should actualize. But if A and B are identical it naturally follows that B has the right to point to any of their possibilities as the one B should actualize, and thus that B has the right to realize any of their possibilities.

B has this right not only before the deliberation of course, but also after. If someone decides "This is what I should do", then they have the right to do that thing, but they also have the right to something else. Which is to say they have the right to decide not to enact the first decision and to make another. In any case they have the right to judge for themselves if they should enact a previous decision or not. If A has the right to decide what B should do, and B does not enact this decision, then A still has the right to, ex post facto, forgive B, or to ex post facto legitimize B's behaviours by making a new decision. If A and B are identical, then there can be no problem in this regard.

FUNDAMENTAL ETHICAL PRINCIPLES

The argumentation for the fundamental principle of law/right is not yet complete. The most important lack up until this point is the fact that we have thus-far simply assumed people to be rational beings, and thus moral subjects. Should we accept this assumption? Can we use the fact that people require a moral code as a grounds for concluding the existence of values that people should strive towards? More specifically: can we show that the compatibility of moral perfections is an objective absolute value? These are the question with which we will occupy ourselves here.

The idea of a moral code, as it was introduced above, has an arbitrary character to it. In fact, it merely tells us that people should set goals for themselves. Consequently it implies that, fundamentally, the norms we are dealing with are merely conditional in nature. That is to say, of the for "if X is the goal, then under the given circumstances, Y must be done", or "those who want X, should do Y". These norms as such do not yet have any moral contents, as they do not really contain an actual "should".

Even if it is true that Y is the best thing to do in order to achieve X in the given circumstances, making Y the thing that should be done in that sense, this "should" is conditional or relative to the goal X. The question we must ask is, if we are able to identify an unconditional, categorical "should", or if we should make peace with a merely conditional "should". The latter would of course imply that moral discussions are only rationally decidable if they remain limited to goal-means relations, and thus that moral discussions are in fact not rationally decidable. If that were the case, we could do naught but admit that there is no moral philosophy, and that we should in any case limit ourselves to economical or medical or architectural analysis of goal-means relations in terms of cause-consequence relations. I do not believe we should make peace with this very negative conclusion. Before defending this position, and as an introduction, I would like to show that the claim that people are rational beings is not a mere presupposition that may be accepted or rejected at will.

In itself this claim seems plausible enough. What we must determine however, is its philosophical statute. There are other claims that seems plausible which are vehemently opposed and rejected by some, and not always without good reasons. A human is an animal rationale, or as Johathan Swift put it: an animal rationis capax. This proposition is illustrated whenever two or more people commence an argumentation, or when someone starts thinking, arguing with themselves (or perhaps with an imaginary opponent, or an imaginary "generalized other", to borrow a term from G.H. Mead). Many people enjoy argumentation, either seriously or playfully. Even those who tend to avoid arguments about "the foundations/heart of the matter" and rather stick to superficiality, usually appear to be convinced of the fact that they have good reasons for doing so. These reasons can support an argument in defence of their neutral or avoidant position, and it is not a rare occasion that these people fail to resist the temptation to glowingly defend their neutrality with a mass of arguments.

The fact that Western philosophy realised its first triumph in Plato's dialogues is symbolically very fitting. Philosophy has its roots in argumentative dialogue, if it is not the causa finalis of the dialogue itself. Even the most sophisticated are forced to admit that Huckleberry Finn and his

companion, the run-away slave Jim, come afwully close to philosophy in their dispute on the question of why the French speak French:

> “And ain’t it natural and right for a cat and a cow to talk different from us?” “Why, mos’ sholy it is.”
>
> “Well, then, why ain’t it natural and right for a Frenchman to talk different from us? You answer me that.”
>
> “Is a cat a man, Huck?”
>
> “No.”
>
> “Well, den, dey ain’t no sense in a cat talkin’ like a man. Is a cow a man?—er is a cow a cat?”
>
> “No, she ain’t either of them.”
>
> “Well, den, she ain’t got no business to talk like either one er the yuther of
>
> ’em. Is a Frenchman a man?”
>
> “Yes.”
>
> “Well, den! Dad blame it, why doan’ he talk like a man? You answer me dat!”
>
> I see it warn’t no use wasting words—you can’t learn a nigger to argue. So I quit.[22]

There was certainly no Socrates to be found on that raft on the Mississippi, but the argument between Huck and Jim still provides us with a good example of human rationality, and of the human passion for the rational. As a participant in a dialogue a person is all too aware of the existence of a non-physical, logical space, with specific requirements, rules and modalities. The participant in a dialogue is always mindful: they will try to corner the other, but said corner is not a physical, but a logical trap. Huck Finn was caught in such a trap. His defeat is a fact, and all the more painful a fact because he knew that the position he was defending, that it is not abnormal for the French to speak French, should be defensible. But his argument is flawed, and Jim showed this. We cannot simply say that. since Huck is in fact correct, the rules of dialogue, of logic, are no good and thus should be changed. The rules of argumentation or dialogue are not merely conventional, or at least not all of them are. A defeat in a discussion is not a defeat in a game whose rules we can change at our whim, without altering the nature of the game.

Argumentation entails a call to the others reasonableness, on their willingness to behave as a rational

22 Mark Twain: The Adventures of Huckleberry Finn. (1885), Chpt 14 in fine.

rational being should behave. The goals is to make them see that they should alter their opinion, that they owe it to themselves to change their opinion. That is all one can do: it is impossible to change someone’s opinion without their cooperation. All that can be done is to attempt to give them insight. This is also why argumentation is often such a discouraging endeavour: one is completely dependent on the good-will of the other, and their willingness to play along with the game.

The rational force of an argument is certainly not force in the physical sense of the word: it is not capable of moving someone against their will. Without the willingness of the other to be reasonable, arguing with them is merely "wasting words". If they don't want to listen, they will not listen. This means that no argument can have rational force, not even metaphorically, if we cannot show that people should be reasonable. To claim "If you were reasonable, then if you said A, you would also say B", is not sufficient, for the other may always retort: "Possibly, but I do not wish to be reasonable. Why should I be reasonable?". This question is a challenge for any practical philosophy: any who fail to answer it must give up any attempt to lend their philosophical considerations more weight than that due to any personal opinion.

If reasonableness itself were but one of many possible positions, and if the choice of position were absolutely free, there could be no rational force. Nor could there be truth, value, or knowledge. That people ought to be reasonable, may not even be open for dispute, but if this is so, is the reasonable still reasonable? Does it not become a simple dogma? There is a rather standard argument against rationalism that goes roughly like this: the rationalistic attitude is characterised by the importance it attaches to logic and experience, to arguments and foundations, but none of these things can provide a foundation for rationalism itself, for those that do not wish to be reasonable will not be impressed by arguments and observations. The choosing of a rational attitude comes first, no argument or empirical evidence can be effective if the rationalist conviction is not present, and as such the adoption of the rationalist attitude cannot itself be the effect of arguments that do not presuppose the superiority of this attitude. Which is to say that this position itself is irrational.

This argument has little weight, as we will soon see. It is of course true that the choice between rationalism and irrationalism can be made "blindly"; but that does not mean that the rationalist position that a) all people for whom this choice is real are rational beings, and b) all people, as rational beings, ought to be reasonable, is not provably correct. We will see that the norm, that people ought to be reasonable, is a categorical norm which is not merely valid for those people that have simply decided, without a reason, that they want to be reasonable.

To claim that man is an animal rationale, is to claim him to be both an animal and a rational being. To claim that man is a rational being, is however not akin to claiming him to be an animal being. Those claims are quite different, at least from the perspective of the people themselves. "Man is a rational being" is a dialectical truth; the position "man is an animal being" is an empirical truth at most. (ed: dialectic here refers to "using reasoned argument and dialogue to reach a true conclusion") From the perspective of formal logic one could say that both represent synthetic, logically contingent propositions which can be generated without contradiction. A Martian that is able to use the word "human" correctly as the general name of the members of a certain species of Terrans, could have doubts about either of these propositions without running the risk of being caught commiting to a logical contradiction of the form "A is not A". The difference between these claims is therefore not that knowledge of language suffices to verify or falsify one but not the other. The difference follows from the difference in positions we are in when we argue about the truth of these propositions.

As people we cannot reasonable deny that humans are rational beings. It is true that, given what we know through the continuous accumulation of anatomical, physiological, biochemical and other knowledge, we cannot reasonable deny that humans are animal beings. But that does not make this proposition into a dialectical truth. We can easily imagine the existence or previous existence of circumstances in which it would be very reasonable to not believe that man is an animal being. Whether it is reasonable to believe this or not depends on the entire epistemic context. There are quite a few differences between humans and animals, and it is not a priori absurd to believe that the noted similarities are just as unessential as the

similarities between a rock and a piece of coal. In the current epistemic context, in which all these scientific data are available, we will tend to consider the rejection of the proposition that humans are animal beings as unreasonable, but why should we? Why should we care about any of that data? What is the "authority" of that data?

It is however impossible to imagine circumstances in which it would be reasonable to believe that humans are not rational beings, a being that does not posses rational abilities ("reason"). Such as the ability to form concepts; the ability to erect complex logical structures like propositions and theories; the ability to interpret visual, auditory and other signals as signs, symbols, carriers of specific meanings; the ability to think, judge, to use the knowledge of the distinction between true and false, logically valid and logically invalid, beautiful and ugly, just* and injustice, etc; the ability to hypothesize, plan, execute said plans, and so on.

It would be very unreasonable to refuse to believe that humans are rational beings, not because there is some empirical evidence that could be considered decisive, or because it complies to certain ideas or hypotheses that one could consider to be self-evident. But because the existential situation created but the question itself allows for no other conclusion. Maybe there are indeed no eternal facts, as Nietzsche warned. But we cannot escape the conclusion that in any argument, any dialogue, the "I"and "You" are rational beings. Mark Twain referred to this fact when he had Huckleberry Finn state that one cannot teach a negro to argue. Imagine that Huck had spoken his thought out loud so Jim could hear it, and that they had gotten into an argument over whether or not a negro can argue. Hucks behaviour in the book (in which, Twain wrote "a good heart and a deformed conscience come into conflict, and the conscience is defeated")[23] proves that Huck does not believe Jim to be an animal rationis capax. It is clear, however, that in this argument, Hucks position would be logically untenable: refuted by the fact of the argument itself.

The rationality of the participants in a dispute is, to the participants

23 Mark Twain: Notebook. nr.28a(I).TS, p.35 (1895), gecit. in Mark Twain: The Adventures of Huckleberry Finn. Edited with an Introduction by H.N.Smith. Boston 1958, xvi.

themselves, an inescapable, irrefutable and necessary fact. Even the claim that the dialogue itself is an illusion does nothing to change this. For, as a refutation this claim itself is simply a "move" in the dialogical game of chess, and not a negation of the dialogue.

Humans are rational beings. No-one can reasonably deny this. If I were to tell the reader, in the most solemn or convincing tone I can produce, that I am not a rational being then they would do well to not believe me. For if the fact that I am speaking those words is instrumental in my attempt to convince the reader of something, then this denial of my rationality itself is proof of my rationality. Regardless of the motive I may have for trying to convince the reader or listener of such a thing, I have to order my words and actions in such a way that my reader or listener understands what I want them to understand, that they believe that I believe what I am saying, and that they ultimately reach the conclusion that what I say is true. When I claim that I am not a rational being, then I am showing that I actually am, and that I believe the reader or listener to also be a rational being. If I were not a rational being, I would not even be able to attempt to make the reader or listener understand what I want them to understand. I would not even be able to know what argumentation, or getting someone to see that they should revise their opinion, is. When I am attempting to get someone to understand something, I cannot maintain that there is nothing to be understood, nor that they are incapable of understanding anything. I could, possibly, refuse to take part in any debate, and take care never to be caught showing any outward sign of rationality, but even then I would be incapable of escaping the conclusion that I am what I am trying to hide.

Anyone can simply refuse to acknowledge or confirm the truth of the proposition that both they and their partners in conversation are rational being. But no man can hope to successfully present this refusal as being motivated by reasonable arguments, as a conclusion that ought to be accepted. An interjection into the philosophical debate of this type would immediately be exposed as a dialectical contradiction, as it would create a situation in which theory and praxis are opposed to each-other in a relation of irreconcilability. Such a situation in which man, while reasoning, forgets that he is reasoning; in which man, while trying to make it clear to others why they should accept their conclusion,

loses sight of the fact that their conclusion is precisely that the entire notion of a reason for why something should be accepted, has no application in the context of actual dialogue. Though it is possible to refuse to or refrain from acknowledging the truth of this proposition, or from investigating its consequences, this changes nothing about the truth sub specie rationis humanae, nor does it change anything about its consequences. If there is such a thing as a premise that can be put forth in any philosophical debate, without fear of refutation, then it is this one: humans are rational beings.

The dialectical nature of the truth of this proposition in relation to any dialogical context is of course an interesting fact. If there are necessary truths, it becomes possible to posit the coherence of propositions as a criterion of truth. Any theory that is in opposition to a necessary truth, no matter how internally consistent it may be, is false, and must be rejected. This gives rise to the question of whether norms also exist that can be deemed necessary. Not in the mere formal tautological sense, but in the sense of being irrefutable in light of human reason. That every rational being ought to behave reasonably ,is a purely formal tautology: every rational being should behave as befitting a rational being. But that a person ought to be reasonable is not mere formal tautology, not even when taking into consideration that the fact that humans are rational beings is a necessary, dialectically provable truth. Quite on the contrary: it is a necessarily true, dialectically provable norm, with very clear normative implications for people. If this is truly the case, then we can apply the test of coherence in normative discussions, differences of opinion over values, as well.

We've just seen that it is a necessary truth for humans, that humans are rational beings. As soon as the truth of this proposition is questioned, the truth of it is already assured. But, this being a necessary truth, and thus a fact, is in itself not a reason for why we should accept it as such. We can not reasonably deny that humans are rational beings, but we can deny it. Why should this inability to reasonably deny something mean that we should not deny it? The answer to this question is once again dialectic in nature. To ask the question is to answer it: we should be reasonable, respect our rational nature. That is to say we should use our rational

abilities, and correctly too – we should believe what is true, desire that which is worthy of being desired, we should carefully prepare our judgments, taking into consideration all relevant data; we should reason in a logical fashion, etc.

It is beyond doubt that it is within our capacities to be unreasonable, yet we cannot reasonably deny that we should be reasonable. Any attempt to do so immediately puts us in a state of dialectical contradiction, should we attempt to justify it.

I can refuse to confirm the validity of this norm, but as soon as I attempt to justify this refusal, I identify the validity of the norm as problematic, as a problem, something to think about. When I pose a problem for myself, this is giving myself the task: "Think, be reasonable, respect facts and logic, check the premises of your reasoning, look for alternative solutions, etc.". Normally, we use the term problem when the answer, the solution, is not contained in the problem posed. There is however one case in which asking the question is the same as answering it, this being when the "problem" is whether one should think or not. In this case, asking the question and answering it are one and the same action. Normally the case would be that if I say A today and not-A tomorrow, it can either be that I am contradicting myself, or that I have changed my opinion. In any case, two different intentions can be discerned, and the question is if there has been a change of opinion between the first and second incidents. If this is the case, the first incident should be disregarded, as it no longer reflects what my opinion is at this time. But in the case of the question of whether we should be reasonable, it is impossible to answer in the negative at a later time with the intention of invalidating a previously given positive answer. For if you were to do so, you would also have to disregard the question itself, and with it your second, negative answer. It is impossible to consider something a problem and simultaneously deny that the solution requires the careful application of critical abilities. As soon as the question of the validity of the norm, that we should be reasonable, is posed, only one possible answer remains: it is valid. If it is valid, then we ought to be reasonable, we ought to behave as befitting of a rational being, we ought to respect our nature. It is senseless to ask "why?". This question is merely another confirmation of the validity of this norm. In no way

can its validity be doubted. The only option is to refuse to think: to live unintelligently, but such an attitude cannot be justified, neither to one's self, nor to others.

The question, whether we should be reasonable, answers itself. In the sense that this question is the ultimate question for us all, the question underlying all others, the answer to this question is the ultimate answer, the first fundamental principle. It is because we should be reasonable that we, for example, cannot merely say that we cannot reasonably deny the fact that something exists (ed: in the sense of "why is there something rather than nothing?") (The metaphysical question "is there something" is also a question that answers itself), rather we should confirm the reality of "something". In the same way we cannot just claim that it is unreasonable to ignore that people are rational, but that human rationality should be affirmed.

This first principle, that each of us should respect our rational nature, applies as much to me as to you. If it is valid for me, it is valid for you, for within the dialogue you are my alter ego, an alternative ego, an "other" that I can still identify with. To take a dialogue seriously is to take the other seriously. Dialogue entails opening up to the opinions of others and willingness to expose ones own opinion to criticism.

In a dialogue, both speakers are an "I-You", The validity of an argument is not a matter of personal tastes or preferences. Dialogue is not possible unless the speakers have assimilated each-others meanings, or if they are not willing to do so during the course of the dialogue. The dialectic status of the truth of this principle guarantees its validity for every person that is capable of taking part in a dialogue, or is capable of asking questions of themselves. For each of those people, without any condition or limitation, the following is valid:"I should respect myself as the rational being that I am; I should live as it befits a rational being. That is to say intelligently, with respect for logic and facts and thus also with respect for moral truths. Not just of this fundamental principle itself, but also of its implications."

The fact that this norm is indeed valid for everyone of course implies that each person should respect themselves as a rational being, and that each person should live life in an intelligent manner, that each person should act according to their own critical judgments. This of course does not mean

that a person should live their life "in service of reason" (whatever that may mean). Rather it means that they should turn reason to the service of their own life. A person should respect themselves as the rational creature they are, not as if they were some purely rational being, or some manifestation of "pure reason". Respect for the facts, which is characteristic of the reasonable person, naturally includes respect for the nature of man in its entirety, and this is not reducible to a pure, unembodied reason.

The characteristic of rationality is the sole foundation of these normative implications, just as it is solely this characteristic which makes it possible to engage in dialogue with others. The validity of the fundamental ethical principle, that every person should respect themselves as a rational being, has the same foundation for everyone, namely the rationality of human nature. This is the reason that the proof of the validity of this norm for you and me may be generalized to apply to any "me-you", that is to say for any possible opponent in a rational dialogue. This means that not just the norm "I should respect myself as a rational being" is valid for all, but that the general norm "Everyone should respect themselves as rational beings" is as well. In other words: that everyone live reasonably is an objective moral value for everyone, just as it is an objective moral value for each person separately that they behave as befits a rational being.

However, if everyone should behave as such, and if this is an absolute moral value, than it follows that everyone should let everyone have the opportunity to respect themselves as a rational being.

This consequence expresses the objective value of the compatibility of individual perfections, and as such provides us with the last missing link in the proof of the normative validity of the fundamental principle of law/right. Not only does no-one have the right to make themselves the master of the possibilities and achievements of another, but everyone should leave everyone the opportunity to respect their own rational natures, to organise their lives according to a coherent life-plan.[24]

24 See also: A.Donagan: cit. with note p.129, pp.57–66. A.Gewirth: Reason and Morality. Chi-cago 1978. H.B.Veatch: Rational Man. Bloomington 1962, p.117. C.S.Peirce: “Review of Pearson’s Grammar of Science” Popular Science Monthly 48,1901, 298e.v.: “The only desirable object which is quite satisfactory in itself without any ulterior reason for desiring it, is the reasonable itself.” Note that the norm. that everyone should respect themselves as rational beings, together with the argument on p 159 (the right to do implies the right to judge), and the naturalistic interpretation of "I have the right to do" (see note p 152) implies that each person should respect the right to self-determination of each and every other. Respect for law/right is, in other words, a moral imperative that is absolutely and objectively valid. It is however not the case that a person has the right to self-determination as a consequence of the fact that others should respect them. The right to self-determination is not a consequence of this categorical norm, but rather of the fact that people are what they are, and thus require a moral code and a way to ensure co-existence of said codes.

We can say that each person should respect both themselves as well as all others as the rational being they and those others are. It is however evident that to respect one-self as a rational being is of a wholly different nature than to respect another as such. In relation to themselves, each person must attempt to organise their lives as intelligently as possible, accounting for all aspects of that life.In relation to others, everyone must make sure not to appropriate the possibilities and achievements of another, so that the others at all times maintain the opportunity to organise their own lives in accordance with their values. This of course does not imply passivity towards the others, merely an explicit acknowledging of the fact that they are others – other rational beings, with other values, other insights, other problems.

It is important to note that the respect one owes to another as a rational being is a consequence of the respect one owes oneself as a rational being. Thus it is impossible to respect yourself if you do not respect another, though it is conceivable for someone to respect all others but not themselves. This is obviously just a way to bring attention to the fact that self-respect and respect for others are not identical. To respect others as rational beings is to allow them the opportunity to respect themselves as rational beings. This makes it evident that to respect oneself as a rational being it does not suffice to leave oneself the opportunity to respect themselves as a rational being, rather it requires that one uses that opportunity. People owe it to themselves to respect others, however they don't owe respect for themselves to others.

The fundamental ethical principle, that one should respect oneself as the rational being they are, implies very clear and relevant absolute norms for people. It regulates, as it were, the problem that is created by the fact that, though humans are rational animals, the working of the mind, of rational consciousness, is a matter of "willing/wanting". (ed: Dutch “wil” – will; “willen” – to want/to will)

It's about volitional consciousness, not some spontaneous or automatic process running in accordance with natural laws. People can think or not think. live reasonably or unreasonably, etc. This choice is a free choice, in the sense that if one has the option of thinking or not (thus not being, for instance, unconscious) whether one thinks or not is a matter of willing/wanting, not something dependent on circumstances. However, this choice is not a free choice in a normative context: the fundamental ethical principle provides the norm for the making of this choice. That principle is clear and relevant, as it clearly speaks in favour of one of two fundamentally different ways of life, and against the other, and even implies a general norm relating to inter-human relations.

The fundamental ethical principle and its logical implications shape morality in the absolute and objective sense, the framework in which each person can form, test and improve their personal moral code. Since each person should live in an intelligent manner, each should attempt to find that way of life which allows them to make the best out of their lives. This best of all possible lives is indeed a task, not a given or an automatic acquisition – and it is certainly no easy task at that. But neither is it an impossible task! In any case, the attempt to successfully execute this task until its end is imbued with normative significance by the ethical principle and its implications, and thus by the right/law which gets its normative value from the fact that the compatibility of individual moral perfections is an objective, absolute, ethical value.

PEOPLE AND MEANS

Thus-far we have not just seen that all alternatives to the fundamental principle of law/right are either contradictory or devoid of practical content, but also that each person at least has the right to dispose over a number of somatic means. We've also established that this right in not a conventional *ius*, but a natural *dominium* owing its lawfulness to the rational and thus moral nature of human beings. However, not all things are quite so naturally connected to a certain person, and as we have seen, we cannot make peace with a fundamental principle of law/right that only relates to somatic means.

To act is to purposefully apply means, but not only somatic means. Who has the right to dispose over which extra-somatic means?

It speaks for itself that we cannot demand there to be a method or criterion which can, in all concrete circumstances and regardless of any complications or difficulties in empirical proof, unambiguously answer the question of who has the right to dispose over a certain extra-somatic means. Complications and difficulties in relation to proof will always arise, unless one holds to a theory which claims that all means, without distinction, belong to the same sovereign subject of law/right, and we have seen that such a theory suffers from other problems. Human action spans time, which means that evidence may be lost or destroyed, that the weakness of human memory may play a part, and that fraud and forgery may throw a spanner in the works. Furthermore there are the well-known difficulties when interpreting contracts, which derive from the inability of people to foresee all future difficulties, and the human tendency to save on transaction costs and thus to make peace with contractual formulations which are usually, but not always, sufficiently precise. Such difficulties are unavoidable, but they have no significance to philosophy of law/right. All societies have examples, as an expression of the general tendency towards distribution of labour, of people that occupy themselves with helping solve or avoid such empirical difficulties. Some of these people track down evidence, others archive it, and yet others are engaged in researching and judging it. Some may specialize in refining and adapting contractual formulations, and in drafting rules of interpretation of a nature capable of satisfying involved parties *ex ante*, so that these may be willing to have any potential disputes resolved by this specialist. It usually even comes to pass that certain of these formulas and rules of interpretation come to be presupposed, so that only an explicit agreement may introduce a different formulation or rules. This is all legitimate work for jurists. At least, as long as it does not become the object of some monopoly or privilege assigned by a ruler. After all, the fundamental principle of law/right implies that everyone has the right to establish themselves as "judge", "lawyer", "notary", "advisor", etc. and that no-one may be forced to utilize the services of a certain organisation.

All these empirical difficulties should be left outside of the scope of this discussion. Here, we are discussing the framework within which these difficulties should be solved. In this regard the only a priori statement we can make is that the means a person has the right to dispose over should in all cases be means they have acquired rightfully/lawfully. That is to say, without violating the fundamental principle of law/right. More specifically without violating the fundamental "rechtsnorm", norm of law/right, that no-one has the right to do anything whatsoever with the means of another without that other's permission. A coherent interpretation of the fundamental principle of law/right is impossible if this condition is not imposed. This means that the legitimization of a title to property always requires a historical inquiry: the question is always if and how a person made a means their own, and if they have not since abandoned or estranged it.

This historical dimension is a necessary component to any rational theory of law/right. As mentioned however, not all theories of law are rational: there are plenty examples in which it is simply stated that X, Y or Z have a right to this or that, or even to all things, even (or especially) those they have never had anything to do with, and the existence of which they might not even suspect. The essential point here is that if it is indeed the case that it is in principle possible to determine in a coherent, unambiguous, non-circular manner to whom a certain means belongs, then the fundamental principle of law/right is wholly determinable, and can thus serve as a basis for an objective order of law/right. If we consider that means are always the creations of specific people, we can see that this condition is always met. Ahistoric theories of law/right, like those that propose "distributive justice*", have no choice but to deny this historical dimension. After all, their essential characteristic is that they consider means as a "datum", to be distributed by some X or another, without questioning where those means came from.

That the fundamental principle of law/right is not an "empty" principle has been discussed above. Now we must determine what its implications are. The most direct consequence that is of interest to us, is that everyone has the right to appropriate, without limitations, anything that has not already been appropriated by another, and this while everyone has the right, equally without limitations, to alienate/abandon any of their abandonable means. The importance of these implications is that they allow a person to rightfully/lawfully adjust and adapt the quantity, quality and composition of

the collection of their means/abilities (ed: see gloss "vermogen") to their needs and goals. It is only this possibility that gives people the occasion to live a moral life. No-one is born with self-knowledge, no-one innately knows what life would the best life for them. Self-knowledge must be acquired by a critical and self-conscious testing of hypothetical self-conceptions. Each of these self-conceptions implies a certain configuration of values and goals, and thus a certain valuation of all possible means or types of means. As no-one is born with self-knowledge, and as such is incapable of knowing a priori which means they will need to live their lives, it is essential for a person to be able to adapt their praxeological body, their material domain, to consecutive self-conceptions. The greater the freedom to constitute yourself as a means for the best possible self-actualisation, the greater the chance of successfully completing the fundamental ethical task of making the best that can be made of your own life. As a goal in itself each person is what they are; as a means each person has the right to define themselves, no-one has the right to define others.

This is the importance of said unlimited right to appropriation in relation to everything which can in fact possibly be law-/rightfully appropriated. The same can be said for the right to abandonment/alienation in relation to everything which can be rightfully abandoned/alienated.

It is easy to see that these rights indeed follow from the fundamental principle of law/right. If each person has the right to do or not do with their means as they see fit, and no-one has this right in relation to the means of others, then no-one has the right to prevent another from first appropriating an object or thing from the environment by utilizing it as a means. What right would one person need to have to prevent another from expanding their domain? Here, there are only two possible justifications: either the one person has the right to decide what the other will or will not do, which is to say that they have the right to dispose over the other; or they have the right to dispose over the thing in question (of which the other is the first user), and thus to decide what shall happen to it. Each of these two options must be rejected. The first because of its flagrant contradiction of the fundamental principle of law/right itself. The second for its presupposition of a mystical appropriation: a thing that has not been put to use by anyone yet is a res nullus, it belongs to no-one, and how can

a thing belong to no-one when there is someone who has the right to dispose over it? Where would someone get the right to dispose over something if not from the fact that they are the first user, the one to transform it into a means? This latter condition is unfullfilled ex hypothesis, we are assuming that the other is the first user.

If a person has neither the right to dispose over another, nor the right to dispose over a thing put to first use by that other, then they also do not have the right to prevent another from expanding their domain. This expansion does not violate anyone's rights, certainly not the right of expansion of any other, at least not as long as any possibilities for expansion still exist. Should there be no more opportunities for expansion, then the right to expand one's domain loses all meaning: for it is not a right sui generis, but merely an application of the fundamental principle of law/right in a situation in which said possibilities for expansion still exist. The right of expansion is not a right to opportunities of expansion, for this would mean that if someone were to have no opportunities for expansion, others would have to create them for him. Of course, they certainly have the right to do so, but not a duty. Furthermore it is manifestly absurd to, from the fact that everyone has the right to appropriate an unappropriated thing Z, deduce that no-one has the right to put Z to first use, using the argument that those who would do so would violate the right to appropriation of Z of all others.

If the appropriation is lawful, then it functions as the foundation of the right to determination over the thing. The auctor or producer acquires the auctoritas over the means. Still many authors are convinced that this transition from production to right to determination is not valid. Lawrence Becker writes:

> "Here the defenders of the labour-theory have a tendency to use an argument that tends to put the burden of proof on the shoulders of their opponents. 'Why not?', they say. 'The fact that I used my labour in the production of a thing changes the matter. It puts me in a totally different relation to the thing in question than others. I am the producer of the value that the thing represents, undoubtedly that means that the thing is now mine.'."
>
> "Sadly, this is not sufficient. The expression 'it is mine' is

> ambiguous. As a reference to the fact that the product of someone's labour is indeed their product – and not someone else's, nor the result of a natural process- the proposition 'it is mine' is obviously true, but it is no more than a repetition of the claim that a unique relationship exists between the producer and the product. The crucial question remains unanswered: what reason is there to conclude that these relationship gives any grounds to the claim that the producer now has the right of ownership in relation to their product? Why does it not mean, for instance, that they now have the right to public admiration? Or to gratitude? Why should it mean more than the fact that he is the author of said change in the great book in which the world is described? The proponent of the labour-theory take the position that the producer has the right to the right of determination – and the burden on proof rests on their shoulders. But they have offered no evidence, and I do not see how they could offer such evidence."[25] (ed: couldn't find original, retranslated)

It is rather evident that a purely formal analysis never allows the deduction of a conclusion of form Rxa ("x has the right to dispose over a") from a premise of the form Mxa ("x is the maker of a"). In this purely formal sense there is indeed no "evidence" of the Lockean labour-theory. But neither is there such a formal evidence of Mxa to Rya (from "x is the maker of a" to "y has the right to dispose over a"). Becker's argument essentially boils down to the claim that the assignment of right to determination doesn't necessarily have anything to do with the means itself, and its history or how it came to be. However, this argument only has any content relating to theory of law/right, if we interpret it as follows: "someone other than the producer has the right to dispose over the thing". After all, someone will dispose over the matter, or else it will remain unutilized. The question is: who has the right to dispose over the thing – the producer or another? Further: if another, which other?

Becker dodges these questions, and paints a picture in which the proponents of the labour-theory are content with asking the rhetorical question "And why not the producer?". In doing so, he suggest that they concede that there are no better arguments for assigning the right to the producer than to any non-producer. This is wrong. The question is not "And why not the producer?" but "Who, if not the producer?" – and this question makes it clear that they posit

25 L.Becker: Property Rights: Philosophical Foundations. London 1977, p.40

that only the producer can lay claim to the right to determination of the thing that was made into a means by them, and that if the producer cannot make this claim then a fortiori no-one can.

It is puzzling to hear Becker claim that the producer has a unique relationship to their product, only to hear him implicitly suggest that the burden of proof regarding the right to determination of that means rests on the shoulders of the producer, who thus needs to justify themselves towards all or some non-producers. The implication is clear: is the producer does not succeed in convincing the non-producers, the right to determination of the thing stays with them!

This is of course pure mysticism: how did these non-producers acquire this right? Becker doesn't deem it necessary to answer that question. He simply assumes that the state has the right to dispose over all means and reduces the problem of the original appropriation of means to the question of how an ideal state should draft its legislation regarding property-rights. Becker, being a candidate conseiller du prince, is willing to answer that question. Sadly he neglects to add any arguments to his answer regarding why someone should prefer his mystical scheme, and not the mass of other mystical schemata which can be found in literature, or from whence the state has acquired this ultimate right to determination. Furthermore, why should this right belong to the state? Why not to God? Why not to Becker himself?

It is probable that Becker fell into the trap of equating the right to determination or the right of ownership to some right in rem. That is to say, to interpret it as a ius instead of a dominium.[26] The right to determination or ownership is a dominium and not ius – it is not a conventional "right", but a morally relevant fact of law/right preceding all conventions. It seems fruitful to remind the reader that dominium was not originally an ius, but precisely that from which iura could be deduced. To Roman jurists from the classical period, all iura were the result of an agreement or a regulated interaction, and as a consequence their character was purely private, bilateral and conventional. Their foundation was the dominium, which therefore was not a ius itself, but rather the moral or normative meaning of the primary fact of law/right, the subjection of nature to human will, the transformation of things into means.

It is in this sense that we must strive to understand Gaius' otherwise unintelligible remark in

26 See R.Tuck: Natural Rights Theories. Cambridge 1979, 8–13.

the Digesta VII 6.5:

> “Uti frui ius sibi esse solus potest intendere, qui habet usum fructum, dominus autem fundi non potest, quia qui habet proprietatem, utendi fruendi ius separatum non habet”

Which means that the right (ius) of usufruct can only be ascribed to the usufructuary. The dominus of an estate cannot have this right, since the person that has the good in property does not have a separate right (ius) to use their good and appropriate the gains. To us, it sounds absurd to say that the owner does not have the right to use their means and reap the benefits thereof. This paradox disappears immediately when we consider that the owner does have the right to do so, without requiring anyone's permission. The original property, dominium, is not acquired contractually, it cannot be traced back to a convention (contract, legislation) but rather to labour. The right of the usufructuary on the other hand is a ius: it is allowed by the dominus.

The assimilation of the concepts "dominium" and "ius", which led to the identification of *dominium* as one of the many possible *iura*, was the result of the political evolution of Roman society* from a relatively free and decentralized society* (or at least with a relatively weak centre) into a relatively centralized and bureaucratized state (*imperium*). *Dominium* was increasingly interpreted as the result of a bilateral agreement between Emperor and *dominus*. That interpretation was facilitated by the colonial expansion of Rome: the new areas were conquered in the name of the central authority, which therefore became, according to traditional conception, the actual *dominus* of those areas. In other words, the individual colonists and local inhabitants held their rights only with the permission of the central authority. They were still called 'domini', but their 'dominium' could no longer be conceptualized as preconventional: the permission of the central authority, of the Emperor, was a necessary condition for the acknowledgment of the right of the individual *dominus* to their estate.

In other words, *dominium* became a *ius*, though it was a ius with a much broader content that the traditional *iura*. Legislation raised itself above the right/law of the free citizens, but remained under the right/law of imperial authority. The imperial *dominium* was called imperium, and was of course not a *ius*: it did not rely on permission or accord, but on factual

power. Because of the transformation of *dominium* into a *ius*, all *iura* started to seem to be founded in the relationsbetween emperor and subject. As long as there was an emperor, conceptual continuity could be maintained. Roman terminology outlasted the imperium, however, and eventually, with the rise of the modern state, even *imperium* started to be considered a *ius*. The entire notion of law/right thus was thus left hanging in the air. This, at least in my opinion, is a possible explanation of Beckers incoherent criticism of the "labour-theory", as well as for his introduction of the state as the ultimate *dominus* on whose permission all individual property-rights (*iura*) are dependent.

The right to alienate and abandon is just as important as the right to appropriation. A person that discovers that they have invested poorly, in means that are not appropriate to what they now consider to be their actual goals, has the right to reject those means. They have the right to release then, abandon them, or to estrange them to certain others. Either to free themselves from the management of these means and associated liabilities in order to fully devote themselves to means that are appropriate for their goals; or in order to exchange them for means that are of more utility than the ones they relinquish. If a means is not abandonable (such as the will, for example), then there can of course be no such thing as a right to abaondon that means. The right to abandonment is after all not a right sui generis. It is an implication of the fundamental principle of law/right applied to a situation in which abandonable means exist. The fact that such abandonable means exist itself is not part of the logical content of the fundamental principle of law/right.

It is evident that no person has the right to abandon their critical abilities. This is an impossibility. These abilities, and that part of the organism in which they are embodied, are unabandonable/unestrangeable means, both in fact and in law/right.

What could possibly be the grounds for the claim that some does not have the right to abandon their abandonable means? Which is to say: for the claim that someone has the right to prevent another from abandoning their means? If A want to give one of their rightfully acquired means M to B, and B accepts, what right would C claim to oppose this? Ex hypothesis C does not have the right to dispose over A, does not have the right to dispose over B, and also not the right to dispose over M. What right could they apply to force A to retain M, or to not give it to B,

but to a person of their (C's) choosing, be that C themselves or D? Here too the only possible justification could only be provided by a mystical theory of law/ right. But we have no interest in mysticism.

The right to abandon one's means finds its complement in the right to dispose over means that one received from others. If A has the right to dispose over M, then they have the right to give M to B. If they give M to B, willingly and knowingly, then we are forced to conclude that because of this fact B acquires M rightfully/lawfully. M is now part of the domain of B, who has the right to dispose over it. No-one's rights are violated by this transaction, even though there may be many that feel hurt in their interest, because they are of the opinion that they "deserve" M much more than B does, or because they had speculated that A would give M to them. Their opinion of their own merits in relation to B's is, however, irrelevant, as M, ex hypothesis, belongs first to A and then to B. If we were to say that their ideas on who should or "deserves" to have M are lawfully valid, then we would say that they have the right to determination over M, which contradicts our hypothesis. Of course they are fully within their rights to distribute their *own* means according to their own personal concepts of merit – but the same is true for A.

All of this is so evident that it seems superfluous to remark on it. Yet this is exactly one of the areas on which opponents of law/right focus their assaults. Admittedly, they seem to find it inopportune to assault the right to give; they seem to prefer to assail this right indirectly, by disputing the right to receive. Typical of this are the assault on the right of still living people to decide what should happen to their material assets after their deaths. These assault usually focus on "undeserved/unearned, inherited wealth" and one may find their impact in what is called "inheritance law", which is to say the positive legislation relating to this matter, which consists of forcing the citizenry to distribute their assets in a certain way (and in such a way that the rulers, the organs of the state, assign themselves a "right of inheritance" in the form of taxation of legacies). This legislation is clearly a direct violation of the right to self-determination.

This violation is usually embedded in a complex of demagogic attacks on the "unearned" nature of the inherited assets, but – and this betrays their demagogic character – none of these attacks are

consistently elaborated. A judges that B is the most suitable person to manage B's estate after A's death, and makes B into their sole heir. B has not "earned" this fortune. He did not do anything to acquire it. Indeed, the only one to have "earned" these assets is A. If B does not have the "right" to receive these assets, because he has not done anything to acquire them, then after the death of A no-one would have a "right" to these assets. Must we then conclude that law/right dictates that the entire fortune of a person should be destroyed upon their passing, so that we may ensure that no-one inherits an "unearned"fortune? This is of course not the intention of those who use this demagogic argument. What they propose is for them to acquire the right to determination of legacies, and that they should decide what should happen to the estate of the deceased. That they have not "earned" this estate either appears to suddenly be totally irrelevant.

Like all violations of the right to self-determination, "inheritance law" is a means to take from one set of people, the rightful heirs, and to give to others, the legal heirs (assigned by, or identified on the grounds of legislation). The imperative nature of this positive "inheritance law" is incompatible with law/right, though it should be obvious that there is no objection to a supplementary "inheritance law" to decide how a legacy should be divided in the absence of a last will and testament. The right to abandonment/estrangement is implied in the fundamental principle of law/right, and this principle makes no distinction between a donation between living parties and a donation which is only carried out upon the death of the donor. There is no logical grounds for taking to task only the latter type of donations if one's objections are against "unearned income". But if it is this "unearned income"one takes exception to, it would behoove them to be consistent.

The fact that a persons estate often persists after their passing makes this "unearned" income a fixed phenomenon. Indeed, it is an essential factor in what we call progress. If humanity had, since the days of the Neaderthal, consistently banned any and all forms of "unearned" income, and had taken all elements of wealth, and buried them with their producers, or destroyed them upon their deaths, we would still be living in those days.

We have seen that the fundamental principle of law/right implies both an unlimited right to appropriation and an unlimited right to abandonment/estrangement.

The ethical importance of these two implications, and thus of the fundamental principle of law/right itself, is that they guarantee to each person the right to materially constitute themselves in such a form as seems most appropriate for the accomplishment of their own goals. Without this opportunity to rightfully alter the size and composition of one's own "praxeological" body, of one's own abilities and possibilities, ethical living is not possible. Ethics is the art of living, but there are many ways of living, and in each of them there are artists and failures, those who chose the wrong way of life for themselves. Every life's goal requires certain physical equipment, and as such maximal self-actualisation presupposes maximal freedom to compose and construct one's self as a specific structure of means. The function of law/right is to reconcile this ethical necessity with the fact that there are many people, and the omnipresent phenomenon of scarcity.

A certain type of literature likes to present the two implications we have discussed here as an expression of "materialism", a focus on "material" values to the exclusion of "spiritual" values. It is however obvious that the fundamental principle of law/right in no way discriminates against more "spiritually" oriented ways of life. Furthermore these two aspects, material and spiritual, are inseparable to human beings. Everything people do, whether it is catalogued as spiritual or materialistic, requires the control over a number of material means, and a more or less sophisticated application of theoretical insight and imagination. Many of the greatest feats of architecture have a profoundly spiritual value and meaning. But this does not detract from the fact that they contain many thousands of tons of material and required many thousands of hours of hard labour. One can deplore and lament the fact that so many people spend so much on clothes, cosmetics, and what is disapprovingly called status-symbols, but you would have to be blind to miss that to many people these things often represent symbols of very fundamental, spiritual values, such as confidence, freedom, faith in the future, etc. It is not a rare occurrence for the loudest propagandists of the "higher", "spiritual" values to demonstrate the emptiness of the distinction. They are usually not last in line for availing themselves of subsidies, or to denounce the miserliness of their fellow man in relation to the financing of their hobby-horses.

What they want is not so much a shifting from the material to the spiritual, but rather a transfer of the material means of others to themselves. In this, they are no different from others. The fundamental principle of law/right acknowledges their right to acquire more means, it merely limits the methods they are allowed to use in doing so.

I've remarked before that in the 19th century attempt to place the individual fundamental principle of law/right on the same footing as the principle of state-sovereignty, a tendency to construe the individual property-right as a reflection of the right of the state was expressed. As a consequence this individual property-right gained an equally mystical character as the right of the state. In particular, it was considered to be just as "eternal" and perpetual as the sovereignty of the state itself. With the absurd theory of the so-called Social Contract, which attempts to justify current rule by referring to an original contract which was supposedly closed between people all of whom are long since dead, corresponds the theory that anyone who has ever taken possession of a certain thing, retains the right to determination to said thing even if they have, in fact, long since abandoned it. Such an idea is of course totally irrational.

If the right to determination over a thing comes into existence by the first use, then it also disappears when the thing is abandoned, when it is no longer used or maintained, when it is no longer utilized, exploited or rented. This question has some topicality in the so called "squatter-problem", which is a problem mainly created by foolish legislation and regulation. Someone that "squats" in an abandoned building or takes possession of a fallow and unkempt plot of land functions, ex nunc, as the first user, and thus acquires the right to determination over that thing, even against the previous owner who left the building or plot abandoned. It is true that in this regard there may arise quite a few difficulties relating to empirical evidence, since it will not always be immediately clear whether a farmer, for example, is abandoning a plot or merely leaving ti fallow for a while to let the soil recover, but this does not debunk the principle of abandonment itself.

The so-called "squatter-problem" however, doesn't really refer so often to abandoned buildings. It often has a lot to do with an excessive

legal protection of renters. That is to say with an artificial discouragement of those would like to rent out their property. If A leaves a building vacant while there are many candidates for rent, A gains nothing and loses all income from rent. Why would someone do this? In fact, owners usually leave buildings vacant because they expect to be able to sell or rent to someone who has another purpose in mind for the property (office space rather than residential space, commercial space instead of offices, etc). They fear, or know, that if there are residential tenants at the time this commercial renter or buyer shows up, they will be unable to quickly evict the current tenants, thus such they will be unable to be of service to the commercial renter/buyer.

It is rather evident that keeping land or buildings which will need demolition off of the market is totally senseless, except when the income derived from utilizing them do not outweigh the costs of switching to a more valuable use later. If this latter is the case, it would indeed be senseless to use said land or buildings in the meanwhile. This is a rare case, unless legislation drives up these "switching-costs", potentially into infinity (such as is the case of legislation ascribes a so-called "habitation-right" to a tenant, so that the owner is not allowed to evict them). Excessive protection of the tenant makes renting out a property prohibitively expensive, and as such it should not be surprising that few people remain willing to do so under these circumstances.

Abandonment means that a means disappears and a thing returns to the status of thing. Abandonment is however not a perfect mirror-image of appropriation/first use. I have previously pointed out that auctoritas has two natures: it implies right to determination as well as liability. Abandonment makes the right to determination disappear, but not liability. If someone throws something away, say a dangerous chemical, they remain liable even though they can no longer stop someone from finding, and using the discarded product. As long as no new appropriation takes place, the "abandoner" remains liable. Liability cannot be unilaterally discarded, after all. It may come into existence together with the right to determination, but it is not bound to the exercising of that right.

This point is especially important in relation to children. Those who bring children into this world,

bring into the world sovereign subjects of law/right. Children are not means belonging to their parents. Parents do not have the right to dispose over them. They are not "property" of their parents, nor of anyone else except themselves. Yet parents cannot deny that it is they (and not others) that are responsible for bringing these children into the world. Though they do not have the right to dispose over the children, they are and remain liable for their children, in the sense that they must take care that their children do not burden anyone but them. They must vouch for the consequences of the activities of their children as long as these children have not freed their parents of said liability. Parents cannot unilaterally release themselves from this liability: try as one might, it is simply unthinkable that these children came to be by their own request. The fact that children themselves are also liable for their actions in no way decreases the liability of the parents. This, I believe, is the only bond between parents and children which is imposed by law/right. Though this relationship can and will obviously be the object of many "moral" obligations, as far as law/right is concerned only liability is specific. Parents don't have a "right" to obedience from their children (though they do of course have the right to regulate the use of their means by their children) and children do not have a "right" to their parents or the means of their parents (though they do have the right to refuse to free their parents of their liability). It is probable that, in most cases, children should obey their parents (though this depends on a slew of considerations, including what it is the parents want from the children), and that is most cases parent should take care of their children. However it is also undoubtedly the case that these so-called natural obligations are of much lesser importance than the answer to the moral question of whether it is morally responsible (for these particular persons) to bring children into this world. Children don't come falling out of the sky after all, they are the result of very specific human actions. Despite how pressing these moral problems may be, they are outside of the scope of this book. Here, we can make peace with the position that although the parents bring children into the world, this in no way means that they have the right to dispose over their children. In this sense they must immediately "abandon" their children – but they do remain

liable for what they have brought into the world.

Before concluding the discussion on the rights to abandonment and expansion implied by the fundamental principle of law/right, I would like to draw attention to a problem which is often brought up. According to John Locke this right to expansion would no longer hold in periods of overpopulation. That is to say: when the supply of the things not yet put to first use has shrunk to such an extent that what is left is not enough for others, or otherwise is of inferior quality:

> "Whatsoever, then, he removes out of the state that Nature provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property…at least where there is enough, and as good left in common for others".[27]27

This condition is not easily interpreted. It is unclear what Locke means by it exactly. It's not even clear what he could mean by it.

Locke's proviso – and this is what I want to stress here – does not follow from the fundamental principle of law/right. We will see that Locke's theory of law/right, despite a number of superficial similarities, differs fundamentally from the theory of law/right I am defending here. The problems with Locke's proviso are specific to this other theory. In a finite world, any appropriation (of land certainly, but also of any slow-growth natural resources) means a limitation of the opportunities for expansion of other. This is simply the fact of ecological scarcity. A strict application of Locke's proviso would imply that no-one has the right to make first use of a thing, and thus that Locke's theory is in fact equivalent to the simplex usus facti, the simple right of use or consumption, which is the only right the medieval Order of Fransiscans found acceptable, with their ideal of apostolic poverty. Such a conception implies that the relationship between humans and nature is analogous to the relationship between animals in a herd and the meadow they are grazing in. Each takes what they need, but no-one has the right to exclude any other from any particular piece. This interpretation is however difficult to reconcile with the general tone, and other specific claims, of Locke. The problem is that if the proviso is not strictly interpreted

27 John Locke: Two Treatises of Government. ii/5, par.27. Relating to this, refer to the discussions in R.Nozick: Anarchy, State, and Utopia. New York 1974, 175–182. D.L.Phillips: gecit. with note p.104. pp.115–136, (124–133 in particular).

it becomes possible to generate an infinite series of interpretations, all different either in the criteria they propose to determine when "enough and as good in common for others" is still left, or in where they ascribe the authority that has the right to decide in cases of conflict regarding this determination.

Locke himself is far from clear on this point. Another claim he makes is that everyone has the right to establish a right of ownership in "as much as they can use for the maintenance of their lives before it spoils. If he takes more, he takes more than his part, then he takes what belongs to others". Here Locke seems to claim, not so much that putting a thing to first use is insufficient to acquire the right to determination over that thing (compare, the above on abandonment: things not in use are abandoned), but rather that one can have a right to things with which one never had any connection at all (what one takes but doesn't use belongs to others). Elsewhere still, Locke states that "he who leaves as much as another can use, takes as good as nothing". Are these three expression meant as paraphrasing the same proviso, or as the expression of three different conditions?

This is a question any interpreter of Locke must answer. A discussion of Locke is not the real point here however. As stated, Locke's theory is fundamentally different from the theory that each person is a sovereign subject of law/right. What I am trying to elucidate here is that the problems that Locke is attempting to avoid by only provisionally ascribing the right to expansion (particularly, the possibility of a situation in which everything has already been taken into possession, so that nothing is left for some) are not consequences of an acknowledgment of an unlimited right to expansion, but of a relative overpopulation resulting from irresponsible procreation.

A finite Earth can only house and feed a finite number of people, and a smaller number still above a level of subsistence. Overpopulation is always relative in relation to a mass of heterogeneous factors, particularly technological and scientific knowledge, and the availability of capital in order to incorporate this knowledge into effective methods of production, but there is always a threshold of overpopulation relative to a certain give state of these factors. Once this threshold is exceeded, the result is

the deepest of misery. In cases of overpopulation, even the Fransiscan ideal of a condition of apostolic poverty changes into the not-so-very apostolic state of malnutrition, famine and physical and mental degradation. Limiting the right to expansion does not solve the problems of overpopulation, quite on the contrary. No-one has a strong motive for engaging in family planning if they know that the burdens of feeding, clothing, housing, educating, and providing health-care, etc., for *their* children will be borne by *all*, and not just they themselves. Yet it is exactly this which is implied in Locke's provision: the more "others" exist, the more everyone must leave aside for these "others". This is the famous "tragedy of the commons"[28]: everyone has the right to bring as many children into the world as they want, and to reap the benefits which this wealth of children brings, but no-one has the duty to ensure that their children are guaranteed an existence worthy of man, this duty is smeared out to encompass all. If A brings ten children into the world, the rest of the people must ensure that there is enough living-space for A's children. The others will just have to be willing to lower their standards of living.

Once again I see utility in pointing out: children do not just come falling from the sky. Overpopulation is the result of specific human actions

28 G.Hardin: “The Tragedy of the Commons” o.a. in B.A.Ackerman: Economic Foundations of Property Law. Boston, 1975, 2–11. In relation to overpopulation see also P.T.Bauer: Equality, The Third World, and Economic Delusion, Cambridge, Mass. 1981 (hk 3: “The Population Explosion: Myths and Realities”) en F.Oppenheimer: The State. New York 1975, 6–8 en 105, also Oppenhei-mer: Grossgrundeigentum und soziale Frage. Berlin 1898, Bevolkerungsgesetz des T.R.Malthus. Berlin–Bern 1901, Grundgesetz der Marxschen Gesellschaftslehre: Darstellung und Kritik. Berlin 1903. Both Bauer and Oppenheimer emphasise the fact that a lot of land is yet available, and that consequently the cause of all the misery associated with overpopulation cannot be found in the so-called "fact" that all land is already effectively occupied. Of course it is true that some (mainly governments, for military, police or even "ecological" reasons) discourage or forbid the putting to first use by others (fiscal extortion, regulation, etc) while also encouraging wasteful applications, by ascribing simple usage-rights to effective users, but not full property-rights. Refer to the "sagebrush rebellion", a US controversy about the application of "public lands" a.o G.D.Libecap: Locking Up the Range: Federal Land Controls and Grazing. Cambridge, Mass. 1982. Cf. Also: B.J.Frieden: The Environment Protection Hustle. Michigan Institute of Technology Press, 1978. B.H.Siegan: Other People’s Property. Lexington, Mass. J.S.Mill, in first edition of his Principles of Political Economy. (1848) ii/1, par.5 noted that there is no direct connection between the "social question" and "private property": “The principle of private property has never yet had a fair trial in any country. The laws of property have never yet conformed to the principles on which private property rests…If the tendency of legislators had been to favour the diffusion, instead of the concentration of wealth, to encourage the subdivision of large units, instead of striving to keep them together, the principle of private property would have been found to have no real connection with the physical and social evils which have made so many minds turn eagerly to any prospect of relief, however desperate.”

It looks to me as if this elementary fact is often forgotten in the confused and endless discussion about Locke's provision. The meaning of that component of Locke's theory is indeed that a person's rights are determined by the number of children others want to have. It is clear that the application of this provision would change nothing about the underlying problem of overpopulation. As previously stated, overpopulation is always relative to many factors, but there is always a moment when any further population-growth must be to the detriment of the living-standards of all. This is even the case if one were to accept Franciscan communism as a theory of law/right, or if one were to worship and deify poverty, as in many Easter countries. In fact, Locke's provision is a logical consequence of a conception of law/right that denies that all people are sovereign subjects of law/right. Where the fundamental principle of law poses that everyone has the right to decide over their own lives and no right to decide over anyone else's – each has the right to live according to their own vision- then Locke implicitly poses that everyone has the right to life, that is to say that everyone has the right to be kept alive, that everyone has the right to receive victuals. In this conception, overpopulation is something people must simply suffer, as everyone is made liable for the maintenance of everyone's children, reducing the responsibility of the parents for the fate of their children. The hellish circle this brings into being, should be patently obvious to all. The combination of ideologies which both plead for a zero-growth (or even contracting) economy as well as fuelling a population-explosion, makes the phantom of a merciless struggle for self-preservation loom ever more real. It is exceptionally naive to believe that this is in any way helped by limiting the individual's right to expansion.

The redistributive element in Locke's theory of law/right simply creates the same dilemma all redistributive theories of law/right contend with. Sooner or later, they are forced to choose between equality in misery or the centralizing of decisions relating to procreation.

CONTRACT

The fundamental principle of law/right implies the principle of contractual freedom.[29] If each person has the right to do or not do with what is theirs as they please, then each person has the right to alienate any of their abandonable means under conditions they themselves pose. This also means a person has the right to decide under which conditions to allow others to make use of their means.

It is of essential importance to realize that the principle of contractual freedom is a direct consequence of the fundamental principle of law/right. This is not some separate principle stating that one should honour their contractual obligations. This is important because it is just as wrong to interpret the fundamental principle of law/right in terms of a determinate, often labelled "individualistic" contract-theory as it is to interpret it in terms of for instance the Lockean theory of property-right. Whosoever writes of law/right cannot but make statements which will be judged positively by some party of some ideological debate, and negatively by others. It is however strictly impermissible to interpret all that is said of law/right in terms of such a debate, or as the taking of a position against some party, and for another. Such an approach leads only to hineininterpretieren. (ed: to attribute non-existent intentions, meanings or intentions to something or someone), to the rendering of the verdict "guilty" on the grounds of associations extant only in the mind of the judge.

Freedom of contract must be properly understood as an implication of the fundamental principle of law/right. Contracts "bind" people on the grounds of that principle, not on the grounds of a principle such as pacta sunt servanda.[30] The latter may be a moral principle, but it is not a principle of law/right. (ed: rechtsprincipe) Showing that no-one has the right to not fulfil their contractual obligations is of a wholly different nature than showing the moral validity of the rule that one should fulfil one's contractual obligations. Many legitimate objections to the principle of freedom of contract are in fact objections to the consequences,

29 P.S.Atiyah: The Rise and Fall of Freedom of Contract. Oxford 1979. A.W.B. Simpson: A History of the Common Law of Contract. Oxford 1975. M.J.Horwitz: The Transformation of American Law. 1780–1860. Cambridge. Mass. 1977. hk 6 (“The Triumph of Contract”). W.M.Evers: “Towards a Reformulation of the Law of Contract” Journal of Libertarian Studies I, 1977,for an interpreation analogous to the one defended here . E.Mack: “In Defense of ‘Unbridled Freedom of Contract’” American Journal of Sociology and Economics, 40, 1981, 1–14.

30 not an innocent doctrine. Zie o.a. R.Tuck: cited. with note p.160, passim.

which can indeed be unacceptable, of the rule that you should keep your promises, which is posited as an objective and absolute moral truth.[31](31) What makes a contract "binding" is not the fact that promises are made, nor the fact that these promises created certain expectations. Such subjective elements are not mentioned in the fundamental principle of law/right. As such, they have no bearing on the exchange of property-rights which is the essence of contract. (It should go without saying that in this context property-rights should be understood as: not the right to self-determination of a certain person, but the right of ownership of that person in relation to one or more of their abandonable means, or the "splitting off" of a bundle of property-rights from the right of ownership of said means. For example, the right to usufruct, right of use, etc.)

It's rather evident that this rule, you should keep your promises, is not an objective and absolute moral truth. Some promises ought not to be kept, and this is not just true of promises one shouldn't have made. If B promises A that he'll rob or murder A's rich uncle, that is a promise B ought not to keep. Yet it is possible that, under certain circumstances, B should still have made this promise. To stall for time, for instance, or if A had set the scene so that B could rightly believe that it was his moral duty to rob or murder said uncle. It's also not impossible for B to reach the conclusion that they should promise something to A while also realizing that they should not keep this promise. In this example for instance: promising A to realize his plans in order to prevent said plans from being enacted. Not every promise one should make is a promise one should keep. Conversely not every promise one should not have made is a promise one should not keep. In fact, it's impossible to say much more than that you should keep your promises if and only if you should keep your promises. That is to say, there are promises one should keep, but there's also promises one shouldn't.

It is easily conceivable for someone to make a promise in circumstances that leave no doubt that what they are promising is morally permissible, that they know that they are making a promise, and that they know what they are promising, only to find themselves, when the time has come to make good on the promise, in a situation where they are morally obligated to themselves to do something

31 Pro: Charles Fried: Contract as Promise. Cambridge, Mass. 1980. Contra: P.S.Atiyah: Promises, Morals and Law. Oxford, 1981. Atiyah: “Contracts, Promises, and the Law of Obligations”. Law Quarterly Review 94 April 1978. 193–223.

else. The textbook example for this case is that of the singer that promises to perform, say in a charity event of which the proceeds are to be donated to some noble goal (helping the invalid, victims of natural disasters, or something of the like). After they have made their promise, and the organizer has made quite a few expenses, the singer gets an offer which is much more attractive to them, whether for artistic or financial reasons. Is the fact that they have promised to perform sufficient to be able to say that, morally speaking, the singer is obligated to perform at the charity-event? Only a mechanistic conception of morality, one which renders everything which is morally neutral into a moral obligation by way of the contingent fact of a promise, will allow for an affirmative answer. Undoubtedly, the fact that one has made a promise is a relevant moral consideration, but it is not necessarily a decisive consideration.

Morally speaking, the singer must take the new opportunities available to them into consideration, together with all relevant information and values (humanitarian, financial, artistic, etc.). They must make a choice. There is nothing inherently noble in a policy which consists of "keeping your promises", which is to say in avoiding moral responsibility by holding fast to a mechanistic rule that replaces thought. The fact that the singer may lose reputation in certain circles, and be called a "promise-breaker", may be relevant, but it may also not be. They are responsible for their own values. Those who direct all their actions towards the acquisition or maintenance of some conventional reputation or the other are not exactly moral heroes.

The omnipresent fact of scarcity necessitates choice. There is no reason to believe that the proper choice is always the promised choice. A promise may be made in good faith yet still later prove to be an error. In such a case one must face their mistake and make the best that can be made of the situation, according to one's own scale of values. It is one's own inner integrity which is at risk. It is not moral to compromise this merely because one risks a bad reputation in the eyes of some. One one side, promises *to others*, but on the other, promises *to one-self*. One one side, frustration of other's expectations by not keeping your promise, but on the other frustrating your own expectations when you would keep it. To believe that in

such conflicts, the moral option is to ignore or sacrifice yourself and to give preference to others, is to reduce morality to subservience, to "mores", and to deny yourself any and all integrity.

The idea that the rule that you should keep your promises is a moral truth, is a strange one of itself. To elevate it yet further,to the status of principle of law/right, is all too crazy. No-one is capable of binding their own will for the future, no-one can honestly decide now how they will honestly judge a situation in the future. Claiming that every person has the right to live according to their own legislation, is also claiming that every person is above their own legislation. Every person has the right to change their own legislation to their own vision/insight. There is no reason to posit that the principle of moral autonomy is fulfilled if you are forced to live according to a legislation that you made, or helped make, at one time, but in which you no longer believe. A makes a promise to B to do X. Does this statement lead to the conclusion that it is now B who has the right to decide whether A should do X or not? The theory of contract which is called "liberal" answers this question in the positive. It behooves one to recall that this theory was developed in an attempt to justify an absolutist state. It is unsurprising that those who wish to derive, from the principle that each person is a sovereign subject of law/right, a justification for rule of some over others revert time and time again to the idea of the binding promise. However, no-one can denounce/relinquish their own moral autonomy, no-one can abandon/estrange their own will.

The risk of associated with the failure to keep a promise is borne by the one to whom the promise is made. This is a necessary consequence of the position that moral autonomy is an inalienable/unabandonable good. The classical doctrine of contract – "that men performe their covenants made" as Hobbes puts it – has exactly the goal of relocating this risk. The singer in our example retains the right to not perform, and the risk is borne by the organizer. Of course the latter may do such things as reclaiming wages already paid, but this has nothing to do with the promise made by the singer, this is an immediate consequence of the fundamental principle of law/right. The organizer has not yet transferred their rights of ownership to this hypothetical sum of money to the singer. The latter only becomes the proper owner when he fulfils the conditions posed by the organizer, and performs. If he does not perform and still keeps the money,

then he is guilty of theft. He makes himself the master of a means belonging to another in a deceitful fashion, as he only received the money under the condition that he would perform. The right of the organizer to reclaim their money is implied in their right to do or not do with what is theirs as they see fit, and the money is still theirs. Of course singer and organizer could explicitly agree to relocate the risk to the singer, or to spread the risk among the both of them in some way, but this must be explicitly agreed to. This is self-evident, and it cannot be excluded that the singer may want to function as a co-organizer. In no case does the mere promise of the singer give the organizer any right to the services promised. This is because this promise does not constitute or enact a transfer of property, as the singer cannot alienate/abandon his own will.

If the singer does perform, the organizer must pay the agreed upon wages, not because they should keep their promise, but because the singer has fulfilled the conditions posed by the organizer and as such has become the proper owner of the money involved. If the organizer does not pay, they are guilty of theft. Only in the case of implicit or explicit theft (which is to say the illicit appropriation or use of means, or services, of another) that the fundamental principle of law/right allows for the possibility of "enforcement". After all, at that time there exists and actual condition of aggression or invasion: one of the parties in within the domain of the other without fullfilling the conditions posed by the dominus. There is however no aggression, no invasion when one party wrongly anticipates the other to keep a promise, and on the basis of this makes all kinds of expenses which will be revealed to be useless or lost when it becomes clear that the second party has no such intent. Everyone bears their own responsibility for the risk of trusting the other. This is evident when considering clearly speculative action: if an enterpreneur decides, on the grounds of a market-analysis, decides to establish a point of sale in location X, the enterpreneur retains the risk for failure of this endeavour. The answers that people in X gave at the time of the market-analysis, which gave the impression that sales at that location would generate sufficient revenue, cannot and will not be interpreted as buying-orders by anyone. But even if

there is a clear and unambiguous promise, the matter remains speculative. The one that makes a promise to do a thing retains the right to freely decide, when the time has arrived, whether or not keeping their promise is indeed the best use of their means. It is not for the other to make this decision for them.

It's obvious that here too, the actual context in reality will create many difficulties in the interpretation of contracts. It's not always clear if someone is buying something or just promising to buy something. People are often rather sloppy in such matters, and often enough they attempt to economize on transaction-costs by avoiding long and expensive negotiations, or by refraining from seeking expert advice in the wording of contracts. Of course everyone is free to choose between a cheap contract with an amount of risk of trouble later, or an expensive contract with little to no associated risk. The crucial question, in light of the enforcement of contract, is always this: has partial execution already taken place or not? Which is to say: is one of the parties guilty of (implicit) theft if they do not execute their end of the contract?

This should suffice in making clear that the principle of freedom of contract in this work should not be taken to mean "that all deals, promises, etc are enforceable", but rather that everyone has the right to make any agreement with anyone else, as long as this agreement relates to means belonging to the parties involved. The "enforcement" of contract simply means that when there is (implicit) theft, the victim has the right to either reclaim goods they delivered, and potentially demand compensation for illicit use another has made of them, or to reimbursement for services rendered, or to demand delivery of goods promised in payment, and potentially demand compensation for illicit use the other has made of them (as they rightly/lawfully already belong to the victim), or to demand compensation for services not rendered. If the opposing party resists, the victim can seize/confiscate both the good delivered by them (or the corresponding reimbursements) as well as the good to be delivered to them (or the corresponding reimbursements).

Relating to this matter, it should be noted that those who are paid to render services or labour, and that do not deliver, can in no case be

forced to render these services or perform this labour. The reason is that no-one can alienate their own power of labour. A house, a car, etc. are all abandonable/alienatable things, since another, to which those things are left, can make use of them without the continual cooperation or consent of the one that leaves them. This continual cooperation or consent is required for the application of labour. From this follows that no-one can sell or rent out their labour or themselves, in the sense that of offering the guarantee that the buyer or tenant will be able to dispose over the labour, or time of the seller or renter (since we are not speaking of the simple body, as in the case of sedation or death).

The main implication is that contracts of slavery are not enforcable by the "master". At most they would be able to reclaim the "price" paid, or a part of it. Of course anyone can promise any other that they will follow the other's command. They can even keep this promise. However, from the moment the "voluntary slave" has had enough, as soon as they no longer consent to do what their "master" commands, they regain their independence (save for having to reimburse the "price" paid to them, or part of it). Their "master" has no right to their obedience. The absurd doctrine that such contracts of voluntary slavery are possible and lawfully valid has no grounds in the fundamental principle of law/right. It rests either on the infantile reasoning that if a person "owns themselves" they should be able to sell themselves – an argumentation characteristic of a tendency to define concepts a-prioristically – or on the exaltation of the rule that you should keep your promises from a dubious moral rule to a fundamental principle of law/right.

As remarked previously, this doctrine did not have wholly innocent intentions, as it aimed to use the notion of contracts of voluntary slavery to justify rule, even absolutist monarchy. The insufficiency of the supernaturalist theory of law/right, manifested the more in European cultural circles after the open schism in Western Christendom and contact with other civilizations, gave rise to attempts to justify rule on an individualistic basis, that is to say on a non-mystical, scientific

basis. The following quote by Francisco Suarez in De Legibus ac Deo Legislatore is typical :

> "Quamvis natura dederit libertatem, et dominium eius, non tamen absolute prohibuisse, ne auferri potest …Eo ipso, quod homo est dominus suae libertatis, potest eam vendere, seu alienare"[32]

-though nature has given man freedom and dominium over his freedom, it has not absolutely forbidden it to be lost... precisely because man is master of his freedom, he can sell or alienate it.

Here, again, we see the confusion between dominium and ius I have previously discussed. Human freedom should be understood in terms of the right to do or not do with yours as you see fit, and this right is not alienate-able/abandonable. The right to do with what's yours as you please does not imply that you have the right to do with this right as you please. It simply means that each person has the right, within bounds of the sovereign right of each, to dispose over their own means. We find the same unacceptable equivocation of dominium and ius in Grotius' De Jure Belli, in which he draws a direct connection between the lawfulness of rule as such, regardless of the particular form the state takes, and the lawful validity of contracts of voluntary slavery.[33] Grotius considered the rule Pacta sunt servanda to be the foundation of the notion of the legislation in the perspective of his individualistic point of view.

An adequate analysis of the right to self-determination undermines the entire deduction of the rightful validity of rule from the individualistic principle. Theoreticians of law/right did make further attempts to weaken the importance of this deduction without casting doubt on its validity. One such attempt consists of claiming that, though contractual slavery is possible and lawful, it should be considered very unlikely that such would have appeared frequently, and a fortiori

32 F.Suarez: De Legibus ac Deo Legislatore (1612). Oxford 1944, part 1. p.160. Cf. Q.Skinner: The Foundations of Modern Political Thought. Cambridge 1978, Pt.2: The Age of Reformation. pp. 135–173, especially 165–166 for Suarez' concept of the 'universitas' of the people, which is to say his concept of the People (ed:Volk) as an original mystical body with a unique will which as such is capable of binding itself and all its parts (including future parts).

33 Grotius: De Jure Belli ac Pacis (1625) i. iii. viii. 1–2: "Licet homini cuique se in privatum cui velit addicere ut & ex lege Hebraea & ex lege Romana apparet, quidni ergo populo sui iuris liceat se uni cuipiam, aut pluribus ita addicere, ut regendi sui iuris in eum plane trabscribat nulla ejus iuris parte retenta." See Also G.Maccormack: "Grotius and Stair on Promises" American Journal of Jurisprudence 22, 1977, 160–167. K.Olivecrona: Appendix 1 in op.cit. bij noot p.11

that there was once such a thing as a contract in which an entire people bound themselves into slavery. Doing this allowed them to acknowledge the legitimacy of the idea of the state without immediately affirming the legitimacy of any extant state. This argumentation however, was itself dismissed as irrelevant by Grotius, among others. He posited that the question that the study of law/right should answer has nothing to do with any historical or psychological hypothesis. It is the principle itself of the legitimacy of the state in se[34] which is of importance. Historical and psychological hypotheses are never conclusive, as each person will have their own opinion on these. To Grotius, the essence was that he thought he had shown that rule, even the most absolute, is compatible with the sovereign right to self-determination of each person.

This "contractualistic" elaboration of the individualistic point of view is not compatible with the fundamental principle of law/right, that each person has the right to do or not do with what is theirs as they see fit and that no-one has the right to do anything with the means of others. It is compatible with the alternative fundamental principle: that each person has the right to do or not do as they please, and that no-one has the right to do anything without the consent/permission of all others. We've already discussed this alternative, and found it it be incoherent. As such it should not be surprising that Grotius, and other modern theoreticians of law, managed to deduce from a contradictory conception of human freedom the legitimization of even the most far-reaching unfreedom or slavery. Once more it is shown how important the underlying vision of humanity is. If one defines people in such a way that in their very being they are in conflict with one-another, then only the unification in a consensus, in a contract with binding force, can resolve this antagonism.

This contractualist approach, as developed by Hobbes and Grotius, was in a sense the culmination of the feudal world-view. Rule was founded on a strict personal relationship between ruler and subject, between master and slave. The rule of the state related immediately to the subjects personally, and only indirectly to territory and material goods. It would take Locke, with his masterful reinterpretation of the theory of social contract, to turn this relationship on its head, and to claim the first foundations of the rule of the state to be of a territorial nature. Locke, I will discuss elsewhere.

34 Grotius: op.cit, ibid. “Neque dixeris minime id praesumi: non iam quaerimus quid in dubio praesumendum sit, sed quid iure fieri possit.”

The essential point to be taken from this discussion is that one should take care when interpreting and applying the fundamental principle of law/right, so as to not smuggle in any conceptions of contract which are alien to this principle.

The subjectivist doctrine of contract as a promise is incompatible with the objectivist doctrine of contract as an exchange of rights (iura), as a reciprocal re-determination of the boundaries between two domains, by means of which means can be transferred from one domain to another, partially or wholly, temporarily or permanently, conditionally or unconditionally. Only the latter is compatible with the fundamental principle of law/right, in the same way that only the objectivist doctrine of liability is compatible with it. Each person is liable for their means. Each activity of each of their means which crosses the boundaries of another fall under this liability. Each person carries the risk of their own means, even when they could not be deemed guilty or negligent for the damage their means have caused. This is rather clear when the activity of one of the means belonging to A damages one of the other means of A. There is no reason to alter this judgment when the passive means are outside of A's domain. Just like the subjectivist doctrine of contract, the subjectivist doctrine of liability had a heyday in the nineteenth century, even though neither could ever be applied consistently. It's clear that a subjectivist theory of liability, if applied, would make the accumulation of means, not in the least industrial property, much easier and cheaper. The absence of any proof of guilt in such circumstances would mean, after all, that the risks associated with the establishment and exploitation of these means are spread out over many others which cannot be considered auctores of these means (even though they often indirectly benefit from this establishment and exploitation, capital gains for example, by rising prices of real estate, or a higher income resulting from employment opportunities, etc.).

In the nineteenth century, the administration of justice/law was, relatively speaking, a much more important instrument of policy than it is today. As such it is not surprising that this subjectivist undermining of the, admittedly vaguely and implicitly, accepted fundamental principle of law/right came to be in vogue in this period among those who saw forced economic growth, and

the rapid building of large accumulations and combinations of capital (heavy industry, rail, ports) as a good thing. Besides the spreading of the risks – in this regard, consider air-pollution – this subjectivist tendency in contract enabled a considerable decrease in transaction-costs, as parties were able to force the costs of the execution of agreements onto the tax-payers, even without having first convinced themselves that the counter-party is capable and seriously intent on executing the agreement.

I do not wish to create the impression that the popularity of these subjectivist interpretations can be explained by these "economic" considerations alone.[35](35) Though there certainly are historical studies that lend credence to that idea, I find it important not to lose sight of the fact that the world would indeed be a better place if people would only make promises regarding actions that they can and, morally speaking, may do, and thus keep their promises. On the other hand, there is always danger in taking such a moral ideal to be reality, and it is certainly inappropriate to simply take this morally superlative conception of contract and posit it as a principle of law/right. The current controversy surrounding contract shows that in this regard a lot of different conflicting moral ideals may be formulated. It is not the task of a theory of law/right to take a position for or against one or more of these ideals. Its task lies precisely in drawing objective boundaries, in which it becomes possible for each person to plead their ideals, and to put them in practice, without having to deny or negate the validity of other ideals to others.

35 a.o M.Horwitz: cited. with note p.173. Also relevant, specifically relating to the role of "social" considerations, R.Derine: Grenzen van het Eigendomsrecht in de negentiende eeuw. Antwerpen 1955.

4 The Order of Law/Right

“Injustice is relatively easy to bear;
what stings is justice.”
—H.L. Mencken

LAW/RIGHT AND VIOLENCE

What the fundamental principle of law/right declares to be unlawful is physical intervention of one person in the domain of another. That is to say the violent invasion in the totality of concrete things, means, that embody the opportunities and accomplishments of another. Each person is obliged, by right/law, to take care to not produce physically external effects. There can be no equivalent obligation to not produce psychically external effects, since it is impossible to predict what others will think of what you do, and it is likely that the actions that truly no-one will object to are few indeed. The "psychic domain" of a person does not have any boundaries which may be objectively determine, and is likely to overlap to some extent, of greater or lesser importance, with the "psychic domain" of others. The physical scope of the praxeological body of a person on the other had, is objectively determinable, at least in principle. This makes it so that the

question of whether someone is using someone else's means is objectively answerable.

The protection of "psychic integrity" cannot be a coherent principle of law/right. It would lead to much theatrical display: each person would benefit from pretending that what others are doing with their own means is hurting them deeply, so as to be able to lay claim to restitution for the "injustice" visited upon them. There is little reason to doubt that if this compensation were somewhat assured (i.e. if the protection of psychic integrity were effective), then displeasure and offence would very quickly become a second nature to people, in time predisposing them towards reacting negatively to everything that happens without their permission. This leads us back again to a point where it behooves us to remember the contradictory nature of the theory of universal consensus as a criterion of law/right. If A does something that displeases B, and B demands compensation, A will undoubtedly be displeased with B demanding said compensation. That is to say: B's demand for "moral" compensation does not have the consent of all others. Does this mean B has no right to compensation? Conflicts of this nature are obviously unsolvable without some sort of authority exalted above the parties involved, some superior legislation that dictates which moral interests are worthy of protection and which are not. As previously established, this solution is inherently unsatisfactory and arbitrary since at that point all of the problems relating to legitimization and objective validity, which must be considered to be unsolvable on the grounds of moral autonomy, pose themselves.

The fact that this notion of psychic protection appears again and again in the literature on law/right is a consequence of the monopolistic organization of the administration of justice/law/right (ed: rechtspraak, jurisprudence) – an organisation which can only be lawful if it can be shown that the fundamental principle of law/right should be rejected. If we assume that in a free society*, an order of law/right, the undoubtedly very useful service of jurisprudence would be delivered in a competitive context[1], then the different (at least differently structured)

1 See the important article by G.H.Smith: “Justice and Entrepreneurship in a Free Market” Jour-nal of Libertarian Studies 3,4, 1979, 406–426, en G.H.Smith: “Justice Entrepreneurship Revisited: A Reply to Critics.” Ibid. 453–469. M.N.Rothbard: For a New Liberty. New York 1978, 215–241. Rothbard: Power and Market. Kansas City 1970, hk 1. Rothbard: “Society Without A State” in Pennock & Chapman (eds.): Nomos xix: Anarchism. New York 1978, 196–207. G. De Molinari: Les Soirées de la Rue Saint-Lazare. Paris 1849, “Onzième Soirée”, 303–332. G. De Molinari: “La production de la sécurité” Journal des économistes 1849, 277–290. F.D.Tandy: Voluntary Socialism. Denver 1896, hk 5. J.T. Sanders: “The Free Market Model vs. Government: A Reply to Nozick” Journal of Libertarian Studies 1,1,1977. J.Paul: “Nozick, Anarchism and Procedural Rights” Ibid., K.Fielding: “The Role of Personal Justice in Anarcho-Capitalism” Ibid. 2,3,1978, 239–241. Carl Person: “Justice, Inc.: A Proposal for a Profit-making Court” Juris Doctor maart 1978, 32–36. G.S. Becker & G.J.Stigler: “Law Enforcement, Malfeasance and Compensation of Enforcers” Journal of Legal Studies 3, 1974. W.M.Landes & R.A.Posner: “The Private Enforcement of Law” ibid. 4, 1975. R.A.Posner: Economic Analysis of Law. Boston 1977, hk 22. M. & L. Tannehill: The Market for Liberty. Tannehill, Box 1383, Lansing, Mich. E.A. Opitz & R.Lefevre: Must we depend upon Political Protection? The Freedom School, Colorado Springs 1963. R.E.Gaskins: “The Voluntary Society” The Standard (pamflet) 1962. B.Leoni: “Consumer Sovereignty and the Law” New Indivi-dualist Review 3,1,1963, 16–19. The administration of law/justice in a competitive context of course implies freedom of entry into all "juridical" professions. Therefore it's not so much a "privatization" of jurisprudence but rather a "publicization" of it. The existing monopoly may be called "public", but it is actually "private" and it makes jurisprudence (and everything associated with it) into a "privilege", a "private" matter of some privileged few. Legalising such a monopoly does not render it "public". Rather it gives it the opportunity to use "the arm of the law" to exclude parts of the public from engaging in a competitive activity (the only activity which would be capable of giving the public some basis for judging the efficiency of the monopoly). Cf. A.G. Curzon: “Do We Ever Really Get Out of Anarchy?” Journal of Libertarian Studies 3,2,1980,150–158.

enterprises or organizations which make these services available would have to take care not to violate people's rights. After all, since they would have no privileges, and would not be able to count on the cooperation of a legislator which defines or manipulates the "rights" of people in such a way that the actions of the courts by definition does not violate these rights. Undoubtedly such free and independent courts would find it necessary to develop a system of jurisprudence in which rules are expressed for the interpretation of facts, acts and contracts, or for the determination of damages, etc. But, as they are not above the law/right they would not have the right to alter anything about the substance of law/right. No-one would be willing to bring a case before a judge that reserves the right to deny the rights of others, that is to say for them to stipulate where the boundaries of another are, and what the nature of these boundaries is. As soon as one such organisation acquires a position of monopoly, arrests or intimidates all of its competitors and makes the establishment of alternative courts punishable this all changes. Then, the distinction between rules of procedure and interpretation on the one hand (which are at the discretion of that court, and are in fact its specific product) and the rules of substantial law/right on the other (the fundamental principle of law/right and its implications) loses its importance.

Such a position of monopoly after all implies that there is no other court that people can turn to to appeal violations

of their rights by this monopolistic court. The latter organisation (or its "client" (ed: opdrachtgever, giver of assignments), which is called the legislator) can violate the rights of others without facing punishment. That is to say they can unilaterally determine what they will recognized other's "rights" to be. As such it might for instance determine that some people (eg legislators or candidate-legislators) have certain "moral" interests which require special protections. From the position of philosophy of law/right it is of course unacceptable to consider this specific monopolistic organization as an unchanging datum. This becomes even more clear when one considers the existence of plenty of historical examples that show that things can be different.[2]

The fundamental principle of law/right makes it possible to distinguish between lawful and unlawful violence. Violence is an omni-present phenomenon in nature and in society*. The fact that the natural and physical order is characterized by scarcity is what causes this. The world consists of a near incomprehensible multitude of things, all behaving according to their own characters/kinds or natures. Each of these entities follows its own path, so to speak, but collisions or conflicts cannot be excluded. In such cases of conflict at least one of the parties involved must, wholly or partially, temporarily or permanently, make way for the other(s). The cow eats the grass, the lion eats the ox, worms and parasites weaken the lion. Even among humans violence is ever-present, both in their relationship to their natural environments, as well as in relation to each-other and each-others realizations.

Every action is a purposeful application of certain concrete means, of material things, according to some plan developed to some degree. In other words each action implies the direct or indirect manipulation or adaptation of concrete things, which must be moved, broken, compressed, tied down, etc. Each action implies the exertion of physical force or violence to some body. Every action implies physical control, both over the own organisms as well as

2 M.N.Rothbard: Conceived in Liberty. New Rochelle, N.Y., 1975–1979 (4dln). passim. B.Leoni: Freedom and the Law. Princeton 1961. T.Anderson & P.J.Hill: “An American Experiment in Anarcho-Capitalism: The Not So Wild Wild West” Journal of Libertarian Studies 3,1, 1979. 9–30 (Ook Anderson & Hill: “Property Rights as a Common Pool Resource” mimeograph, Liberty Fund Conference: The Environmental Costs of Governmental Action. 1978, for a theoretical analysis). J.R.Peden: “Property Rights in Medieval Ireland” Journal of Libertarian Studies 1,2,1977. A.S. Diamond: Primitive Law. London 1935. See also W.Kunkel: Geschiedenis van het Romeinse Recht. Utrecht–Antwerpen 1965.

usually over things in the environment. Every action is a physical intervention in the "natural way/order of things" of some object or another. In this sense one can say that every action implies violence, even though we do not usually use the word "violence" in such a broad sense.

The claim that each person has the right to do or not with theirs as they see fit means that each person has the right to physically intervene in the way/state of things of those things that constitute their domain. That is to say they have the right to use violence against the different elements of their praxeological body, to the ends of forcing said elements to do what they want them to do. Each person is master of their means, but this does not mean that each person has mastered their means: the world consists largely of things which are not directly subjected to human will, and which people must "tame" and control by means of physical force, if they want to be able to use these things as means.

Of course the fundamental principle of law/right also states that no-one has the right to physically intervene in the domain of any other, without permission of the other. Every illicit, unauthorized physical interference or boundary-crossing act is unlawful. Boundary-crossing violence conflicts with law/right.

The distinction between lawful and unlawful violence is thus not at all subjective. It follows from the objective boundaries between people as extensional entities in the praxeological space. Unlawful violence may of course take various forms. The most obvious paradigm is: A takes M, where M is a means of B, and B has not given A permission to take M. "Take" in this context can be replaced with use, damage, destroy, soil, etc, and "A" by: something of A, belonging to A.

A special technique of "taking" (in the generic sense of the word) is one that makes use of threats: A forces B to hand over M. It is not the verbal expression of a threat per se which is considered to be unlawful, as this in and of itself cannot be considered a boundary-crossing action. The unlawfulness lies in the fact that A is taking without B's permission. One who forces another, under threat of some unlawful action, to use or not use their means in a certain way, or to hand them over

to some person chosen by the threat-maker, is just as quilty of theft as when the same effect would be achieved by direct physical intervention, even though they themselves are not touching the means of the other. We are then dealing with unlawful compulsion: A threatens to take an unlawful action if the other does not do as the threatening party demands. There is compulsion, but not unlawful compulsion, when one threatens to take a lawful action, which is to say an action the threatening party has a right to take, but which would be very unpleasant or disadvantageous to their opponent.

It speaks for itself that, from a moral perspective, the fact that someone is the object of unlawful compulsion does not necessarily divorce them of all moral responsibility for what they do when obeying their assailant. There are cases in which one, morally speaking, ought to refuse to obey the other, and to bear the consequences of the execution of the threat, This is a matter of self-respect, for example when what is demanded is an unlawful or immoral act. There are also cases where the threat is so unbelievable, or so minor, the one can reasonably assume that the threatened party will pay it no heed. A threat being unbelievable or minor, or the fact that what is demanded in exchange for the not executing of the threat is something the victim ought to do of their own accord, all do not detract in any way from the unlawful nature of the exerted compulsion/force.

The cowardice of the threatened party does not decrease the unlawful nature of the act the other threatens to take in any degree. If the threatened party still obeys, that is to say if they prefer to do what their assailant demands so as the avoid the injustice said assailant threatens to do to them, then this is obviously a case of unlawful taking by the assailant. The fact that the other has a choice between obeying and avoiding execution of the threat, or not obeying and suffering the threat's execution does not mean they consent to concede to their assailant. Their assailant merely leaves them the choice on what they will lose: the things he must relinquish or use when obeying, or the things they must relinquish when they do not obey and the other executes their threat. In actuality, what the assailant is saying is: "I will take this, or that. Now, you choose what you would prefer to keep.". In other words they create a "Heads: I win; tails: you lose"-situation.

It is essentially important to realize that, though the exertion of unlawful compulsion leaves the victim a choice, this choice is not between giving and not giving, but rather between taking this or thus. Under these circumstances making a choice is not making a free choice: there is no self-determination to be spoken of here. The fundamental principle of law/right does not support calling this choice "free". This is in contrast to the doctrine of Hobbes, that those who, under threat, bind themselves to the doing of a task also have the duty to fulfil their obligations, on grounds of the fact that they themselves are making a choice, making the obligation "voluntary". By right the threatened party is acting as an involuntary agent to the threatening party. The latter is the author of the actions of the former. The fact that the task assigned to the agent leaves said agent with some wiggle-room does not change a thing about the nature of the relationship between the two.

It is clear: that which is acquired through the exertion of unlawful compulsion has been acquired unlawfully, even if the threat was so minor that most people (or even all people but one: the threatened party) would have simply ignored it. Determination of the unlawful nature of an action is an all-or-nothing affair. Only the facts and their qualifications in light of the fundamental principle of law/right bear any relevance. Matters are of course different if we want to form a moral judgment of the threatened party, but that is not the aim here. The simple fact that the threatened party responds to the threat is enough to show that an unlawful benefit is attained by the threatening party, and that the latter is bound to restitution or compensation, and that they are forcing the threatened party to act as their agent. The right to self-determination of each person after all implies that each person may judge for themselves on the relative weight and value of available alternative – the fact that another would judge otherwise is totally irrelevant.

The mirror image of illicit compulsion is lawful compulsion. Making a threat of taking a lawful action is also a way of pressuring another person, when the action which is threatened is experienced as unpleasant or disadvantageous by the threatened party. (Some even speak of force/compulsion when a person offers something in exchange for certain actions which is considered to be so attractive, that the other party "cannot" refuse. Here too we can make a distinction between lawful and unlawful compulsion. A promises B that he will kill B's gold uncle, if B grants them a loan; contrast: C promises to appoint B as sole heir to C's immeasurable fortune, if B does not grant a loan

to A).

Threatening damages on another is putting pressure on them, but to damage another does not always imply a physical intervention in their domain. Lawful compulsion plays an important part in society* – in the raising of children, maintaining group cohesion, in all processes of social control.

The fact that lawful compulsion can sometimes be more reprehensible or compelling than illicit compulsion from a moral perspective, does not detract from the lawful or unlawful nature of these things respectively. The lawful or unlawful nature of compulsion has nothing to do with their degree of "reprehensibleness", nor with the moral judgment of either what is threatened or what is demanded. The benefit a person derives from lawful compulsion is therefore lawfully acquired (unless of course the deed the other is made to do is an illicit action).

Some cases of lawful compulsion tend to offend. Cases involving a so-called "bad Samaritan"[3], in which someone makes use of the unfortunate plight of another to have the latter pay up the nose for help the former is offering, and is threatening to withhold if the demanded price is not paid. Since these cases often involve a promise to pay, we may at this point remember the short exposition on contract from the previous chapter. In principle the victim must pay, since the unmerciful saviour delivers first (it is, after all, possible for the sum demanded, which may seem to be extortionate to us, to be but a pittance to the victim). In most cases the bad Samaritan himself will have to admit that the price demanded is truly disproportionate, and that it is only the imminent danger the victim was is (and the absence of another saviour) that made the victim promise to pay the price. In such a case it is easy to argue that there was no actual contract, and that the saviour took the risk upon themselves willingly and knowingly (the risk that the other would not keep a promise made). True problems only arise when the judgments of the price strongly diverge in the valuations of the saviour and saved. That is to say, when the saviour believes the price they are demanding to be very reasonable, and the victim finds it to be unreasonable. A true

3 See F.van Dun: “Contracts, Necessity and Justice” in F.van Dun (ed.): The Law between Morality and Politics. in Philosophica 23,1, 1979, 51–77. E.Mack: “Bad Samaritanism and the Causation of Harm” Philosophy and Public Affairs 9,3,1980, 230–259.

merciless/bad Samaritan, in an order of law/right, would stand little chance of having their claims acknowledged by a court of law, as no court would want to jeopardize its reputation by being complicit in such despicable practices. Presumably, a court would point out to the unmerciful saviour that they could have easily known that the victim was in a position in which their self-respect would oblige them to promise to pay the price, but not keep that promise. In other words, it would point out that the contract the saviour is appealing to exists only in their own mind, and even there only as a self-deception.

There are however "unmerciful Samaritan"-cases in which the paying of the price precedes the salvation. In those cases, there is usually a valid contract so that the saved party does not have the right to demand the reinstatement of that price. By paying the price, they place the other under the obligation to save them. No matter how reprehensible the behaviour of the bad Samaritan may be or seem (but what if the victim is some hated dictator or well-known bad Samaritan themselves?), this does not make the compulsion exerted by them lose its lawful character. There is no question here of a situation in which one threatens to take something if the other does not "give" them something. Quite on the contrary: one is merely threatening to not give another a thing, and that is fully within their rights.[4] Calling such cases "unlawful" means as much as claiming that people have the right to be helped by others at a price they themselves determine. In other words, the same as claiming that the plight a person finds themselves in is sufficient grounds to give them rights of property over others, which is to say to transform the other from a morally autonomous person into the means of one. This is a mystical position that is wholly incompatible with the fundamental principle of law/right.

As an aside, I'd like to remark that "bad Samaritans"-cases essentially relate to isolated two-party-situations.[5] As soon as there are multiple potential "saviours" and/or multiple "victims"

4 It is this right that some people seem to call on when they, although indignant about the attitude of the "saviour", still do not volunteer to carry a part or the whole of the burden of the "victim", to alleviate the latter's plight.

5 Cf. F.van Dun: op.cit. bij p.192; E. Boehm-Bawerk: Macht oder Oekonomisches Gesetz. Wien 1914· Ch. Fried: Contract as Promise. Cited with 200. M.N.Rothbard: Power and Market. gecit. bij 215, p.228e.v. D.Zimmerman: “Coercive Wage Offers” Philosophy and Public Affairs 10,2, 1981, 121– 145 also relevant R.Hamowy: “Hayek’s Concept of Freedom: A Critique” New Individualist Review 1,1, 1961, 28–31. M.N.Rothbard: “F.A.Hayek and the Concept of Coercion” Ordo 31, 1980, 43–50

we are dealing with a completely different situation. In a certain type of literature, an attempt is made to paint nearly all contracts between parties in different material positions as examples of "unmerciful Samaritans" (e.g labour-contracts). Such an approach loses sight of the fact that the distinguishing characteristic of the "bad Samaritan"-situation consists precisely in the fact that the victim lacks the opportunity (due to the urgent nature of their plight) to play one saviour against another, and in so doing reducing the price to the one asked by the most merciful of potential saviours.

Another form of unlawful violence, besides unlawful compulsion and open boundary-crossing violence, is fraud. In the case of fraud, just as in the case of unlawful compulsion, we are dealing with a situation in which one person makes another act as their agent. Under the fundamental principle of law/right, each person has the right to allow others to make use of their means, as well as the right to agree to use his own means in a way which conforms to the desires of others, and all of this under terms they themselves determine. A common method of making yourself the master of the means of another, is to promise to abide by the terms and conditions they set, and then not to do so (by doing nothing at all, or by doing something else than what the other asked). As in the case of unlawful compulsion, in the case of fraud too the decisive element is that someone is making use of the means of another without their permission: the other agreed to a certain trade, but not the trade the fraudster actually executed in reality. Additionally, in the case of fraud the victim is also acting as the agent of the fraudster, such that it is unnecessary for the latter to personally manipulate the means of the other.

AGGRESSION AND PUNISHMENT

Lawful compulsion means using the potential execution of a lawful act as a threat. That is to say: to threaten to use one's own means in a certain, nonboundary-crossing manner which is detrimental or unpleasant to another -never to threaten to make one-self master the means of another. This means that the concept of "punitive right/law" (ed:strafrecht, "straf" punishment) – e.g. the right to destroy, to damage, to incarcerate, to fine, etc.-can only

exist in relation to one's own means. After all, all the punitive measures mentioned imply the exercise of direct physical control over certain things. As an example: a rancher has the right to punish or discipline their animals when they are disobedient.

Obviously the right to punish people (in a way that implies such direct physical control) can only belong to the "master" in relation to their "slaves", if and only if slavery is a lawful institution. We've seen that this condition is not met: people are sovereign subjects of law/right by nature, and contracts of voluntary slavery do not create any rights for the "master" – they only exist for as long as the consent of the "slave" lasts. This means though, that aforementioned punitive actions can only be taken against another when that person has lost their right to self-determination, by committing aggression. The victim of aggression has the right to expel their attacker, and this by any means. This right is no more than a direct application of the right of each person to dispose over their own means freely, and it remains extant for as long as the aggression lasts. Which is to say that as long as the aggressor is not willing to retreat completely from the domain of the other (which implies that they must also be willing to compensate any damages they may have caused).

To properly understand the concept of "aggression" one must understand that an unlawful, and thus boundary-crossing, action brings about a mixing/blending of two domains: one person "takes" a means belonging to another without the other's permission. This creates an unlawful situation, which the "taker" must undo: they must restitute. Aggression is characterized by the refusal to withdraw from the domain of the other, by the refusal to restitute. It is irrelevant whether or not the initial violation of boundaries was deliberate or not. Whosoever unintentionally performs an unlawful action and then refuses to withdraw (e.g.: by refusing to compensate for damages) makes themselves into an aggressor. The same applies to a debtor that refuses to pay down their debt (or refuses to put their future income at the disposal of their creditors, if they were not ex ante made aware of this attitude). Whosoever deliberately performs an unlawful action is of course an aggressor, but if they show remorse at a later time, and show themselves willing to make restitution they immediately cease to be an aggressor.

The unlawful action is characterized by the fact that one person

"takes" from another, while this other of course retains the right to determination over that which is "taken".

"Taking" is not a lawfully valid way of obtaining property. But those who are in a state of aggression, which is to say they those who refuse to withdraw from the domain of another, mix themselves with, or cling to the means of another, making it impossible for the other to dispose over their means without also affecting the aggressor. As such we can say that since the victim has the right to dispose over their means, they also have the right to dispose over the aggressor, and to force the latter into restitution in any way. This also applies to a murderer: the heirs of the murdered have the right to dispose over the murderer as long as the latter is not willing to offer restitution[6] (compensation/damages), and if the murdered has no heirs the aggressor simply becomes a res nullius (an outlaw), as do all the possessions of the murdered. As far as I can determine, this is the only circumstance in which, under the fundamental principle of law/right, a person can lose their right to self-determination and not be able to regain it by declaring themselves to be willing to cease their aggression. Such a murderer would be at the mercy of any who seize them (roughly the way a criminal at this time is at the mercy of the legislator and the judges of the state in which they commit a crime). As a sovereign subject of law/right, they died when their victim did.

Leaving this exception aside, it can be stated that the "right to punitive action" (ed: strafrecht, "punitive law") is limited to ending a situation of aggression, and only exists for as long as the aggression does. It goes without saying that those who assume that not people themselves, but some other entities, such as for example states, are the sovereign subjects of law/right have a very different idea of "right to punitive action". To people of this persuasion states have the right to manage their means as they see fit, they have the right to determine what will be considered a "crime" in their legislation (nullum crimen sine lege), and what they will consider to be an appropriate "sanction" (nulla poena sine lege). It is not

6 R.E.Barnett & J.Hagel iii (eds.): Assessing the Criminal: Restitution, Retribution and the Legal Process. Cambridge, Mass. 1977 (o.a. “Introduction”, en R.Barnet: Restitution: A New Paradigm of Criminal Justice”, 349–383, B. Galaway: “Restitution as an Integrative Punishment”,331–348); R.E.Barnett: “The Justice of Restitution” American Journal of Jurisprudence 25, 1980, 117–132. S.Schafer: Compensation and Restitution to Victims of Crime. Montclair, N.J. 1970 .J. Hudson & B.Galaway: Restitution in Criminal Justice. Lexington, Mass. 1977 and R.E.Laster: “Criminal Restitution: A Survey of its Past History and an Analysis of its Present Usefulness” University of Richmond Law Review, 5, 1970, 71–80.

probable that in a system functioning on that basis the main aim of criminal law (ed: strafrecht, right to punitive action) will be restitution of the victim. On the contrary: history shows a tendency to regard the state, the so called "public order", as the victim, leaving the factual victim to their fate. Usually the victim, as a taxpayer, even gets to contribute to the maintenance and housing of their aggressor, while not seeing a cent of any fines the latter must pay, and which reduce the latter's ability to offer restitution to the factual victim. Furthermore, this emphasis of crime as a relationship between criminal and the state makes the victim seem to disappear into the background to such an extent that it seems almost self-evident that humanitarian benefactors will start to concern themselves with the fate of criminals more than with that of the victims. A moral absurdity which can actually be driven so far that "society", or "the system", which is to say everyone but the perpetrator, is considered to be responsible for the crime. From this follow demands that everyone, including the factual victim, make an effort to "rehabilitate" the criminal, to "cure" them, to "better" them, etc.

Yet another consequence of said theory is that the distinction between aggression and violation of legislation is blurred. This allows for just about any activity to be "criminalized". Think of, for instance the myriad of victimless crimes. (homosexuality, the use of certain medicines or drugs, publication of certain books or opinions, saving money abroad, building in certain zones or with or without certain materials, membership in certain associations, organising certain recreational activities, radio-broadcasts, etc).[7]

Under the fundamental principle of law/right no man has the right to "invent" new types of crimes. A crime is a crime, not what is commonly called a crime. Obviously people have the right to tolerate or forgive certain aggressions against their person or means, but the principle of objectivity clearly excludes the possibility for someone's negative emotions regarding a certain action to be sufficient grounds for qualifying it as a crime. This also applies to the theory of

7 For an extensive case-study, refer to: R.Hamowy: “Preventive Medicine and the Criminalisation of Sexual Immorality in 19th century America” in Barnett & Hagel iii: op.cit bij p.196. Also R.A.Childs: “Crime in the Cities–The Drug Connection” The Libertarian Review, August 1981, 28–37.

state-sovereignty, insofar as it concerns relations between states. Even a rational theory of state-sovereignty only aims at affirming the protection of the physical integrity of the state.

It is evident that the fundamental principle of law/right offers people a much greater degree of legal certainty (ed:"rechtszekerheid", certainty of right/justice) than the theory of state-sovereignty, with its formalistic legalism from the formulas nullum crimen sine lege and nulla poena sine lege. The fundamental principle of law/right

1) determines what aggression is

2) leaves no room for arbitrariness or inconstancy of legislation (that

is to say of the temporary rules that have control over the state), and

3) allows each aggressor to avoid punishment by ending their aggression, which is to say by offering certain guarantees to the victim, their representatives or successors, that damages done will be wholly compensated (the extent of the damages to be determined by negotiation or mediation – after all, the victim loses the right to determination over the aggressor as soon as the aggression ends). The "right to punitive action" in light of the fundamental principle of law/right is no more than a "big stick incentive" (ed: "stok achter de deur" untranslatable saying, stick behind the door, it refers not so much to a threat, more like a just-in-case kind of armed peace type deal, like the baseball bat you might keep next to your bed) to the ends of acquiring compensation, not a right or means to make another suffer for what they have done. In actual fact it is the right to self-defence.

The only exception to this rule is murder or manslaughter, and even then only when the victim has not taken the precaution of appointing a representative or successor to their rights after their demise. The aggressor that kills such a victim, kills the person in whose domain they have trespassed, and in so doing loses the chance to regain their right to self-determination by offering restitution. Any who later seizes them has the right to decide what will happen to them, whether they deserve to be emancipated or not, and if so under which condition(s). They may even condemn the murderer to death, but they will have to be one hundred percent certain of the guilt of the other party. If an innocent is punished, the punisher end up in the same boat as the aggressor. Under the fundamental principle of law/right no person has the right to commit "juridical mistakes" undisturbed and unpunished, not even those who render juridical services. The order of law/right is a society* without privileges.

This last point probably explains why many people are so uncomprehending of the fundamental principle of law/right. The whole idea of a society* without privileges, without privileged positions or classes, seems absurd to them. Such is the extent to which they have gotten used to seeing society* as the domain of a master (though a many-headed master it may be). To them society* is an inert mass which must be organized and governed from without, and which therefore has an absolute need for a privileged element, for a network of positions of command that maintain the cohesion of that society*.

The cessation of aggression finds expression in the willingness of the aggressor to withdraw and reimburse damages. Previously I have pointed out that under the fundamental principle of law/right the only valid theory of liability is an objectivist one: any activity that violates boundaries is unlawful, even is there is no subjective guilt or negligence.[8] The passive party, the victim, has the right to tolerate or forgive non-guilty, non-negligent exceedance of their boundaries, but they do not have the duty of doing so. Of course the principle "you break it, you buy it" does not mean that in every concrete case it is sufficient to show that A was causally active in the breaking of B's thing, to arrive at the conclusion that A must compensate B. In every concrete case the principle must be applied to the entire context of the interaction, and this means that such evidence is merely a prima facie evidence for the establishment of A's liability. The essence of the objectivist approach to liability is that the responsibility for the total damages must be assigned, that there are no subjectivist creases in which more or less important portions of liability may vanish. In didactic terms:

If 100 units of damage are to be answered for, then all 100 units must be answered for. For example, 60 on account of the defendant, 20 on account of the claimant and 20 on account of a third party. This has to

8 Cf. R.A.Epstein: A Theory of Strict Liability. Cato Institute, San Francisco 1980. M.N.Rothbard: “Law, Property Rights and Air Pollution”, 55–100, en P.Lewin: “Pollution Externalities: Social Cost and Strict Liability”, 205–230, beide in Cato Journal, 2,1,1982. M.Rizzo: “Law Amid Flux: The Economics of Negligence and Strict Liability in Tort” Journal of Legal Studies 9, 1980, 291–318. M.Rizzo: “Uncertainty, Subjectivity and the Economic Analysis of Law” in Rizzo (ed.): Time, Uncertainty and Disequilibrium. Lexington, Mass. 1979. Regarding the dissolution of the distinction between unlawful/illicit action in the narrow sense, and a crime, refer to contra: R.E.Epstein: “Crime and Tort: Old Wine in Old Bottles” in Barnett & Hagel iii: op.cit. bij p.196, en R.Pilon: “Criminal Remedies: Restitution, Punishment, or Both?”; pro: R.E.Barnett: “The Justice of Restitution” American Journal of Jurisprudence 25, 1980, 117–132.

happen by means of an extensive causal analysis of the entire situation. This analysis must then be supplemented by judgments of relevance, since the causal analysis will never precisely determine the exact weight of a certain cause in a complex situation. Such judgments are always more or less subjective, which implies that the establishing of liability must always occur in an oppositional debate, a dialogue or negotiation – and possibly be brought before a mediator.

The task of the philosopher of law/right is not to pass judgment on the many different "theories of causality" which were, are, and will continue to be, developed in connection to this matter. At most their logical coherence may be investigated, but not their "truthfulness" since there is no procedure which would allow determination in all cases of which of two conflicting theories of causality ought to be accepted.

Neither can anything be stated in abstracto about the quantity of the compensation owed, or on the way this ought to be computed (and of course nothing about the measure of punishment: how much of which punishment someone "deserves" to get). These quantitative matters are not determinable with mathematical certainty, not even approximately. A theory of law/right which would claim to be able to provide this cannot be taken seriously. One person will, with honour and in good conscience answer this, another thus. The only question which can be answered is: who has the right to decide? The fundamental principle of law/right answers: the parties involved, in mutual consultation, either in direct negotiations or with mediation by a third party. The quantitative determination of the "measure of punishment" (in the case of an "outlaw") is the right of the one that seizes them.

Judgments that decide over relevance, compensation or punishment are unavoidably relative in relation to a certain moral code, as such they are dependent on historical, cultural and personal circumstances. In any society conventions are bound to arise which many will experience as "proper", but complete unanimity is not to be expected. Even in states where the administration of justice is of a monopolist sort, where much time and energy is spent trying to make "the" administration of justice uniform across the many courts that are part of the monopoly, often remarkable differences persist, as the so-called legal realists and like-minded researchers/investigators have shows.

Though even in the objectivist conception of liability, it remains a matter

of judgment rather than measurement, at least it is free from the necessity to construe additional theories of guilt, fault, negligence, etc. that also all lack an objective, universally valid foundation. A subjectivist approach of liability does not require one hundred percent of damages to be assigned, only those units of damage (to maintain didactic terminology) which are the product of guilt or negligence have to be accounted for. I've already pointed out that the application of such a theory is inherently unjust, since it moves the risk associated with a means from the owner to the non-owner, thus creating the opportunity to use the means of another without permission – which is in violation of the fundamental principle of law/right as it has been derived above.

FINANCIAL DAMAGES

We've seen in the above that inflicting "psychic" or "moral" damages is not unlawful per se, and that it is not even possible to state that it is always immoral to inflict such damages. This datum additionally implies that inflicting purely "financial" damage is not unlawful. By financial damage, in this context I mean the loss of value in exchange. Purely financial damage is damage that consists only of loss of value in exchange, not from any physical damage or manipulation of the means in question. Each person has the right to dispose over their means; no person has the right to the preservation of the value of their means as they exist at a certain time. This may seem evident to some, but it is important to realize that those who claim that the inflicting of financial damages is unlawful per se, are in fact ignoring the most fundamental and axiomatic right of man: the right to judge, value and appreciate for yourself.

This matter touches the core of so many so-called economic problems and controversies that it is probably worthwhile to dwell upon it. Properly understanding law/right requires the realization that any non-consensual physical intervention in the domain of another is unlawful, even if it does not cause financial damages. Conversely it is possible to cause financial damage to someone without physically affecting their mean, which is not unlawful. Someone that uses the means of another without permission, without

damaging it, is taking an unlawful action. For example: a man lets his dog run loose in a forest belonging to another. They could have asked for permission, and possibly reached an agreement where he agreed to compensate the owner for the use he is making of their means. If he does not seek this permission, he runs the risk of ex post facto having to pay a price that also reflects the aggravation of the owner for being forced into an agreement they would not have voluntarily committed to. The fact that the value of the forest, after the dog has left, has not decreased does not change a thing about the situation. Nobody is obliged to subsidize dog-owners, not even in natura.

The question of financial damages may be best approached by staring from a situation in which three parties are involved. A does something, which prompts B to change their plans in a way that is financially detrimental to C. Say for instance this concerns a racially homogenous neighbourhood in a multi-racial society*. When at some point a person of colour buys a house and moves into this neighbourhood with his family, the white residents note that the selling prices of their houses has dropped. This decrease is the consequence of the fact that many white potential buyers, and also potential buyers of colour, are less interested in a house in a "mixed" or "integrated" neighbourhood, making the demand for houses in that neighbourhood drop. It is quite possible to state that the person of colour that buys the house causes financial damages to the residents. But one could equally claim that these damages were caused by the previous (white) owner, who sold his house to a person of colour. Or even that it is the potential buyers, for considering the racial character of the neighbourhood in their valuations and judgments.

A different example: an entrepreneur brings a new product to market. The mass of consumers appreciate this to such an extent that they start limiting the purchases from other producers in order to reorient their purchasing-power to the new product. This reorientation of the flow of spending will hit some established producers hard: their income will drop, or the capital-value of the factors of production they posses decreases. The new producer – or the mass of consumers – caused financial damage to the established producers.

Such examples may be multiplied ad infinitum.

Financial external effects are among the most common and unavoidable in a society*. It is quite possible for the number of parties involved to be different than three. A group of musicians are accompanying a popular singer. When the latter ends his career (whether for health related reasons or because he's had enough), or switches to another genre (and a different accompanying band), the musicians will probably lose an important part of their income, as they were only booked as a band for the singer. An entrepreneur establishes a factory, creates positions for work, and attracts people to do this work by offering the people in the area higher pay than they can get elsewhere. When the factory closes however, they will have to look for other work, probably for lesser pay (or with less benefits). A divorce may mean a serious financial step backwards for one of the spouses, etc.

Obviously there aren't just negative external effects, positive ones occur as well, and often in relation to the same actions that caused the former. Establishing a factory in a certain area may make the income of labourers in that area increase, but it also increases the production-costs for already extant firms. Sometimes the same person may experience both a positive and a negative effect from the same action of another. For example, the building of a supermarket may increase the sale-value of the habitation of a shopkeeper living in that same neighbourhood, while decreasing the sale-value of his business in that same neighbourhood. Positive financial effects tend to pose little in the way of problems, people hardly seem to object to them. Negative external effects of a financial nature on the other hand are all the more controversial. Resisting these is the most visible of motives for the actions of various pressure groups upon the modern state, and for the legislation which so often results from their intervention. Through various policies, various people and groups attempt to protect their incomes or the capital-valuation of their means, which is to say the value in exchange of their means and the services these means render, from (downwards) fluctuations. The sorts of things often referred to as social-economic policy, are often no more than this. If this is the case however, then what we are dealing with here is tyranny, in the sense of Spinoza's classical definition as the attempt to control that which cannot be controlled. Fluctuations in exchange-value are the effect of the fact that people judge (though they can of course also result from physical intervention into the domain of another), and the freedom to judge is a metaphysical fact, which is outside of the terrain of action

of the legislator. It is impossible to know and control what other people think (if it were, such "mind control" would merely mean that certain people disappear as independent moral subjects. even though their body continues to exist and move, like a zombie, that is to say as a part or annex of the body of the mind controller).

No person owns the exchange-value of their means and no person can. The exchange-value of a thing is after all not a property of the means itself. The essence of value is valuation. People value things for the goals they hope to achieve with the help of said things. This valuation/appreciation explains why they "demand" things, that is to say why they are willing to offer other things, good or services, in exchange for the use of means which the value more than the ones they are offering. They hope to be able to realize more important or urgent goals than they could achieve with the means currently at their disposal. As previously stated: exchange is a method to alter the composition of one's own estate or praxeological body.

It's easily conceivable for a person to "demand" a certain means, not so much for the intrinsic properties of that means itself, which is to say without accounting for the characteristics of the environment in which it is thought to be applicable, but precisely because, in the given circumstances, control over the means in question is incredibly valuable to said person. In such a case, a change in the general situation, of the environment can also change their interest for the thing in question, and thus also their willingness to offer a certain sum in order to gain control over said means. Example: A thinks B is about to take a certain action X, and that if B does so, A will be able to achieve one of his highly valued goals if they were able to dispose over a means M, belonging to C. A's expectations regarding B's actions bring A to value M greatly (causing M's value to increase). If it turns out that B is not actually going to do X, A will lose all interest in M (causing M's value to decrease once more). The value of all means is constantly in flux, and this flux is caused by the fact that people are continuously engaged in setting goals, valuating means in light of changing goals, and of changing circumstances.

Those who would claim that inflicting financial damages is unlawful per se, would claim that people have a right to the exchange-value of their means, that they own said exchange-value. Thus, implicitly they claim that people have the right to determine how others must value the things in their environment. That is to say, that they have the right to dispose over the (cap)abilities of judgment of others. This is impossible, and any attempt to exercise this "right" is tyranny. Beside, it's clear that there is no such thing as "the" exchange-value of a means. Why would you claim C to have the right to the temporary increase in value of M, and that injustice is done to C if that value starts to decrease again? Yet still, this is what is claimed in the economic sphere with the concept of "acquired rights". Is the fact that the value of M is higher at some time t then at some other time t', evidence that at t' C is subject to injustice? Why would you not claim D, a potential buyer, to be subject to injustice at time t, as they have to offer more at that time than at t'? In an legislative/legal order both C and D have the opportunity, through influencing the legislator, to have their financial interests declared to be a "right". The issue will depend on which of them has the most influence (or: which of them is the legislator at that time).

Offering someone financial certainty/security by making them "owner" of a certain exchange-value of their means requires making that person "owner" of other people. Which people? Here, there are many options, as we've noted earlier. Let us return to the example of the racially homogeneous neighbourhood. We can imagine that some residents (a majority or a minority) have the "right" to use violence in order to force other residents to not sell their homes to people of colour, but also that they have the "right" to prevent people of colour from buying a house in said neighbourhood. We can just as easily imagine that they have the "right" to tax other potential buyers (those that would withdraw their demand is they knew the area was no longer homogeneously white), and to use those taxes to, through some organisation ("public governance"), maintain the exchange-value of their houses at a level they decide on (which means: they are "buying" their own houses, with other people's money, or they are forcing others to buy their houses at prices they themselves set, which is the same thing). Which method they will use cannot be determined a priori, this would depend on the specific balance of power-relations. As long as they

are acting in their own name, people are likely to easily recognize such actions as the practices of a gangster, and as such they will have a hard time executing their intentions. However, most societies* have to contend with an organisation which legalizes such injustices, the state/government, which is engaged precisely in organizing coalitions willing to support, or at least tolerate, such measures.

MORAL DAMAGES

Just as people do not have a right to the conservation of a certain (historically high) financial value of their means, in the same way they do not have a right to the conservation of their reputation, and for the same reason.[9] A person's reputation is after all nothing but the resulting total of opinions others hold of them, and no person has the right to dispose over the abilities of judgment of another.

The legal protection against slander is a typical symptom of a hierarchical status-society, in which enforcement of the existing order is largely dependent on the ability of the higher classes or castes to safeguard their prestige and claims of superiority – with violence if need be. Said violence is formalized and legalized in legislation and adjudication to combat slander. Such legislation is rather hard to square with the right to freedom of expression, which some legislations recognize to some extent.

The notion that a person could have a right to their (good) reputation is in fact just as contradictory as the idea that people have a right to the conservation of the financial value of their means (which means, to the "good reputation" of their means). If A tells B things which compromise the reputation of C in the eyes of B, then it is up to B to judge whose opinion will be decisive to B: that of A or of C. Should B consider A to be a credible source of information, and C claims that A is slandering him towards B, should we then say that A has the right to the conservation of his reputation of "well-informed source"? B is faced with a dilemma: either to believe A, who he

9 Spencer: Social Statics. New York 1970, 128–130, argues that people have a “right to property in character” especially on grounds of the observation that “those who hesitate to admit that a good name is property should remember that it really has a money value”. Spencer himself however, admits that “the propriety of so classifying (this right) is not provable with logical precision”.

considers to be credible, and change his positive opinion on C, or to disbelieve A, which means changing his opinion on A, and to retain his previously established positive opinion of C. It is up to B to solve this dilemma, not C, not A. B might ask C or A, to prove or refute some things, or B may launch their own investigation. It speaks for itself that if B finds A to not be very credible they will experience A's allegations towards C not so much as statements that compromise C's good reputation (in the eyes of B), but rather as confirmations of A's lack of credibility and of A's bad character. If B, on the other hand, already thought that C was a bastard, B will not still not experience A's statements as counter-evidence to C's non-existent good reputation.

Of course C himself can act against A's slander, for instance by publicizing a denial or even refutations/counter-evidence, or by publicly inviting A to help organize an investigative committee, the costs of which will be borne by either A or C depending on its findings. There is no reason to believe it necessary to invent fictional and contradictory "rights" to the end of fighting slander. Certainly slander is not proof that the fundamental principle of law/ right is incapable of generating an adequate order of law/right. As soon as you realize that a good reputation is not something anyone can hold as property, but rather consists of the opinions of others, it becomes clear how implausible it is to only speak of the slandered and the slanderer, and not of the many third parties whose opinions are the actual constitutive factors of a person's reputation. In a legalistic order it is of course possible to simply posit that people have the "right" to not be the subject of slander. However, the selectivity with which this right necessarily must be protected, and the difficulties associated with it this concept, show that this "right" can only have a legalistic foundation.

In line with this we should also note that the fundamental principle of law/right also does not allow for an interpretation which designates blackmail as inherently unlawful. Everyone has the right to use information gained lawfully in any way they see fit. This includes making the offer not to make said information public. If a journalist has the right to sell lawfully acquired information to a news-outlet, and thus to the wider public, they also have the right to sell it to one person, including the person who

has the interest in not making it public. If the information was acquired unlawfully, matters are of course different.

It should be quite clear that the blackmailer is a far less "dangerous" individual than the gossip, as the latter does not even offer their victim the opportunity to prevent the spread of unpleasant information. What reason is there to call the blackmailer a criminal, for preferring money or a service in kind over the dubious "social success" preferred by the gossip, while the gossip or writer of rags is considered an ordinary, though not very high-quality, civilian? From the perspective of law/right the only matter of relevance is whether the information was acquired lawfully or not.

It is rather typical that the contemporary discussion concerning the protection of "privacy" hardly ever touches upon precisely this question. All attention seems to be drawn to which data are and which are not to be considered to be part of which public domain, a question which is totally irrelevant from the perspective of law/right. The whole concept of "privacy" clearly shows how even the most rudimentary idea of law/right has been lost. One could believe that a strict application of the rules of classical private law, which is a positivistic-judiciary shadow of the fundamental principle of law/right, with in particular the rules of copyright, would suffice to adequately protect privacy. That belief is naive, however. The entire discussion surrounding the protection of privacy gives primacy to the theory of state-sovereignty. This theory axiomatically assumes that the state has the right, not just to collect information over its citizens, with violence if need be, but also to determine what these citizens are allowed to do with information they have lawfully acquired. This is taken to such lengths that many deem it necessary, in the name of democracy, to plead for a special statute, which is to say privileges, for journalists, so that they at least can have enough space to function properly.

The acceptance the theory of state-sovereignty, in which the citizen is principally considered as part of the public domain, is the cause of the fact that a specific problem of protection of privacy exists. Under the fundamental principle of law/right this problem is merely an economic problem. This in the sense that each person is free to decide for themselves how many means they will devote to preventing the undesired spread of information about them. But especially in the totalitarian

states of the twentieth century, in which government power is directly dependent on its ability to monopolize information about its citizens (for reasons of general policy or of a military, fiscal or regulatory nature), protection of privacy is a political problem of the first order. It makes all the difference between totalitarianism "with a human face/humane visage" and a fascist or stalinist totalitarianism without a mask.

The fact that the subject of slander or blackmail is not, or at least not necessarily, the victim of an unlawful action or aggression, of course does not mean that we should be blind to the suffering inflicted upon them. This suffering is real, even if we (or some of us) conclude that they, all things considered, are getting exactly what they deserve. I cannot stress enough that it is not the task of law/right to be some sort of violently-enforceable moral code, but rather to be a delineation of the boundaries in which each person can live according to their own moral code. The goal of law/right is justice*, (orig: Het doel van het recht is de gerechtigheid). Not the moral virtue of justice (or: rechtvaardigheid), which consists of judging and treating everyone, yourself and others, according to their true value: Jusitia est animi affectio suum cuique tribuens. This virtue can only be attained by those who have managed to discover their personal objective moral truth, and have mustered the courage to live by it. Which is to say, it is only achievable for a person of integrity.

This integrity implies an explicit recognition of mine and thine, of right/law. The person of integrity gives to each that which belongs to them on the grounds of his own personal system of values, but he knows that they may not give that which they do not have the right to give. There can be no justice without right/law: it is right/law which makes justice possible. Those who would assault the fundamental principle of law/right on the grounds of so-called judgments of justice know not of what they speak. Or worse: they would sacrifice justice for pity, independence for unity, reason for blind faith, self-respect for self-sacrifice, happiness/joy for duty. Then, when they are forced to conclude how unjust, slavish, irrational, poor and miserable people are they can do naught but call out all the louder. For more pity, more solidarity, more belief, more self-sacrifice, more sense of duty. A moral without right/law is a contradictio in terminis. Only the fundamental principle of law/right generates a coherent theory of law/right. This has been shown above. Yet still, moral absolutism

is rooted so deeply in many people, that they simply cannot accept the fundamental principle of law/right.

Opposition to the fundamental principle of law/right usually takes the form of a fantastical tale derived from the statement that each person has the right to do or not do with their means as they see fit. This results in a series of imagery depicting the most chaotic of anarchy. It's however rather trivial to realize that this result can only be produced when ignoring rather critical facts: the important qualification "with their own means"; the fact that the fundamental principle of law/right also states that no person has the right to do anything with the means of another without their permission; and the fact that "with their own means" does not refer to the arbitrary legal definitions of property-right in some positivist system of law/right. In truth: it is usually not the permissive aspect of the fundamental principle of law/right which seems to offend, but rather the restrictive aspect of it. It is precisely because the fundamental principle of law/right denies everyone the right to rule over others that causes it to be so often opposed.

This isn't just the case for those who are merely out for power (those people are usually not very active is philosophical debates), but also for those who fear that the goals they consider to be so important will not be attained if they are only able to count of voluntary participation of others. It saddens me to see how much poor people and the handicapped are touted any time anyone dare to posit every person's right to freedom in debate, without immediately apologizing for their audacity. One would almost be led to believe that neighbourly love was the prime existential reason for rule/rulership itself. Great pleasure is taken in repeating time and again the old Hobbesian formula that man is a wolf to man, homo homini lupus, in which context we are of course expected to think of homo liber, as this formula is, without fail, cited as an argument for the necessity for rule. Of course we are also expected to think of rule of the good over the bad/evil.

We are facing what Ludwig von Mises called the "dictatorship complex":

> "He learns that his will is not almighty, that he has to accommodate himself to others and adjust his actions to his social environment, and that the aims and the actions of other people are facts with which he must reckon."

> "The neurotic lacks this ability to adapt himself to his environment. He is asocial; he ever arrives at an adjustment with the facts. But whether he likes it or not, reality has its own way. It is beyond the neurotic's power to eliminate the will and the actions of his fellow men and to sweep everything before him. thus he escapes into daydreams. the weakling, lacking the strength to get on with life and reality, indulges in reveries on dictatorship and on the power to subdue everybody else. the land of his dreams is the land in which his will alone decides; it is the realm in which he alone gives orders and all others obey. In this paradise only that happens which he wants to happen. Everything is sound and reasonable, i.e., everything corresponds exactly to his ideas and wishes, is reasonable from the viewpoint of his reason."
>
> "In the secrecy of these daydreams the neurotic assigns to himself the role of the dictator; he himself is Caesar. When addressing his fellow citizens he must be more modest. He depicts a dictatorship operated by somebody else. But this dictator is only his substitute and handyman; he acts only as the neurotic wants him to act. A daydreamer who refrained from this cautious restriction and proposed himself for the post of the dictator, would risk being considered and treated as a lunatic. the psychiatrists would call his insanity megalomania. Nobody ever recommended a dictatorship aiming at ends other than those he himself approved."[10]

Everyone knows the refrain: rule is good and proper, it's just the current rulers that are no good. Even the "anarchist" P.-J Proudhoun couldn't help but make note in his diary that it was absolutely vital that he himself should take the lead over all confederated federations. But those who see their psychic discomfort, their "moral" outrage, as justification for their rule, face a problem. The paradox becomes clear when we combine the title of K Notts recent book on the politics of socially motivated humanitarians, The Good Want Power[11], with Acton's famous quote "Power corrupts". Ergo: the good want... corruption? This is not a mere quip. The whole notion of rule by the good is a confused mess. Everyone seems to agree that if all people were "good", rule would not be necessary, that voluntary interaction would suffice. However, not all people are "good", so rule is necessary.

This reasoning is so familiar to us all that most of us hardly respond to its patent absurdity anymore. It implies, after all, as Harper pointedly remarked upon, that rule would be the most necessary if all people were 100% evil.[12] In this case, totalitarian rule would be needed, without a trace of liberty, as liberty is reserved

10 L.Mises: Omnipotent Government: The Rise of the Total State and Total War. New Rochelle, N.Y., 1969, 242.
11 K.Nott: The Good Want Power. London 1977
12 F.A.Harper: "Try This On Your Friends" Faith and Freedom, januari 1955, p.19

for only the good. But, if all people are 100% bad/evil, then so too would the rulers be. "Such a society* would be under the rule of a dictator that is evil through and through, a dictator that is in possession of an absolute right to dispose over others. How is it possible, without doing violence to logic, to claim that anything but the greatest evil could be the result. How is it possible to claim that in such a society* rule would be better than anarchy?". In the former case rule is superfluous (all people are good), in the other it is the very embodiment of evil. Where is the point on this spectrum between good and evil at which rule is "necessary" and "good"? How likely is it that in a battle for power, the good will win out over the evil (who will stop at nothing)? If the good are strong enough to rule over the evil, then they are a fortiori strong enough to defend themselves against the aggression of the strong. What justification then, do the good have to take matters beyond self-defense, and subjugate the evil by means of aggression? What justification do they have to take matters beyond the protection of their own rights, and of the rights of those evil ones under assault by other evil people?

These questions are relevant since, as we've previously discovered, the fundamental principle of law/right allows us to make a distinction between lawful and unlawful compulsion/force. Why would lawful force not suffice for the realisation of the goals which the "good" value so greatly that they are willing to seize power and brave the law of Acton?

DISCRIMINATION

It is not the case that the principle of law/right denies people the possibility to enact force on their environment in an attempt to establish a certain desired order of things. It does not allow for unlawful force, but this does not mean it allows for no force at all. In an order of law/right, doing politics is still possible: sanctions can be organized, pressure exerted on other members of society* so that they might take heed of certain social or moral conventions. From a moral perspective it is possible to judge lawful force to be misplaced, that is to say unjust (orig: onrechtvaardig) , in those cases where this force is used to

to stunt people's self-actualization rather than prevent them from hindering each-other. But this injustness cannot be fought through injustice, only by offering counter-pressure.

It is evident that even in a society* that respects law/right, the possibility still exists for the moral development of the majority of people to be so slight that even the fact that "social control" is only exerted by means of lawful force is not sufficient to guarantee that this social control would be, morally speaking, above reproach. That is to say, that is will only be use towards "good ends". But neither does this guarantee exist in a society in which said social control in exercised through unlawful force. In a morally imperfect world, one should have no illusions. The essential difference however, lies in the fact that those who work towards "good ends" by means of unlawful force a priori make any moral perfection impossible. Respect for each-other's right to self-determination is a precondition for any and all moral progress. It's nonsensical to believe that it is possible to foster the ethical insight and ethical action of people by denying them to opportunity to exercise their rational abilities and learn from their own choices. With which I mean to say: by treating others merely as means. Anyone who sees unlawful force as a technique for making people "better", or that judges the loss of freedom following from limitations on the right to self-determination an acceptable price for the moral development of people is making just a ludicrous a judgment as those who would belief that deafness would be an acceptable price to pay in exchange for the development of the ability to enjoy music, or blindness an acceptable price for easier access to museums. Ethics is the art of living, the art of making decisions, and this art is not served by preventing people from making their own choices.

Lawful force/compulsion is compatible with the fundamental principle of law/right. This fundamental principle implies that everyone has the right to divide the psychic and financial external effects of their actions as they will. More specifically, they have the right to use these effect to "punish" and "reward". Everyone has the right to "punish" and to "reward", but only with their own means and at their own risk, not with the means of others. It often comes to pass that people have very scant control over the external psychic and financial effects of their actions. But there are also many cases in which they do have this control, in particular

when they know what certain others consider to be beneficial or good and what they consider to be detrimental or bad. It is possible to use this knowledge in order to discriminate: to decide to do something precisely because you believe that it will be good or beneficial for someone you wish to reward; or to do something precisely because it will be unpleasant or detrimental to some you wish to punish.[13] Everyone at times has the tendency to try to influence their social environment by encouraging certain activities of others, and discouraging others. As long as it is not by means of boundary-violating violence, this pressure or compulsion/force is perfectly lawful.

Positive discrimination (rewarding, protecting, helping) can take the form of rendering favours, showing goodwill, taking extra precautions so as not to harm the interests of certain people, or actively promoting their interests. It can involve taking other's plans into account and possibly even inviting them to mutual consultation to the end of ex ante coordinating your actions, as best as possible. Examples of negative discriminations (punishments) include: the boycott, the purposeful disregarding of the negative consequences of and action to the party you wish to punish or discourage, or even the taking of special measure, entailing extra costs, in order to generate a maximally negative effect. The exercise of this lawful force may be unwise or unjust in the sense that you may punish someone despite their action being valuable to others, or even objectively so. It is also possible to reward someone despite their action being detrimental to others, or even objectively so. These facts do nothing to alter the lawfulness of these actions, and they do not provide (I cannot stress enough) an argument for the use of unlawful force. Forcing others, in a lawful manner, to strive towards certain unworthy goals is undoubtedly bad, but it is far worse to force to force them to strive for said goals unlawfully. It is undoubtedly better to use unlawful force to force people to strive for valuable goals than it is to use unlawful force to force them to strive for unworthy goals, but in any and all cases it is better to use lawful force, whatever

13 Anne Wortham: The Other Side of Racism: a Philosophical Study of Black Consciousness. Ohio State Univ. 1980; Thomas Sowell: Race and Economics. New York 1975. Sowell: Markets and Minorities. New York 1981. Sowell: Ethnic America: A History. New York 1981. Sowell: Knowledge and Decisions. New York 1980. W.R.Havender: “On the Parity of Groups” Journal of Libertarian Studies 2,2,1978, 167–178. G.S.Becker: The Economics of Discrimination. Chicago 1971. W.H.Hutt: The Economics of the Colour Bar. London 1964.

the ends might be.

This point can be illustrated by comparing the situation in two different countries. In one, by the legislation of the land, it is punishable to engage in a mixed marriage (either with a member of another race, or another faith), or to maintain business contacts with members of a certain group. In the other country, such marriages and contracts are legal, but there is social control which, by means of negative discrimination such as boycott and secondary boycott, makes the engaging in such a marriage and maintaining such contacts a very expensive affair. Expensive in terms of interactions with other members of the majority-group.

One can easily disapprove of the situation in both countries, but it would not do to be blind to the fact that in the first country those who break racial or religious solidarity (which means preferring solidarity with the other) run the risk of being put to death, or bereft of their freedom, or lose their material goods, while in the second every member of the majority has the right to decide for themselves whether to choose to deal with members of their own race or creed, or with others. It is no more than correct that if a person in this example chooses to associate with people of another race or creed, thus showing that to them racial or religious solidarity is far less important than, for example, the love they feel for someone of a different race, or the financial prospect contact with these others can bring them, they also accept that the other members of their race or faith have different preferences and act accordingly. These others are fully within their rights in deciding who they wish to deal with, just as the person breaking solidarity is. Neither party has the right to use violence or unlawful force to force the other to live by the other's "ideals of solidarity".

Discrimination is obviously a fundamental right of all people. Judging justly is to discriminate rigorously. To act justly is to act in a discriminating manner, not treating "everybody equally", not tarring everyone with the same brush. Of course it is possible to discriminate on faulty/wrong grounds/principles. No-one is born with perfect knowledge, everyone must learn how to judge, learn to discriminate (the English word 'discrimination' means "capability to distinguish, insight, discernment, acuteness", "the ability to distinguish between the relevant and the incidental". The fact that in our

societies* dominated by the glorification of legislation, the word "discrimination" has a mostly negative ring to it is probably mostly due to the fact that in many historical societies* discriminating legislation applied and applies, on the grounds of which people are prosecuted or marginalized for their skin-colour, sex, creed, etc. The dissolution of such discriminating legislation is undoubtedly a good thing. The same cannot be said for the marked tendency to also make spontaneous, non-violent discrimination illegal and punishable.)

Legislation which threatens a person with the loss of their freedom or their means because they refuse to associate with members of a certain group, or because they refuse to treat everyone the same, are lacking in any foundation in law/right (ed: rechtsgrond). Punishing a barkeep or a prostitute for refusing to serve foreigners is to transform these people into instruments of a public policy which may garner its proponent much international prestige, but for which they do not themselves carry the costs. Usually such legislation is extremely hypocritical, especially when aimed at people that discriminate mainly on economic grounds. It is easy to punish a barkeep or owner of a restaurant on the grounds of his violation of legislation forbidding racial discrimination, but how shall they be protected from the economic sanctions imposed by their clients? After all, no-one can force these people to remain clients to a supplier that, for whatever reason, becomes less attractive. In the commercial sector, usually racial or faith-based discrimination is often more a rational response to the discrimination practised by the majority of potential customers than an attitude rooted in prejudices held by the producer, trader, or employer themselves. This makes punishing the latter not just unlawful but also unjust.

Very few producers, shopkeepers, entrepreneurs, etc. are willing to decrease their incomes solely for the reason of expressing their own racial or religious preferences. The discrimination they practice is usually merely a part of their attempts to maximize their incomes. The discriminate because they think this sales-policy is more profitable, or that a discriminating hiring-policy decreases costs of production (less internal conflicts in the company), or because the wish to garner "good will" with the public which buys the largest part of their products.

The implication of this is that they will also immediately abandon this policy as soon as it becomes clear that these alleged prejudices do not exist. It is irrelevant to start making moralising remarks about "discrimination for profit": this expression simply means that there exists an actual demand among large parts of the public for segregated services. If such a demand does not exist, then racial discrimination, or discrimination based on creed, is a very heavy cost to bear for the producer that engages in them. They would refuse to do business with certain people, even though this refusal does not gain him any extra clients and may even end up causing his potential group of clients to be smaller than it would otherwise be. An employer that chooses to fire a competent A, to hire an incompetent B purely for reasons of prejudice simply increases his own cost of production. But if a person prefers to suffer a financial loss over deriving more income from contact with people towards whom they feel aversion, by what right could that person be forced to maje more money?

There are other forms of legal discriminations than those using the direct definition of "rights" and "duties" of various populations. The legal ban on economic discrimination is in many cases a rather subtle technique for establishing economic discrimination. A good example of this is "equal pay for equal work"-legislation.[14](14) This legislation simply ignores the difficulties which arise when trying to determine which work is, from an economic perspective, equal to which other work. In most cases, artificial juridical (that is to say legislative) criteria are wielded which take little to no account of the concrete situation (eg level of education of a worker, their experience, talents and flaws, characteristics of a technological, geographical and financial nature of the company that employs them, etc). Furthermore such legislation is often intended to artificially increase the pay of all work deemed "equal" to the level of the best paid workers. Now, suppose that, for whatever reason, certain types of work were done by members of a certain population A (men, whites, natives, ...), and that at some time the members of population B (women, blacks, foreigners) manage to encroach upon that part of the labour-market by accepting lower pay. If the

14 Cf. A.Alchian & W.Allen: University Economics. Belmont, Calif. 1972, 440–441.

difference in wages is significant, a number of companies will hire relatively less As and relatively more Bs, despite the fact that Bs may be less schooled, less disciplines, more prone to sickness or absenteeism, less loyal to the company, etc. than the As. In many cases, the As will find it more opportune to push, say, in the name of "social justice", for "equal pay for equal work". If the succeed in enforcing such legislation, they are forcing the companies to pay a higher price for employing Bs than would be economically feasible. In other words, the companies are forced by legislation to discriminate against Bs under the penalty of economic ruin. Such legislation renders Bs "prohibitively expensive". This indirect discrimination is also used in attempts of richer regions, where wages are higher, to halt economic progress of poorer regions, where wages are lower. The latter can only compensate their unfavourable position in relation to the large sales markets by economizing on certain costs of production. Legislation enforcing "equal pay for equal work" will in such cases tend to establish an artificial wage above the local market-price in the poorer region, leading to higher unemployment. Similar discrimination against marginal group and especially young people find expression in the legislation regarding minimum-wage.[15] Ostensibly meant to be measures against discrimination (differences), these sorts of legislation are actually very potent instruments of discrimination. As such legislation violates the freedom of contract, it is obviously unlawful. They posses massive demagogic potential however, as most people tend to believe the declared intentions of a legislative power will be realized, and will certainly tend not to thoroughly study the question "But is this really the case?".

These examples clarify just how important it is to distinguish between lawful and unlawful discrimination. It's one thing for the legislator to make unlawful discrimination punishable. It is another thing entirely for the legislator to declare lawful discrimination to be punishable, certainly when they use the fight against "discrimination" (without qualification/qualifiers) as cover for introducing unlawful discriminations of their own. Furthermore, it is a known fact that free markets tend to have little discrimination, as they force everyone to pay the price for their own

15 Alchian & Allen: ibid. 438–40; W.E.Williams: Youth and Minority Unemployment. Hoover Institution Press, Stanford, Calif. 1978. E.G.West: “The Unsinkable Minimum Wage” Policy Review 11, 1980, 83–95.

preferences, their own consumption, for themselves. Those who find satisfaction in discrimination, in a segregated society, must, on the free market, which is to say in the order of right/law[16] decide for themselves how much that satisfaction is worth to them. A restaurant-owner that, for example, refuses people of colour, usually does not do so because of their own personal preference for a racially homogenous public, but to meet the demand for establishments where people can spend their free time surrounded by members of their race. It occurs often enough that the same person will own both a restaurant for whites and one for people of colour. In such circumstances accusing such a person of racially motivated hatred would be absurd. If there is an effective demand for segregated services, then those segregated services will exist regardless. If needs must they will be found in closed circles, at home, or in clubs or "cooperatives", and such, where the current members have control over the admittance of new members.

In the so-called "public", which means to say the monopolistic sector of the the legal order, discrimination is far cheaper. The reason is of course that the price a consumer from the private sector pays for a certain good or service is usually far higher than the price the government pays for that good or service. The private consumer, after all, has to pay a price consisting of a compensation to the producer, and a tax towards the authorities, while the government only pays the compensation to the producer (it does not pay a tax to itself!). In this sense, government consumption is always "cheaper" to the government than private consumption to the private consumer. This also applies to the consumption of segregated services or a segregated work-environment. The fact that consumption by means of government is in most cases markedly "cheaper" than consumption for one's own means, likely explains the durability of the "stately" relationship. Each person benefits (in the purely material sense) from having their consumption paid for by others. Each person benefits from having their own goals achieved with the means of another, so too when these goals relate to preferences for certain groups. Regardless of whether the legislation discriminates or makes discrimination punishable, in all cases it boils down to acquiring a monopoly on discrimination.

The ruling group tries to enforce their preferences, their discriminations, as the

16 Refer to F.van Dun: “Marktfaling, Marktproces, en Institutionele Context” Tijdschrift voor Sociale Wetenschappen 23,3, 1978, 237–277.

only acceptable ones. The ones who fail to do so lawfully will often enough be tempted to give unlawful means a try.

This brings us once again before the fundamental problem of choice. There are but two ways in which social control can be exerted, the lawful and the unlawful, the peaceful and the violent. But social control is discrimination. The fabric of society, in its aspect of a pattern, mostly consists of the cumulative effect of discriminating action, of the way in which people attempt to control the external effects of their actions to the end of promoting some development in their environment and delay others. The fundamental principle of law/right does not imply a choice against social control as such, but rather against violence as a method of social control.

Proponents of the fundamental principle of law/right are permanently faced with a reproach, which the previous should make clear is wholly unfounded and laughable. This reproach is an accusation that said proponent "does not take into account the social aspect of human existence sufficiently". What separates the proponent from their opponents is not a matter of being "asocial". This is not about an opposition between "social" and "individualist" (in the sense of common use in parlance), but about the opposition between free sociability and unfree sociability. It is not about an opposition between order on the one hand, and the chaos of war of all against all on the other, rather about an order of society where violence has only a defensive function, contra one which is maintained by aggressive violence.

It is not an exaggeration to claim that most people, in most of their activities, are inveterate conformists. The acceptance of the fundamental principle of law/right alone is not sufficient to undermine that conformism. But it does deny the claim to the right to use violence, that is to say external physical effects, to bring non-conformists in line.

Conformist behaviour in many cases has a wholly rational foundation. As such there is usually no reason to enforce it with violence. This behaviour is rational not just because it is usually "rewarded", or brings goodwill, etc. But also because most people, for most activities, have little interest in taking the effort of

fundamentally thinking through said activity, in weighing out the pros and cons of various solutions, of looking for new ways, etc. By behaving in a conformist manner in domains A, B, C of life, they make available time for the careful, time-consuming study and resolution of problems in domain D, which does catch their interest sufficiently. As such there are non-conformists in all domains of life that are markedly conformist in all other domains. Often, nonconformists are specialists, connoisseurs, the people who have occupied themselves with the problems in a certain domain the most intensely, or the people to whom this domain has a greater significance than is common.

In this way, everyone can be a non-conformist and a conformist, and in so doing use their mental and intellectual energy as optimally as they can. Which is to say, most in the domains of greatest significance to them and least in the domains of least significance to them.

The fundamental principle of law/right offers the space, both for those who wish to follow the well-trodden paths regarding a certain domain, as well as for those who wish to forge new ones. It offers the space for social change and social continuity, that is to say for a dynamic social order. It does not disavow the role that habits, traditions and conventions have in society, but it does circumscribe the methods with which these conventional structures may be maintained. It's patently absurd to believe that only aggressive violence, the confiscation of the accomplishments and opportunities of others, can generate a durable social order. The opposite is true: if aggressive violence is necessary for the maintenance of a certain order, this means that this order is threatened from within, that not everyone within it accepts it, and that marginal shifts in power may topple it. Such aggressive violence is the hallmark instrument of the imperialistic morality of those who believe themselves to have the right to rule over others, that they have the right to legislate others. It forces the others into either capitulation or a struggle/battle for freedom, to a war of secession. Each person has the right to withdraw themselves from the rule of any other, every person has the right to separate themselves and convert the unfree sociability of rule into the free sociability of the order of law/right.

SELF-DEFENCE

The fundamental principle of law/right only allows for "internal" violence, not boundary-violating or aggressive violence. "Internal violence" here means: any form of physical use of their own means, specifically also defensive violence against an aggressor, as we have seen this to simply be a special case of internal violence. The right to use one's own means implies the right to use violence against anything that "mixes" itself with those means without permission. As such, defensive violence is not at all an extension of the right to self-determination, rather it is implied in it. To put it differently: self-defence is a fundamental right, but not a duty (though it can be a moral duty): pacifism is compatible with law/right.

Evidently, if everyone has the right to defend themselves against aggression, with violence if need be, then people have the right to organize towards attaining a more efficient defence of their person and other means. Collective self-defence is compatible with law/right.[17] It is irrelevant whether this collective self-defence is organized in a mutualist, commercial, or even charitable fashion. The fundamental principle in any case is that such a mutualist or commercial organization has no more rights than its members or customers: it does not hold any special privileges. A fortiori it does not have the right to commit aggressive violence, neither against its members, clients, nor any others, third parties or outsiders. Consequently, such an organisation does not have the right to force people to become a member or client, regardless of the benefit the organisation could derive from a larger membership or clientele. Nor does it have the right to force its members or clients (by unlawful force) to remain a member or client, or to prevent outsiders from joining other organizations or of forming one or more new ones.

The implication of all of this is that a state is an unlawful institution[18], even when this state, in the classical liberal conception of the state, would "only" serve to protect the rights of the citizens. Any organization that would do the latter, by the way, would not establish a state.

17 See note with 215, also R.Nozick: Anarchy, State, and Utopia. New York 1974, pt.1

18 F.van Dun: “De Staat als wijsgerig probleem: enige bedenkingen” Rechtsfilosofie en Rechtstheorie 1, 1979, 1–22

State and law/right are logically incompatible. The fundamental principle of law/right cannot be respected within a statist relation. Even Robert Nozick's recently formulated conceptions of the ultra-minimal and minimal state are incompatible with the fundamental principle of law/right.[19] Essential to both is the ascribing to the state of the right, violently if need be, prevent non-members or non-clients from becoming members or clients of, or establishing, alternative organizations towards self-defence within the territory controlled by said state. Though these ultra-minimal and minimal states would be less sinful in light of the fundamental principle of law/right than the classical liberal state, which is additionally ascribed the right to levy taxes to fund its operation, they are still in violation of law/right. It's an impossible notion for them to "only"occupy themselves with protecting the rights of the citizens. They would also have to enact aggression against all those who, for whatever reason, are not satisfied with the services of protection they deliver, and that wish to replace these services with others. Nozick's position, that they have the right to do so, rests on his claim that everyone has the right to forbid risky actions by others. I will return to this point at a later time. Here, it will have to suffice to note that this claim is subject to the same criticism as the claim that everyone has the right to no be psychically harmed. To claim that everyone has the right to forbid risky actions of others is the same as claiming that everyone has the right to live in an environment in which they have nothing to fear. This would mean an environment in which all people act as all others want them to. The classical liberal concept of the state in fact boils down to A having the right to use aggressive force against C, to the end of protecting themselves from B (and for no other purpose). This means that everyone has the right to impound the means and services of others, as long as the goal is "protection".

This is not the proper place to delve deeper into the position, so often dogmatically announced, that "protection" at least should be provided by a monopoly, and preferably by an aggressive, tax-levying monopoly. May it suffice to remark that such a monopoly is in any case unlawful, and that in no case it is possible for such a monopoly to only engage in "protection". It is of course true that in many cases the state authority provides some degree of more or less

19 Robert Nozick: Anarchy, State and Utopia. New York 1974, zie infra p.592 e.v.

adequate protection against the aggression of third parties (other citizens or foreigners), though it is almost impossible for the citizens to compare and test the efficacy of these protection-services, precisely because of the violent nature of the monopoly enforced by the state authority. One would expect violence to be unnecessary to maintain such a monopoly if a monopoly-market structure was the one most appreciated for the provision of services of protection (legal punishments such as chastisement, deprivation of freedom, fines and other forms of confiscation). Apparently not a single authority is willing to run the risk and experiment, to find out whether they are really considered purely the "protector" of everyone, instead of the aggressor. The essential "protection" the government offers is that it takes less from the citizens than it could take (this is the theory of so-called self-limitation of the state, according to which the rights of the citizenry are nothing but the reflection of the tolerance of the state). From this follows that the state authority can no longer claim to be "protecting", when taxation (in natura, specie, goods or services) becomes such a heavy load that the punishment set for not paying them are no longer effective. At that point compliance is punished more severely than non-compliance, leaving hardly anyone with a reason to obey.

It is of course a fact that if forced redistribution is considered to be an acceptable policy when it is enacted in the name of "protection", the question becomes why it would not be acceptable for the realization of other goals. The classical liberal theory of the state has never been able to adequately answer this question. Neither does Nozick provide an adequate answer to the question why only "protection" may be delivered by an armed monopoly, and not say "education", "nutrition", "culture", "transportation" etc. It is not sufficient to remark that the protection of people's rights is a necessary precondition for an unimpeded exercise of the right to self-determination. This is undoubtedly the case, but it tells us nothing about how this protection ought to be provided. It certainly does not imply that protection of this right to self-determination justifies the violation of this same right. There is no escaping the conclusion that state and law/right are logically incompatible. As Kelsen has show, the opposite cannot be proven, only "presupposed":

> "An isolated act of one individual cannot be regarded as a legal act, its meaning cannot be regarded as a legal norm, because law, as mentioned, is not a single norm, but a system of norms; and a particular norm may be regarded as a legal norm only as a part of such a system. How about a situation, however, in which an organized gang systematically jeopardizes a certain territory by forcing the people living there, under threat, to surrender their money? In this situation we will have to distinguish between the order that regulates the mutual behavior of the members of this robber gang and the external order, that is, the commands that the members of the gang direct at outsiders under the threat of inflicting evils. For it is only in relation to outsiders that the group behaves as a robber gang. If robbery and murder were not forbidden in the relations between the robbers, no community, no robber gang would exist. Nevertheless, even the internal order of the gang may be in conflict with the coercive order, considered to be a legal order, valid for the territory in which the gang is active. Why is the coercive order that constitutes the community of the robber gang and comprises the internal and external order not interpreted as a legal order? Why is the subjective meaning of this coercive order (that one ought to behave in conformity with it) not interpreted as its objective meaning? Because no basic norm is presupposed according to which one ought to behave in conformity with this order. But why is no such basic norm presupposed? Because this order does not have the lasting effectiveness without which no basic norm is presupposed. The robbers' coercive order does not have this effectiveness, if the norms of the legal order in whose territorial sphere of validity the gang operates are actually applied to the robbers' activity as being illegal behavior; if the members of the gang are deprived of their liberty or their lives by coercive acts that are interpreted as imprisonment and death sentences; and if thus the activity of the gang is terminated-in short, if the coercive order regarded as the legal order is more effective than the coercive order constituting the gang."[20]

The state is the most effective, most dominating force/power in a given territory. No doubt, Kelsen is correct when claiming that the only distinction between the state and other organisations with aggressive characteristics is the durability and efficacy of its interventions. That many states us the means they have acquired through aggression for laudable ends (art, care for the poor, monumental architecture, education, etc.) is undeniable, but is no more relevant than the fact that some gangsters do the same. In any case it is absurd to claim that the only way one can engage in the science of law/right is by interpreting the state as a sovereign subject of law/right. It is one thing to claim that this interpretation must be accepted if the validity of the statist order is to be posited. It is another thing entirely to claim that, for scientific reasons, it is mandatory to posit the lawful validity of the statist order. The goal of the science of law/right is the objective study of just* and injustice, not to come up with some method which

20 H.Kelsen: Reine Rechtslehre. Wien 1967. par.6c.

allows us to economize on the use "injustice". There is no grounds for claiming identity of state and law/right. Legislation and state can be claimed to be identical, but this is an entirely different matter. It is essential to decouple the idea of law/right completely from the idea of legislation. The idea of legislation, as the lawfully valid norm presupposes the idea of law/right. Only law/right creates the opportunity to discover what a law is, and to whom. To see law/right as a creation of legislation is to flip matters on their heads.

5 Zoon Politikon or Animal Sociale

“He that knows himself knows others.”

— Charles C. Colton

“Self-sacrifice enables us to sacrifice other people without blushing.”

— G.B. Shaw

INTRODUCTION

As we have seen in the second chapter, the negation of the fundamental principle of law/right can take three forms: a) some people are master, others are slaves b) every person is master, and slave, to all others; c) no person is master, not even over themselves, each person owes obeisance to a "higher" authority. One of the most potent attempts at synthesising these three negations is expressed in the idea of representative, constitutional democracy, the idea of folk-sovereignty (ed: original "volk", a people) exerted by representatives, indirectly for practical reasons, and bounded by a higher legislation. This synthesis claims to justify rule in three ways. Firstly as compatible with

the idea of equality (equality under legislation, everyone "shares" in the exerting of rule by enjoying certain "political rights", such as the right to vote, the right to run for "public office"). Secondly as practically possible (besides the "original" constitutional consensus no permanent universal consensus is required; at any one time only a few people are directly engaged in exercising rule). Lastly, as morally binding or just (rule serves a "higher" purpose, which is to say the people who are at any one time engaged in the exercise of rule do not have the right to do just anything. There is a "higher" legislation that stipulates for them certain obligations, thus implying "rights" to all others outside of the reach of the authority of the effective rulers of the moment.)

One of the first modern proponents of this synthesis was John Locke, 17th century English philosopher, who is paradoxically often called the founder of the idea of individual right to self-determination. It is easy enough to understand why: there are many connections, though they are all superficial. In order to understand the fundamental principle of law/right properly it is important to understand that it may in no way be confused with Locke's theory of law/right. In this chapter I'd like to shine a spotlight on the differences. Firstly because the implication of Locke's theory of law/right are radically different from those of the individualist theory of law/right, which we noted above has nothing at all to do with Locke's conception of the liberal state. Secondly, for the reason that the vision of man/humanity which is expressed in Locke's theory, which is representative for all the negations of the fundamental principle of law/right, is diametrically opposed to the one expressed here. From the point of view of the fundamental principle of law/right, Locke is an ideal proponent of the opposition. With this I of course do not intend to deny that Locke can be called a liberal. On the contrary: I wish to draw attention to the fact that liberalism, liberalism too, presupposes the lawfulness of the master-slave relationship. Consequently it would be a mistake to consider representative, constitutional democracy as an embodiment of law/right, not even when detailed in terms of the Lockean "natural rights".

The following exposition of Locke's theory is to serve as an introduction to the actual theme of this chapter: the contradiction between two

radically different visions of man, which we will see have since ancient times constituted the terms for the most fundamental choice regarding thinking about man and society*, and which provided the basis for the previously discussed distinction between an order of law/right and a legal order. This contradiction is the one between the vision of man as an *animal sociale*, and of society* as *societas*, and the vision of man as a *zoon politikon*, and of society* as *polis* on the other. We will see that Locke's theory of law, despite it's individualistic tone, still presupposes the social rather than the political conception of humanity, while the fundamental principle of law/right does fit into the political tradition. To me, the fact that historically the social conception of man has dominated thought about man and society* seems incontrovertible. This is probably why so little attention has been paid to the fundamental principle of law/right, despite all of the intractable problems associated with that social conception and the idea of a legal order.

JOHN LOCKE[1] AND "NATURAL LAW/RIGHT"

Locke's reputation as a representative of an individualist theory of law/right rests largely on the fact that, in oft-quoted passages, he does seem to start from the absolute right to self-determination of each person.

> "The state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions"

1 Refer, o.a. to: L. Becker: Property Rights: Philosophic Foundations. London 1977, 32–56. J. Dunn: The Political Thought of John Locke. Cambridge 1969. G. Schochet: Life, Liberty and Property. Essays on Locke's Political Ideas. Belmont 1971, In which principally J. Dunn: "Consent in the Political Theory of John Locke". J.W. Gough: John Locke's Political Philosophy. Oxford 1973. W. Kendall: John Locke and the Doctrine of Majority Rule. Urbana, Ill. 1941. C.B.Macpherson: The Political Theory of Possessive Individualism: Hobbes to Locke. Oxford 1972. G. Parry: John Locke. London 1978. R. Polin: La politique morale de John Locke. Paris 1960. M.Seliger: The Liberal Politics of John Locke. New York 1969. J. Tully: A Discourse on Property: John Locke and his Adversaries. Cambridge 1980. K.I. Vaugh: John Locke: Economist and Social Scientist. Chicago 1980.

This quote from the Second Treatise (II/2,6) indeed seems to imply a confirmation of the fundamental principle of law/right. This interpretation is further strengthened by expressions like: "a state of perfect freedom to order their actions, and dispose of their possessions and persons, as they think fit" (II/2,4) and "lord of his own person and possessions, equal to the greatest, and subject to no body" (II/9,123). It is understandable for people to like to quote Locke as an authority on the defence of the individual right to self-determination, on the idea that each person is a sovereign subject of law/right. But this interpretation is wrong. To Locke, God is the only sovereign subject of law/right: everything belongs to God, and as such God has the sovereign right to do or not do with it as he pleases. The "natural" rights which Locke claims humans posses, are not natural in the sense that they can be deduced from a naturalistic approach to humanity. In reality these rights are passive "rights": reflections of the legal obligations the natural *legislation* enforces on people. These rights are valid among people as subjects of the same master (God). When Locke says that reason is the natural law, what he means is that this law is deducible from the conviction that people were made by God. The most elementary point for interpreting Locke's theory of law is the priority of legislation in relation to the rights of man/human rights.

This is obviously not a surprising starting point, as Locke develops his theory of law as a foundation for his theory of legitimate rules (the legal authority of the state):

> "To understand political power right, and derive it from its original, we must consider, what state all men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man."(II/2,4)

There is a lex naturalis which is valid for all, and that limits human freedom. This is the "freedom under the law" or "rule of law" motif, which is central to Locke's political philosophy and in the liberalism he inspired. The validity of this legislation is grounded in God's will, and this is also the fundament of the validity of the "juridical" equality of all people.

> "A state (ed: of freedom and) also of equality, wherein

> all the power and jurisdiction is reciprocal, no one having more than another; there being nothing more evident, than that creatures of the same species and rank, promiscuously born to all the same advantages of nature, and the use of the same faculties, should also be equal one amongst another without subordination or subjection, unless the lord and master of them all should, by any manifest declaration of his will, set one above another, and confer on him, by an evident and clear appointment, an undoubted right to dominion and sovereignty."(II/2,4)

Lord and master of them all – this is, of course, God. God could have delegated his right to rule over humanity, but he did not: the "positive" divine right does not contain a decree in that regard. This is the conclusion of Locke's Argument, in the First Treatise, against the Patriarcha of Robert Filmer, who claimed to have discovered the foundation for the right to absolute rulership of the English kind, in Holy Scripture. Since there is no evidence of a divine decree claiming the contrary all people should be considered to be equal under the Law of God. This equality under God naturally excludes the existence of a human right to self-determination.

> "But though this be a state of liberty, yet it is not a state of licence: though man in that state have an uncontroulable liberty to dispose of his person or possessions, yet he has not liberty to destroy himself, or so much as any creature in his possession, but where some nobler use than its bare preservation calls for it" (II/2,6)

The implication is clear: the denial of the right of one to rule over the other (grounded in the silence of divine positive law, not in any moral consideration) may not be construed as an affirmation of any right to determination of man over himself. The right to commit suicide, in some sense the ultimate test of the right to self-determination, is denied by Locke, as is the right of humans to kill any creatures in their possession.

Of course the Legislation does allow for the killing of animals (and plants?) in some cases, but it's clear that this is not a ius abutendi. Man is not the sovereign subject of law/right, God is. In Locke. there are not "natural" rights of humans themselves, but rather natural duties (legal obligations, flowing from natural, which is to say divine, legislation),

and consequently also legal, positive, or passive "rights". But they don't owe it to each-other, or themselves, to respect each-other's rights, rather they owe it to God. This all is made very explicit in the passage from which the previous quote about the inviolability of life, health, freedom and possession was lifted. The reader will note that this passage includes a rather extensive determination of the fundamental natural legislation:

> "The state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions: for men being all the workmanship of one omnipotent, and infinitely wise maker; all the servants of one sovereign master, sent into the world by his order, and about his business; they are his property, whose workmanship they are, made to last during his, not one another's pleasure: and being furnished with like faculties, sharing all in one community of nature, there cannot be supposed any such subordination among us, that may authorize us to destroy one another, as if we were made for one another's uses, as the inferior ranks of creatures are for our's. Every one, as he is bound to preserve himself, and not to quit his station wilfully, so by the like reason, when his own preservation comes not in competition, ought he, as much as he can, to preserve the rest of mankind, and may not, unless it be to do justice on an offender, take away, or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another"(II/2,6)

This is the passage which is crucial to properly understanding Locke's theory of law/right. Not only do people not have the right to commit suicide, or to kill any creature if this is not required for the completion of God's work, they also have the duty to preserve each-other. We have been appointed to preserve and take care of God's creation, and are part of this creation ourselves. Suicide, like murder, is a violation against God's sovereign right to determination, against God's rights of ownership. God alone has the right to dispose over life and death. The fact that people are means belonging to God, also provides foundation for the duty of parents to care for their children:

> "...all parents were, by the law of nature, under an obligation to preserve, nourish, and educate the children they had begotten; not as their own workmanship, but the workmanship of their own maker, the Almighty, to whom they were to be accountable for them."(II/6,56)

God is the Lord and Master. People are means belonging to God, his slaves (more euphemistically: his servants). This makes it clear where Locke should be situated in the scheme of alternative theories of law/right we have discovered

in the second chapter. The "rights" of people are passive "rights", following from duties that God imposes on others. They are in line with the passive "rights" of animals, of trees and plants, of all the rest of God's creation. Even though these "rights" of animals, etc. do not play any further part in Locke's political theory, all these things are part of God's creation and as such, their wellbeing is part of the divine assignment of mankind. The legislation is the final criterion of just* and injustice.

Locke's God is the master of mankind. He is however not a director, not an interventionist, not a busy-body dictator. He gives his assignment in the form of a goal to reach, but is silent about specific modalities of execution, even though the Old Testament is rife with them. This attitude is understandable, as Locke did not consider the Bible to be the authentic word of God, but as a man-made document which should be read as such. The belief in God does not imply the belief in the authority of the authors of the Biblical texts. The task of making the implications of the belief in God as the creator of the world and people explicit, falls on reason, not on philology or criticisms of Biblical texts. Consequently it shouldn't surprise that in the First Treatise, Locke mainly took stock of Biblical arguments, and why he hardly even mentioned Filmer's more naturalist considerations. There is a certain truth to Michael P. Zuckerts claim that "Locke used Filmer to take a shot at the Bible itself"[2]; but it would be wrong to draw from this the conclusion that Locke's theory of "political obligation" should not be interpreted as a theory of subservience and duty of obeisance to God. Locke's arguments against a certain "authoritarian" reading of the Bible should not be interpreted as arguments against the theological foundation of ethical and political obligations. John Dunn showed, in my opinion convincingly, the theological character of Locke's theory of law/right, contradicting those who would like to present it as a pure consensus-theory.[3] In any case, Locke's writings are crawling with theological references. The passage cited above in fact already speaks for itself.

The assignment God imposes on people is this:

2 M.P.Zuckert: “An Introduction to Locke’s First Treatise” Interpretation 8, January 1978, 58–74

3 op.cit. with p.231

> "You are my property: you owe it to Me to sustain yourself. You owe it to Me to sustain each-other and to take care for one another. You live, not for yourself, but for Me. The meaning of your existence cannot be found within yourself but in Me. It is not your task to realize your own values, rather it is your task to fulfil my work. You are my servants, and it is your task to maintain my creation, and to make it flourish. You bear responsibility towards me for the plants and animals as well. You have my permission to appropriate as much land, and as many animals and plants as you need to fulfil your task."

Or, in Locke's own words:

> "As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. ... God, when he gave the world in common to all mankind, commanded man also to labour, and the penury of his condition required it of him. God and his reason commanded him to subdue the earth, i.e. improve it for the benefit of life, and therein lay out something upon it that was his own, his labour."(II/5,32)

Locke's so-called "labour theory of property-acquisition" is clearly used here in the general theological framework. The right of ownership in land (in the original or natural state, so abstracting from the positive legislation of the state) is acquired by labour, specifically by tilling the soil ("mixing" one's own labour with an unappropriated piece of nature). However, to Locke, it is not so much the labour as such which provides the foundation for the title to property, but the fact that this labour fulfils a divine missive. It is the divine legislation which obliges people to respect each-other's labour, at least as long as this labour can be interpreted as the execution of God's assignment.

> "He that in obedience to this command of God, subdued, tilled and sowed any part of it, thereby annexed to it something that was his property, which another had no title to, nor could without injury take from him"(II/5,32)

To me it seems unacceptable to dismiss Locke's constant references to God or Divine Law/Legislation as being merely hollow phrases, so as to be able to see in him the proponent of a radically individualistic theory of law/right. It is rather dangerous to read the Second Treatise without including the polemics against Filmer. It is more dangerous still to only read the fifth chapter of the second treatise ("Of Property"), or

to interpret that chapter as being the core of the actual Lockean doctrine – for example by reducing Locke's political theory to the formula that the state has no other authority than the protection of individual property-rights as determined in the chapter on property in the state of nature. As Locke very explicitly states "the first and fundamental natural law, which is to govern even the legislative itself, is the preservation of the society, and (as far as will consist with the public good) of every person in it."(II/11,134). The lex naturalis, "which is to say the will of God" is "the preservation of mankind" (II/ 11,135). Consequently, this is the criterion for the legislator; this, not the protection of pre- or extralegal rights of property. Of course, there are some conditions under which the natural legislation will prescribe said protection, namely when this is the best method of obeying the will of God. But it would be wrong to say that the protection of these rights, to Locke, *is* the natural legislation.

As we have seen in the third chapter in which we derived the fundamental principle of law/right, Locke's "labour-theory of property-acquisition" is only meant for an underpopulated world, one in which there is plenty of land for everyone, so that any who lay claim to a plot "takes as good as nothing". If we were to neglect this precondition, then we might be able to conclude that Locke's theory of law is in fact grounded in the fundamental principle of law/right. This conclusion is in error, but understandable. Locke seems to explicitly start from the principle of "self-ownership", deriving from this how a person, through labour, may acquire fruit, game and even land as property. The likeness is but superficial. While deriving the fundamental principle of law/right we have shown that self-ownership is an original subjective right of a sovereign subject of law/right. Conversely, we've just seen that to Locke self-ownership is but a passive "right" of a means of a sovereign subject of law/right. Lockean self-ownership has nothing to do with the individual's right to self-determination, since to Locke people are the property of God. Still, it is possible to claim that Locke has shown that it is possible to arrive at an objective determination of the boundaries of each person, without stipulating that this determination is regulated by some legislation (that is to say independent of what people themselves do) or in a convention founded on universal consensus. This possibility

of objective determination of boundaries makes the natural state a state of equality in freedom. Though in this regard one should keep in mind this equality is only valid among people, not between people and God.

In a primitive state, the labour theory can applied without reservation, as in this case it is clearly the only reasonable solution to the problem God's mission for humanity poses to people. It guarantees a) that everyone will maintain themselves by working b) without making the impossible demand that every act of appropriation or use must have the explicit permission of all and c) also without inserting the presupposition that God has appointed, in the beginning, one person as ruler over all the rest. Property relates to the things one needs to fulfill God's assignment. As long as people produce only rapidly spoiling goods, there is not problem. Relating to property in the natural state, Locke has the following to say:

> "The greatest part of things really useful to the life of man, ... are generally things of short duration; such as, if they are not consumed by use, will decay and perish of themselves... Now of those good things which nature hath provided in common, every one had a right (as hath been said) to as much as he could use, and property in all that he could effect with his labour; all that his industry could extend to, to alter from the state nature had put it in, was his. He that gathered a hundred bushels of acorns or apples, had thereby a property in them, they were his goods as soon as gathered. He was only to look, that he used them before they spoiled, else he took more than his share, and robbed others. And indeed it was a foolish thing, as well as dishonest, to hoard up more than he could make use of."(II/5,46)

All this applies to the original state of humanity (Locke is using a past tense). But, this state no longer exists! As long as there are no durable goods "right and conveniency go together"(II/5,51): labour is the mechanism of the acquisition of property and abilities of consumption limit the scope. There is no room for dispute. According to Locke, the trouble starts with people using their human ingenuity to discover means which allow for them to multiply their property without violating each-other's "rights", far past the boundaries necessary for survival and execution of God's assignment. Indirect trade, enabled by availability of durable goods, like gold, silver, diamonds "things that fancy or agreement hath put the value on, more than real use, and the necessary

support of life"(II/5,46), or anything else that can take the role of money. This enables people to strive to attain goals other than merely their self-preservation:

> "he might heap up as much of these durable things as he pleased; the exceeding of the bounds of his just property not lying in the largeness of his possession, but the perishing of any thing uselesly in it."(II/5,46)

As soon as people start striving towards other values than self-preservation, and start developing techniques to these ends, they cease to be animal laborans and become homo faber. From that point on, application of the labour-theory can no longer guarantee conformity with God's assignment. The implication of the labour-theory is that no-one has the right to invade the domain of another, the implication of God's legislation is that injustice is done as soon as someone takes from nature (God's creation) more than is required for its maintenance. Everything that aims at the satisfaction of needs based on imagination or convention, so non-natural needs, falls outside of the intention of the labour-theory. Even when no boundaries are violated, still the accumulation of durable possessions constitutes a deflection from the goal for which the theory of property-acquisition through labour was actually meant to achieve. Right/law and convenience/utility no longer coincide, individual interest and general (that is to say divine) interests are no longer coordinated. Increasing accumulation and a growing population increase the chance that there will not be enough left for everyone to properly execute their divine mission. As such, a new technique for organizing the execution of natural legislation must be looked for.

> "Men, at first, for the most part, contented themselves with what unassisted nature offered to their necessities: and though afterwards, in some parts of the world, (where the increase of people and stock, with the use of money, had made land scarce, and so of some value) the several communities settled the bounds of their distinct territories, and by laws within themselves regulated the properties of the private men of their society, and so, by compact and agreement, settled the property which labour and industry began;"(II/5,45)

This new technique is agreement, convention, which replaces labour. Locke pays a good deal of attention to discussing the motives which drove people in the pre-conventional state of affairs to

develop a conventional regulation of property. For one, Locke points out that in the last phase of the natural state people start feeling uncertain, and start to look for means to secure their possessions. It should be clear however, that this motive could only lead them to forming contracts of mutual aid, or security-organisations, police-units, militias, detective-agencies, insurance organisations, and facilities for mediation; not a state. Also let us not forget that Locke is looking for a justification of the state, for a foundation for "the right to power" which is to say

> "a RIGHT of making laws with penalties of death, and consequently all less penalties, for the regulating and preserving of property, and of employing the force of the community, in the execution of such laws, and in the defence of the commonwealth from foreign injury; and all this only for the public good."(II/1,3)

Utility as people's motivation is not sufficient to explain and justify the existence of the state. Locke was aware of the need to not just find a motive for explaining the formation of a state, but to also show that people should form a state. We've already discovered that, if the labour-theory of property-acquisition is to be accepted as a principle, state and law/right are logically incompatible. So, what Locke had to do, and did, was show that even in the state of nature, there was something above the right of property based on labour. To put a goal above it, making it a means, such that it would become possible to discard the principle without scruples should it turn out to be necessary for the attainment of the higher goal. The exposition on durable goods, money especially, was supposed to clarify that the state of humanity spontaneously evolves towards absolute scarcity (all the land having been taken into possession) and towards inequality, and that this evolution is incompatible with the protection of the distribution of property on the basis of the original technique for determining the "rights" of people. In other words Locke attempted to show that the original condition had no alternative but to change such that formation of the state would be the only legitimate solution. (In fact it is not the monetary goods, such as gold, silver, diamonds, the durable products, which disrupted to original idyllic condition. Rather it was the primitive means of production, knives, spears, bows and arrows, horses and swords, which could be used as weapons, enabling a few to control large swaths of territory

not by working it but by terrorizing and subjugating travellers and the inhabitants. For Hobbes, such a "Commonwealth by Acquisition... where the Soveraign Power is acquired by Force" did not form a problem, to him choice under compulsion is still choice. To Locke however, conquest or terror cannot provide grounds for a title as it goes against God's legislation. As such he needed another way out, to have the state come into existence from the initial condition of equality in freedom.)

The solution he chose makes use of the formal analogy between the original condition and the state. Just as "law/right" has a residual (not a fundamental) character in the natural condition -each has the right to do or not do with theirs as they see fit as long as the fulfil the duties imposed on them by natural legislation/law- so too does "law/right" in the state.

> "THE natural liberty of man is to be free from any superior power on earth, and not to be under the will or legislative authority of man, but to have only the law of nature for his rule. The liberty of man, in society, is to be under no other legislative power, but that established, by consent, in the commonwealth; nor under the dominion of any will, or restraint of any law, but what that legislative shall enact, according to the trust put in it. "(II/4,22)

The "rule of law" is the form that can encompass both the natural condition as well as the state. Freedom to Locke always means "freedom under the legislation". We've seen in the above that the defenders of the absolute state used the idea of an (non-analytically founded, by the way) absolute right to self-determination of each person to prove the possibilities of contractual slavery on the grounds of the rule pacta sunt servanda, and in so doing justify the rule of one over all others. We have also seen that this line of reasoning turns out to be nonsensical when the fundamental principle of law/ right is not posited as a dogma, but founded as a necessary truth. Locke did accept said reasoning. He saw no other way than to deny its premises. By transforming the right to self-determination into a passive, legal "right", he could exclude the possibility of contractual slavery: "for a man, not having the power of his own life, cannot, by compact, or his own consent,

enslave himself to any one"(II/4,23). After all, each person is already the property of God. In this way Locke could strike at the foundations of the absolutist theories of modernity. At the same time the supremacy of the natural law provided the grounds for the legitimization of the state with its "right" to punish and confiscate.

The state, as a human organization, can only have such "rights" if people also have these "rights" in the natural condition:

> "Though the legislative, ... though it be the supreme power in every commonwealth; yet: First, It is not, nor can possibly be absolutely arbitrary over the lives and fortunes of the people: for it being but the joint power of every member of the society given up to that person, or assembly, which is legislator; it can be no more than those persons had in a state of nature before they entered into society, and gave up to the community: for no body can transfer to another more power than he has in himself; and no body has an absolute arbitrary power over himself, or over any other, to destroy his own life, or take away the life or property of another. A man, as has been proved, cannot subject himself to the arbitrary power of another; and having in the state of nature no arbitrary power over the life, liberty, or possession of another, but only so much as the law of nature gave him for the preservation of himself, and the rest of mankind; this is all he doth, or can give up to the commonwealth, and by it to the legislative power, so that the legislative can have no more than this. "(II/11,135)

The legislative power is limited to what man was allowed to do in the natural condition. Here it becomes clear just how slight this limitation is in comparison to the limitation imposed by the fundamental principle of law/ right. According to Locke every person, in the natural condition, has the right "whereby every one has a right to punish the transgressors of that law to such a degree, as may hinder its violation"(II/2,7); "EVERY MAN HATH A RIGHT TO PUNISH THE OFFENDER, AND BE EXECUTIONER OF THE LAW OF NATURE."(II/ 2,8) (ed: Caps in Locke's original, were omitted in FvD's translation). Locke admits that this may seem to be "a strange doctrine", but he reveals his hand immediately by asking which right a prince or state would have to punish a foreigner for a crime committed inside of the borders of their territory, if not on the grounds of this strange doctrine. This strange doctrine is of course not so strange at all: the fundamental principle of law/right implies the right to self-defence, and Locke's people in the natural condition also have the "right" to self-defence, though only in a limited fashion. Each of them, after all, has the right to guard

compliance with all of the natural legislation, and this legislation prescribes far more than just respect for each-other's person and lawfully acquired means.

As such, in the state of nature suicide is clearly punishable; as is the destruction of any creature unless no "nobler" goal than its mere maintenance can be cited for it. Not only is it punishable to harm another in their life, health, liberty or possessions, so is neglecting yourself, or not contributing to the maintenance of all of humanity (if this does not imply too great a risk to self-preservation). Parents who neglect their children are punishable, as are abortion and euthanasia. Additionally, there exists in the state of nature an enforceable duty to the needy:

> "As justice gives every man a title to the product of his honest industry, and the fair acquisitions of his ancestors descended to him; so charity gives every man a title to so much out of another’s plenty as will keep him from extreme want, where he has no means to subsist otherwise"(I/4,42)

The right of guarding over compliance with natural law is ascribed to the legislative power. It's clearly a right that goes far beyond the protection of the right to self-determination of each person, as multiple goals are mentioned which "justify" the violation of the boundaries of a person.

But for Locke all of this still does not go far enough. Indeed, one could wonder why such a legislative power is required in the first place, besides an executive one, if the latter were truly the case.

It is true that Locke's natural legislation poses many problems in execution for those who would wish to enforce it and guard over compliance with it(which goal is noble enough to justify the destruction of a creature of God? when does a person have a right to charity? how much punishment is too much? etc.). Furthermore, centralisation of said enforcement creates the necessity of creating some sort of regulation which allows for the settlement of differences of opinion regarding these matters. This regulation has nothing to do with legislation in and of itself. This is because organization on the basis of contract does not make a state. Locke does not accept that the agreements of the parents are binding on the children, and as such children are not automatically beholden to the legislation and regulation of the community in which they are born. There is no state, despite the fact that Locke still

clings to the rule pacta sunt servanda (though with the limitations mentioned above):

> "he, that has once, by actual agreement, and any express declaration, given his consent to be of any commonwealth, is perpetually and indispensably obliged to be, and remain unalterably a subject to it, and can never be again in the liberty of the state of nature; unless, by any calamity, the government he was under comes to be dissolved"(II/8,121).

Even though Locke's theory of contract excludes contractual slavery, this accession contract remains clearly very feudal in its inspiration. The community or state may not acquire the right to dispose over life and death, but it still has the right to unlimited obedience of its members. If these members were to change their minds at a later time, they still cannot resign/ quit. The accession is therefore clearly more of an oath of loyalty than a contract establishing mutual rights and duties. Despite all that, this still leaves us with a purely personal connection between the members of an organisation. Even if we were to assume that all members transferred all their alienatable "rights" to this organisation, then still it would not be a state, still it's "laws/legislation" have no binding authority over non-members.

Locke only sees one way out of this:

> "it is fit to consider, that every man, when he at first incorporates himself into any commonwealth, he, by his uniting himself thereunto, annexed also, and submits to the community, those possessions, which he has, or shall acquire, that do not already belong to any other government: for it would be a direct contradiction, for any one to enter into society with others for the securing and regulating of property; and yet to suppose his land, whose property is to be regulated by the laws of the society, should be exempt from the jurisdiction of that government, to which he himself, the proprietor of the land, is a subject. By the same act therefore, whereby any one unites his person, which was before free, to any commonwealth, by the same he unites his possessions, which were before free, to it also; and they become, both of them, person and possession, subject to the government (ed: FvD adds "under the imperium" to his translation here) and dominion of that commonwealth"(II/8,120)

This is Locke's most important modification of the doctrine of Social Contract: the state is no longer a purely personal union, but also and mainly a territorial union. The territory is property of the community, and the legislation is binding on everyone who uses said territory. Furthermore a theoretical foundation is laid for

a political class-structure: one one hand there are full-fledged members of the community (bound by an explicit oath of loyalty to the regime), on the other the people that are only beholden to the legislation because of their relationship with the land, they who are but "guests", who can liberate themselves from their legal obligations by emigrating and liquidating their real estate in the state in question. These "guests" of course do not have the right to vote, which is to say no right of property in the state. Conversely: those who have the right to vote (so: a full member of the community to which they have bound themselves in perpetuity) is co-owner of all the real estate in the state, and can thus help decide on all legislation, but they may not free themselves from their legal obligations by emigrating. They are personally connected to the community, not merely territorially.

The implication of all of this is that the legislator can freely dispose over the entire territory, within the bounds of natural legislation, which is to say "in the common interest". In regards to people, the general limitation holds that they are the property of God, and must be safeguarded as such. Returning to Locke's aim – "to understand political power aright, and derive it from its original" – we can see that the right to create legislation to him is explained as essentially a territorial right: the community acquires a right of property in all real estate of the territory. The right to punish transgressors is explained as a consequence of the natural right to guard over the application of natural legislation.

It is important to realize that Locke's state is not at all meant merely to protect property, if property is to be understood as the means (including land) that someone has produced. The regime of property is part of the jurisdiction/authority of the legislator. In the state, all property-rights have a legal foundation, except of course the Divine right of property over people itself. Under the divine legislation every person has a "right" to life, but in the state it falls upon the legislator to guarantee that right, as a fulfilment of God's mission. The legitimacy of the state is guaranteed by the fact that all parts of the territory, ex hypothesi, was voluntarily relinquished to the legal persona (ed: rechtspersoon) which is the community. After this, all decisions are lawfully valid if they a) have the assent of a majority of full members and b) do not go against God's legislation. Legislation

that meet these conditions do not violate anyone's "right" under natural or Divine legislation, and this "right" to Locke is the only "natural right" people have, as property of God.

Undoubtedly Locke's personal convictions regarding the policy he wished for the legislator of his time tended towards a liberal-democratic politic. It is essential, however, to separate his constitutional conceptions with his ideas of policy. The Lockean constitution is compatible with a totalitarian authoritarian policy (within the bounds of natural legislation). Fundamental to his theory is the voluntary collectivisation of the land (though Locke does not make it perfectly clear whether this amounts to a transfer of full property, dominium, or the establishment of more or less extensive easements, iura[4]). His theory of the state too, is what every theory of state should be: "communistic", not individualistic. But unlike the theories of contract formulated before him, how theory was based not on personal relations, not on some variant of contractual slavery, but on territorial relations. This was sufficient to sink the claims of the absolutist state, and demarcate a domain for individual freedom. But it was not sufficient to break the spell of the master-slave paradigm.

That is after all the most important point for this discussion. Locke retains the supremacy of legislation over law/right. To him, all people, though equal and free among themselves, are subject to the will of one sovereign master. God, who is the sovereign subject of law, and thus also the autonomous moral subject. Locke did not have a solution to the problem posed by how we could derive from this claim, that all people are property of God, that all people owe obedience to God. At times he creates the impression of accepting the Selden-Hobbes thesis, that this obedience has no moral contents, but is solely motivated by the fear of God's omnipotence, for fear of God's "punishments, of infinite weight and duration, in another life"[5]. This contradicts Locke's own claim that the belief in an afterlife has no rational basis, that only revelation can teach us anything in regards to the sanctions of the natural legislation. He also notes in a different, theological writing, that we cannot have absolute certainty regarding the authenticity of any revelation. In other words Locke's theory offers no answers to the questions of

4 Refer to Charles R. Beitz: “Tacit Consent and Property Rights” Political Theory 8, 4, 1980 478–502

5 Cf. L.Strauss: Natural Rights and History. Chicago 1953, 203–204.

the duty of obedience and representation, leaving his conception of natural legislation floating in the air, without any solid foundation and without any clear moral significance. The cultural and historical importance of Locke's contribution should not make us lose sight of the fact that he replaced the right of one master over people with the right of another master. We should also remember that his reputation as an "individualist" rests upon a very tendentious and incomplete reading of his writings.

IN THE BEGINNING...

Returning to Locke's description of the contents of the lex naturalis. The central point of it is that people do not belong to themselves, but to God, and that people has a certain task to fulfil, appointed them by God. Who could be blind to the biblical references, particularly to Genesis 2?

> " ...at the time when Yahweh Elohim made earth and heaven. Wild bushes and plants were not on the earth yet because Yahweh Elohim hadn’t sent rain on the earth. Also, there was no one to farm the land. Instead, underground water would come up from the earth and water the entire surface of the ground. Then Yahweh Elohim formed the man from the dust of the earth[a] and blew the breath of life into his nostrils. The man became a living being. Yahweh Elohim planted a garden in Eden... Yahweh Elohim made all the trees grow out of the ground. These trees were nice to look at, and their fruit was good to eat. The tree of life and the tree of the knowledge of good and evil grew in the middle of the garden. ... Then Yahweh Elohim took the man and put him in the Garden of Eden to farm the land and to take care of it. Yahweh Elohim commanded the man. He said, “You are free to eat from any tree in the garden. But you must never eat from the tree of the knowledge of good and evil because when you eat from it, you will certainly die.”(Gen. 2)

All of the elements of Locke's theory are to be found within this passage: man as an artefact, slave or servant (property) of Jaweh God, has a certain task to perform, to make the earth flourish. The Old Testament provides us with one of the most dramatic and captivating representations of socially defined man, which is man defined as a servant creature. We will have occasion to discover that this same Old Testament also contains traces of a radically different definition of mankind. It is possible to read the book of Genesis as an attempt to resolve a conflict generated by these two different conceptions of man. The eventual

choice of the author or redactor of the book ended up resting with the definition of man as a social being. But, this definition turns out to be, in fact, incoherent. This gives rise to the tragedy of man, who is what he cannot be, that is a contradictory being.

My intention here is to use the Biblical story in Genesis to show the logic of this "social" definition of humanity. In terms of theory of law/right, this is the definition of man as a slave, as a being which is incomplete without a master. I've previously pointed out the contradictory character of the theories of law/right which uphold the legitimacy of master-slave relationships. For this reason it may be useful to take a look at this same contradiction, but from the other side, as it were. Namely from the definition of humanity which is its foundation. This is the definition which was presupposed in Locke's theory as well. We must contrast this with the the definition of man as neither master nor slave, that is to say as a whole unto itself, as morally autonomous, independent from an alien external legislation.

The master-slave relationship is very explicitly expressed in Genesis 2. Nowhere more than in the divine prohibition regarding the tree of knowledge of good and evil. Man ('Adam' means "human, person") may eat of the fruit of all the trees, even the tree of life, except the tree of knowledge of good and evil. Knowledge of good and evil (which is to say of the beautiful and the ugly, more than the good and the bad; so of the value of goals rather than the suitability of means for reaching a certain goal) is knowledge specific to the master, to the one who makes the decisions. One possible way of interpreting the expression often described as "the Lord God" or "Yahweh Elohim" is: 'the ready' (ed: 'paraatblijkende' paraat: ready for action; blijken: to turn out, so the one that turns out to be ready)[6], so the taker of initiative, the entrepreneur whose judgments and choices are decisive in what will happen. The servant on the other hand does not require knowledge of good and evil: theirs is just to do, in the best case they will only require instrumental judgment over the suitability of a means towards the goals set for them. Knowledge of good and evil would make man the equal of God, a moral subject in the fullest sense of the word, which would make the rule of Yahweh a rule over equals, that is to say injustice (This is why man, after their disobedience, must depart from the Garden, the dwelling of the Lord, starting the theo-political search

6 M.Reisel: Genesis—Transcriptie, Verklaring, Vertaling. Den Haag 1972, 22.

for a king, who could replace the rule of God). It is not befitting a servant to judge the legislation; it is not befitting to them to question the actions of their master.

God, according to the Biblical author, has both knowledge of good and evil as well as eternal existence. Though he is willing to grant humans eternal life (no prohibition against eating from the Tree of Life), he is not willing to share the knowledge of good and evil. Yahweh made man from earth to work the earth. People are instruments, and the maker of an instrument expects it to last as long as possible. Adam was destined to be a slave for eternity, a means of and for Yahweh, without his own rational will, a "natural" slave as Aristotle would use the term. Obedience, submissiveness, servility to the Lord, that was Adam's original disposition. Adam is "innocent" in the sense of the word in which it is synonymous with simple. Yahweh's warning in Gen. 2:17, that Adam will surely die if he eats of the tree of knowledge of good and evil is not like an order, reinforced with the threat of death. The verse rather gives the impression that Yahweh assumes it is simply unthinkable that Adam would, under any circumstances, prefer mortality over eternal life. Yahweh made Adam as an animal which has no other desire than to survive (according to Genesis 2 all other animals are also made of clay/earth). Yahweh warns Adam of the danger he would be in if he were to eat of the tree of knowledge of good and evil. That there is no threat of punishment is ex post facto confirmed: after their disobedience Adam and Eve are chased from Eden, but not punished with death. They become mortal, but are not immediately killed. The Bible mentions that Adam would live on for 800 years after the birth of Cain. God's presupposition fits completely into his original plan: Adam is merely a means, a beast of burden and labour, not an animal rationale.

This animal destiny for Adam is confirmed when Yahweh decides to fashion for Adam a helper "who is right for him". What follows borders on the grotesque:

> " Yahweh Elohim had formed all the wild animals and all the birds out of the ground. Then he brought them to the man to see what he would call them. Whatever the man called each creature became its name. So the man named all the domestic animals, all the birds, and all the wild animals. But the man found no helper who was right for him."(Gen 2:19-20)

Even though the animals and man are made from the same material, and in the same fashion, still man does not seem to recognize himself in them. It must have come as quite the surprise to Yahweh that Adam turned out not to be what he, Yahweh, had thought. At his wit's end he tries a different tack: he makes a woman from Adams rib. Upon awakening the latter immediately reacts with the words: "This is now bone of my bones and flesh of my flesh. She will be named woman because she was taken from man."(Gen2:23). Man, Adam, recognizes himself in woman. For the first time he can see himself – he becomes self-aware, which is to say that which separates him from the animals, and which had remained hidden until then for lack of an occasion to become aware of it, becomes visible to him.

This passage shines some clarifying light unto the question of why Yahweh, who after all made man to work the earth, changed his mind after creating Adam and made a Garden himself, in which the "trees were nice to look at, and their fruit was good to eat". It would appear that there wasn't a whole lot of work left for man. Why this change in God's original plan? Presumably Yahweh realized that man as he had made him was far more than just an instrument, and that he had put more of himself into man that he actually intended to. Had he unwittingly recognized himself in man, and had he wanted to spare him the labour of land-clearer and cultivator, in the way that one would try to make work light for your own child? This could explain the new Change in Yahweh's plan: man must have a helper, to make the work even lighter on him. But man, who is not what Yahweh thinks he is, does not need a servant, but a mirror, an equal, through which he becomes visible to himself. Adam could hear God, but he could not see him, yet he was still aware of the fact that Yahweh could see him. This suggests that Adam is driven by the desire to see for himself what Yahweh saw in him? In any case: the desire for knowing himself first finds satisfaction in the appearance of woman. With this, all the elements are in place for total failure of God's original plan. This plan was built around the relationship between master and slave. Adam was meant to be a slave to Yahweh. When this plan is changed, Yahweh attempts to salvage the essence of it by making woman as "helper" for Adam (for lack of a fitting animal). But this plan too, fails: the man considers the woman to be an equal, not as a subordinate.

An atmosphere of equality came into being, which created a shrill contrast with the master-slave hierarchy, which of course uses a totally different language.

Yahweh had clearly miscalculated. He had thought that Adam would cling to life so much that the prospect of mortality alone would be enough to have him obey. But Adam is not an animal which can be content with simply surviving: he wants to live meaningfully/usefully, lead a life worthy of man, even if it means giving up immortality. Adam's obedience is not an automatic achievement; the slave is not a slave by nature. He does lack, for the moment, knowledge of good and evil, but his becoming self-aware makes the desire for this knowledge find expression in him: "the tree had fruit that was good to eat, nice to look at, and desirable for making someone wise."(Gen 3:6)

Yahweh's plan is left a rickety house of cards. All it takes is for humans to ask themselves the question "and why should I not posses the knowledge of good and evil", and the plan is left in tatters. The first question in the Biblical story is not put into the mouth of God, but rather the snake. It is not necessary to see in the snake some manifestation of some devil which has yet to be mentioned. The snake appears as the personification of the question itself: I want to acquire knowledge/insight, why should I do without it? It is the question that begs itself, that poses itself. We've seen before that the question "Should I be reasonable?", once posed, implies its own answer. With the appearance of women, and the becoming self-aware of humans which was made possible by this, this question has become unavoidable, and as such, so is its answer. But it is a question the slave is supposed not to ask, certainly not the slave of a master who is just by definition, who can only justify his mastery as long as their slave shows signs of being a "slave by nature". The dissolution of the relationship of paradise, the tragedy, is now unavoidable. There is no other choice for Yahweh than to grant humanity its freedom, despite the fact that he had not made them to be free.

Yahweh cursed the snake: "I will make you and the woman hostile toward each other. I will make your descendants and her descendant hostile toward each other. He will crush your head, and you will bruise his heel.”(Gen.3:15). The woman is told that she will desire her man, and that he will rule over her, and the man

that he loses his position of favour and will have to toil in the soil by the sweat of his brow, to make the earth flourish without the help of God. The woman, the disobedient one, is degraded into a dependent, submissive being, a subservient helper of man, as was the original intention, and she will desire her lord and master: the brood of the female cannot do without external guidance. Humanity is doomed to desire the impossible: someone who is capable of replacing God as lord and master, a God-substitute[7] – "a God-like prince", as Locke writes (II/14,166). Someone capable of giving people the external guidance/direction they must do without now that it turns out that there is no guarantee that humans will always and unconditionally obey the will of God, which is exactly why God no longer has the right to enforce his will. The presupposition here is that the ability to judge of humans is insufficient for humans themselves. That humans are incomplete, radically imperfect beings. Man, too is condemned to that which he was originally made for. Especially significant to our political reading of this story is the curse Yahweh addresses to the snake, that is to say to the questioning person, the critical, searching person (the philosopher) and thus in fact to the rational part of man. That part thanks to which humans too can share in the knowledge of good and evil. This snake" will constantly be assailed by those that desire a lord and master, to which they can surrender themselves unconditionally", who will make all decisions for them. Between the "snake"and those who long for a return to Eden, to will-less submission/subservience and the comfort of such a life, there is an unsolvable conflict – a conflict within man itself. The "snake" cannot be exterminated, and will time and time again sow the seeds of doubt in regards to the legitimacy of authority. The political wielders of this authority aim for the head (the mind, the spirit), while philosophers nip at the heels of authority. The root of the Hebrew word for "heel" is "to follow": the weakness of rule is the fact that it consists solely of opinion. As such, as soon as the followers begin to doubt, start to question, the ruler loses power. The ruler only has as much power as their followers are willing to give them. The ruler cannot control the thoughts of their followers (even God cannot), and this is what makes philosophy the hereditary enemy of rule: it speaks directly to the thinking man, to that part

7 See the well-known quote by A. Camus in La Chute: “Ah, mon cher, pour qui est seul, sans dieu et sans maître, le poids des jours est terrible. Il faut donc se choisir un maître, Dieu n’étant plus à la mode.” (The Fall, "Ah, my dear, for those who are alone, without God and without a master, the weight of the days is terrible. We must therefore choose a master, God being no longer fashionable.")

of man which is divorced from all external rule.

Man is chased from the Garden, into the desert. The way back is impossible: "a cherub with the flame of the lightning sword" guards the entrance. The above interpretation makes it clear why it must be thus: Yahweh knows that he does not have the right to rule over his equals; he knows that he does not have the right to violently enforce his will on those who "have become like one of us"; that he does not have the right to punish or threaten people, but only the right to deny his favour (see the distinction between lawful and unlawful compulsion). The divine will cannot be legalistically enforced among equals (This same motif is expressed in the story of the adulteress: even Jesus refuses to cast a stone, though he is without sin). But this also means Yahweh can no longer cater to the desire for rule, for a return to Eden and a life devoid of responsibility. This desire must now be turned onto kingship, to the rule of one person over the other.

In 1 Samuel 8 the dilemma is explicitly stated:

> "Then all the leaders of Israel gathered together and came to Samuel at Ramah. They told him, “You’re old, and your sons aren’t following your example. Now appoint a king to judge us so that we will be like all the other nations.”"
>
> "But Samuel considered it wrong for them to request a king to judge them. So Samuel prayed to Yahweh. Yahweh told Samuel, “Listen to everything the people are saying to you. They haven’t rejected you; they’ve rejected me. They’re doing just what they’ve done since I took them out of Egypt—leaving me and serving other gods. Listen to them now, but be sure to warn them and tell them about the rights of a king.”"
>
> "Then Samuel told the people who had asked him for a king everything Yahweh had said. Samuel said, “These are the rights of a king: He will draft your sons, make them serve on his chariots and horses, and make them run ahead of his chariots. He will
>
> appoint them to be his officers over 1,000 or over 50 soldiers, to plough his ground and harvest his crops, and to make weapons and equipment for his chariots. He will take your daughters and have them make perfumes, cook, and bake. He will take the best of your fields, vineyards, and olive orchards and give them to his officials. He will take a tenth of your

> grain and wine and give it to his aids and officials. He will take your male and female slaves, your best cattle,[a] and your donkeys for his own use. He will take a tenth of your flocks. In addition, you will be his servants. “When that day comes, you will cry out because of the king whom you have chosen for yourselves. Yahweh will not answer you when that day comes.”"
>
> "But the people refused to listen to Samuel. They said, “No, we want a king! Then we, too, will be like all the other nations. Our king will judge us, lead us out to war, and fight our battles.”"
>
> " When Samuel heard everything the people had to say, he reported it privately to Yahweh. 22 Yahweh told him, “Listen to them, and give them a king.”
>
> Then Samuel told the people of Israel, “Go back to your own cities.”"(1 Sam. 8:4-22)

The fatal choice has been made. The essence of rule, and thus slavery, is captured in Samuel's warning. The choice made is a hopelessly contradictory one: if people/humanity identify as slaves, as servants, then they are immediately also unfit for rule. But the fundamental conclusion of the story of creation started in Genesis 2 was precisely that man was not fit to be ruled, not even by Yahweh. Not fit to rule, and not fit to be ruled. The entire history of rule, of people/humans as social beings, can only be the history of an unsolvable problem since people as social beings are defined precisely by the need for an external legislation, for heteronomy. Etienne de la Boétie expresses his despair at our history, dominated by the desire for rule, in a very colourful fashion:

> "Poor, wretched, and stupid peoples, nations determined on your own misfortune and blind to your own good! You let yourselves be deprived before your own eyes of the best part of your revenues; your fields are plundered, your homes robbed, your family heirlooms taken away. You live in such a way that you cannot claim a single thing as your own; and it would seem that you consider yourselves lucky to be loaned your property, your families, and your very lives.All this havoc, this misfortune, this ruin, descends upon you not from alien foes, but from the one enemy whom you yourselves render as powerful as he is,[8]

8 E. de La Boetie: Discours de la servitude volontaire. in Pierre Clastres & Claude Lefort: La Boétie et la question du politique. Paris 1978, 114–116, 122.

> for whom you go bravely to war, for whose greatness you do not refuse to offer your own bodies unto death. He who thus domineers over you has only two eyes, only two hands, only one body, no more than is possessed by the least man among the infinite numbers dwelling in your cities; he has indeed nothing more than the power that you confer upon him to destroy you. Where has he acquired enough eyes to spy upon you if you do not provide them yourselves? How can he have so many arms to beat you with if he does not borrow them from you? The feet that trample down your cities, where does he get them if they are not your own? How does he have any power over you except through you? How would he dare assail you if he had not cooperation from you? What could he do to you if you yourselves did not connive with the thief who plunders you, if you were not accomplices of the murderer who kills you, if you were not traitors to yourselves? You sow your crops in order that he may ravage them; you install and furnish your homes to give him goods to pillage; you rear your daughters that he may gratify his lust; you bring up your children in order that he may confer upon them the greatest privilege he knows — to be led into his battles, to be delivered to butchery, to be made the servants of his greed and the instruments of his vengeance; you yield your bodies unto hard labor in order that he may indulge in his delights and wallow in his filthy pleasures; you weaken yourselves in order to make him the stronger and the mightier to hold you in check. From all these indignities, such as the very beasts of the field would not endure, you can deliver yourselves if you try, not by taking action, but merely by willing to be free. Resolve to serve no more, and you are at once freed. I do not ask that you place hands upon the tyrant to topple him over, but simply that you support him no longer; then you will behold him, like a great Colossus whose pedestal has been pulled away, fall of his own weight and break into pieces."
>
> "And now, since all beings, because they feel, suffer misery in subjection and long for liberty; since the very beasts, although made for the service of man, cannot become accustomed to control without protest, what evil chance has so denatured man that he, the only creature really born to be free, lacks the memory of his original condition and the desire to return to it?"

It is clear the Etienne de la Boétie, whose Discours de la servitude volontaire is one of the great milestones in the development of political thought, starts from a radically different conception of humanity than the story of Genesis discussed above. The latter expressly states that man was not made to be free, and the rule in all its forms answer a hopeless desire for a return to Eden,

to a pre-critical state of ignorance and irresponsibility under an infallible legislation. How hopeless this desire truly is, we have discussed above. Another thing to mention, though, is that even Eden was not the original destination of man. God, by creating the Garden of Eden, elevated man above his original position, but this was a favour rendered by Yahweh ex post facto, when he recognized in his creation some unexpected nobility which made him decide to alter his original plan. This decision set in motion the tragic process which, according to this Biblical hypothesis, would leave man as a slave, incapable of not being ruled, while also being incapable of rule. The message of this story is that human self-consciousness, the critical ability to question and judge, is the basis for the desire for freedom, the source of all doom, all evil: the "snake" must be destroyed. The destruction of self-awareness, the destruction of self, is the necessary precondition for the return to the generic unity under God which preceded the creation of woman, and thus human multiplicity. Only as a purely generic being, as Gattungswesen, which is naught but an instrument or means for the exercise of some perfect, external will, can man attain happiness. As long as there is multiplicity, there is self-consciousness, and as long as self-consciousness exists so will the contradiction: man needs a master, and the one perfect master, Yahweh, cannot take this task upon him without committing an injustice: man, as his equal, can only be contracted with, entered into covenants with. But these do not truly limit human freedom and as such do not solve the problem that poses itself. To make the claim, as Etienne de la Boétie does, that man was born for freedom, is to deny the existence of aforementioned contradiction, to deny that man need a master to be happy. Thus, it is a claim that all the misery and suffering rule of one over another causes is not an unchangeable metaphysical fact, but the consequence of an erroneous choice. Not something to be accepted, but rather something to be fought.

Returning to the Biblical story, we can see that very soon after the banishment of people from Eden, Yahweh faces a dilemma. He had ordered man to make the earth flourish, but this had now become a task that required insight, skilful judgment and knowledge. He had predestined man to be without these properties, as an instrument which obeyed only His will, and

not it own. The offerings made by Cain and Abel force him to solve this dilemma, and Yahweh chooses Abel. Cain, the farmer (whose name is related to the word for "to take into possession") is humiliated by Yahweh, despite the fact that as a farmer it is he who makes the earth flourish, while the piddling, simple Abel (whose name means something like "puff of breath") is treated with goodwill. The farmer is a producer, and entrepreneur, a creator, an auctor – an image of Adam after the appearance of woman. The sheep-herder lives in and with nature, he follows his flock – an image of the original Adam.

Cain kills Abel, out of envy/grudge/spite: he, who considered Abel to be his equal, does not accept that Yahweh treats them differently, and he rejects the suggestion that he ought to be "his brother's keeper". In other words, Cain rejects the social definition of man. And Yahweh, he understands the hint: no matter how horrible the crime of Cain is, Yahweh realizes that he does not have the right to enforce his will, nor the right to punish Cain other than by making things hard for him: "When you farm the ground, it will no longer yield its best for you."(Gen. 4:12) For the second time in this story, a person is driven from the land. Cain however, proves himself to be resourceful enough to overcome even this handicap: he becomes the first builder of cities. Among his descendants are nomads, breeders of cattle (Jabal), musicians (Jubal) and smiths (Tubal-Kaïn). These activities, trade, art, industry, which represent the emancipation of man can only come into existence after "Cain had left the presence of Yahweh".

At the end of the fourth chapter of Genesis, as a transition into the fifth, an apparently whole new story starts. There is talk of the birth of Seth, who is seemingly presented as the third son of Adam and Eve. Both placement and presentation elicit the impression of continuity with what came before, but this impression is misleading. I will return to this point later: it is relevant to our purposes if we wish to understand how the Bible deals with a hypothesis which I have yet to go deeper into, the one proposed by Etienne de la Boétie, that man indeed was born "for freedom".

In the fifth chapter, we may note a striking parrallel between the descendants of Seth, and the descendants of Adam and Cain. The names in both family-trees are nearly idenitcal, except that in Seth’s line there is no further mention of Abel, and that Lamech has one son, Noah, instead of three (Jubal, Jabal, Tubal-Kaïn). Noah was

born in the year 1056 after creation, according to Biblical chronology, and with this he was the first man for whom, from birth, death was a historical fact: Adam, Seth and Enoch had already died. Maybe this is the reason why he finds mercy in the eyes of Yahweh when the latter decides to destroy humanity. Of Noah it was said that he lived (orig: rechtschapen, 'schapen': to create, shape) righteously and flawlessly, but the word which is rendered as ""flawless" here could also mean "simple", "silly". Noah "walks with God", which is to say he does not act for any goal of his own, but rather in obedience and subservience to Yahweh. Noah would survive the flood, not through any initiative of his own, but by meticulously executing Yahweh's directions for building the ark.

Noah's actions are those of a loyal slave, a perfect servant. Yahweh spares the servile Noah, but destroys the world of "children (of the Nephilim who) were famous". The latter being the result of sexual union between "the sons of Elohim and the daughters of man" (Gen. 6:4). The result of this sexual union cannot find mercy in the sight of Yahweh. And indeed, the peculiar expression "the sons of God and the daughters of man" refers to a miscreant, to something counter-natural. With the flood Yahweh, or rather the Biblical author or redactor, disposes of not just corrupt humanity, but also a hitherto unsolved contradiction. Namely, the incompatibility of the story of creation of Genesis 1 and the one started in Genesis 2. This is the incompatibility of the view of humanity of Genesis 1, free man, the sons of God, and the one in Genesis 2 and onwards, that of man as a slave, the daughters of man.

The incompatibility of these two hypotheses is concretely represented by the rottenness/corruptness of the result of the union of the sons of God and the daughter of man (the descendants of Eve, who was made from a rib of Adam by Yahweh). The solution rests in letting simple Noah, one of the sons of God (descendants of Seth), but complying with the expectations of Yahweh, survive the flood. In this way a compromise is reached which satisfies both Elohim and Yahweh and allows the author to identify these as one and the same god. The price which must be paid for this is that the entire period before the flood must be forgotten (we must wait until the later prophets before the names of Adam, Eve, Cain, Seth, or mention of the serpent and the flood itself are referenced again). Ham, one of the sons of Noah, sees his father while the latter is naked and in so doing catches a glimpse of

the original state/condition of man, before the Covenant. For this he is cursed and condemned to slavery. He has seen his father as he truly is, but from now on everything must proceed conventionally, according to a positive legislation. The conflict between the two hypotheses has only gotten a conventional solution, which must be preserved by taboo and legal punishment. Noah, free man, descendant of Seth, son of God, who has willingly submitted himself to a foreign will, is to be the model for the new beginning after the flood.

It is sufficiently known that there are significant differences between the story of creation in Genesis 1 and the one of Genesis 2. For our purposes the most important discrepancy is of course the one relating to the relationship of man towards God and the world. In Genesis 2 the earth is made as one chunk of inert matter, though it already contains all things that will exist and live on it. After this humans are made, from the clay/earth itself, placed onto earth in order to work it. Plants and animals, which are also made of clay-earth, come only after that. There is emphasis on unity and determinism, and thus implicitly on the position that all distinctions and differences are but appearances. The multiplicity of things, presupposed by language, is purely conventional, and this is confirmed in the story I referred to in the first above chapter about how animals came upon their names. Things are what they are said to be, only purely conventional determinations of boundaries allow people to orient themselves (or: to retain the illusion that they can orient themselves).

In Genesis 1 on the other hand, the emphasis is placed on multiplicity, indeterminism: there is a primordial chaos, from which as if out of nowhere new things appear, day after day, without the author of the story attempting to present one thing as an implication of a previous thing. Every day the world becomes more complex, and the things in the world also become more complex. All things are also created "according to their kind", as perfect in and of themselves. This is unlike Genesis 2 and onwards, where we have seen failed attempts at fulfilling Yahweh’s intentions: man who turns out to be too good to be a mere animal laborans, animals who were meant to be helpers to man, turned out to be insufficient, etc.

The apotheosis in Genesis 1 is the creation of humans (the creation of humans, not the making of man):

"Then Elohim said, “Let us make humans in our image, in our likeness.

> Let them rule the fish in the sea, the birds in the sky, the domestic animals all over the earth, and all the animals that crawl on the earth."
>
> So Elohim created humans in his image.
>
> In the image of Elohim he created them.
>
> He created them male and female.
>
> Elohim blessed them and said, "Be fertile, increase in number, fill the earth, and be its master. Rule the fish in the sea, the birds in the sky, and all the animals that crawl on the earth."
>
> Elohim said, "I have given you every plant with seeds on the face of the earth and every tree that has fruit with seeds. This will be your food. I have given all green plants as food to every land animal, every bird in the sky, and every animal that crawls on the earth—every living, breathing animal." And so it was.
>
> And Elohim saw everything that he had made and that it was very good. There was evening, then morning—the sixth day." (Gen. 1)

In Gen. 2:1-3 this story comes to a close, after which the second story immediately starts, about the Garden of Eden. Here too placement suggests continuity which is not logically present. The first story is complete: On the seventh day, God rested, his part has been played out, his work is done. Now -one would expect - it will be up to man, created "as in the image of God", not at all created to fulfil some previously allotted assignment. On the contrary, God's words have a liberating sound to them, they are emancipating: "The world is open to you, now you're on your own, from here on out, it will be your life that matters". Furthermore, humanity was created as a multiplicity from the start: "man and woman, he made them", and all of them are made in the image of God. This theme vanishes in chapters 2, 3 and 4 in which women are given a subservient position, both chronologically as well as in regards to their destiny. There is also no mention of man being made in the image of Yahweh, rather there is a clear suggestion that the likeness was, in fact, unintentional and even eventually tragic. It is exactly the divine within man, their ability to question and to judge, which makes the tragedy unavoidable. It is difficult to imagine a greater contrast than that between the image of man as a multiplicity, of people as free and equal and perfect of themselves, not subject to some external legislation on the one hand and that of humanity as a unity, of people as unfree and unequal and incapable of discovering the principles of the good life within themselves on the other. On one side, a world in which everything is what it is, and on the other a world which can only be ordered by convention, in which order can only exist

if a group succeeds in having its conventions accepted by all, but no-one can have a convincing argument with which it could be shown that everyone ought to accept those conventions.

I've already remarked upon how the author or redactor of the book Genesis attempted to solve this contradiction. I would like to offer a few more arguments to support this interpretation. Though I hasten to remind the reader that my goal is to cast light on the essential characteristics of the two view of man I mention, not to prove to intentions of some author or group of authors from a distant past. Genesis 1 refers to man as being created in the image of God. Only in chapter 5 is this idea revisited:

> "This is the written account of Adam and his descendants.
> When Elohim created humans, (Elohim, not Yahweh who dominates proceedings in 2,3,4)
> he made them in the likeness of Elohim.
> He created them male and female.
> He blessed them and called them humans
> when he created them.
> When Adam/Man was 130 years old, he became the father of a son in his own likeness, in his own image. He named him Seth" (Gen. 5:1-3)

God, Man/Adam, Seth: they all share the same likeness, conform to the same image - the three form what logicians call an equivalence class, indistinguishable in form. Seth too, conceives a son, Enoch, though of him it is no longer said that he is the image of his father.

If we take these data-points into account, as well as the fact that "Enosh", just like "Adam", means the same as "human/person" then the almost perfect similarity between the genealogy given in chapter 4 (which fits into the narrative of Gen 2) and that of chapter 5 (which fits Gen. 1's narrative) becomes apparent. The following table shows this[9]

Gen. 2–4	**Gen. 5**
Jahweh	God, Man , Seth
Adam (= man/person)	Enosh (= man/ person)
Kaïn	Kainan
Enoch	Mahalaleel
Irad	Jared
Mehujael	Enoch
Methusael	Methuselah
Lamech	Lamech
Jabel, Jubal, Tubal–Kain	Noach

9 Copied with own alterations from :R.Sacks: “The Lion and the Ass: A Commentary on The Book of Genesis (Chapters 1–10)” Interpretation 8,2/3,1980,79

The obvious interpretation is that the two creation-myths should be understood as rival hypotheses for explaining the same events. Only in chapter 6 are the two connected and their incompatibility concretized in the corruption and evil resulting from the union of the sons of God (Seth), and the daughter's of man (Eve's brood). The combination of the slavish human, who cannot do without external legislation, and free man, leads to unbridledness, unruliness and senseless violence, so that Jahweh decides to force a new beginning. Only Noah is spared: in Noah, the contradiction is solved, even though the relationship between man and God rests on a covenant supported by a demonstration of God's overwhelming omnipotence (the flood). After the failure of natural legislation, dawns the age of conventional, positive legislation, the age of voluntary slavery replaces the age of natural slavery. But in actuality, nothing has been resolved.

If man is what he is, if his truth is within himself, and not in some external legislation, if all people qua moral subjects are free and equal, then any hypothesis of heteronomy, natural or conventional, must be rejected. This other view of man is not refuted in the Old Testament: it is simply ignored. Only after Jesus' declaration that “People can’t observe the coming of the kingdom of God. They can’t say, ‘Here it is!’ or ‘There it is!’ You see, the kingdom of God is within you.” (Luk. 17:20-21) man's search for meaning is diverted from the hopeless quest for an external legislation, to the discovery of one's self as the source of all value. By this, man is saved from arbitrariness and accident of tradition and varied interpretation "You try to justify your actions in front of people. But God knows what’s in your hearts. What is important to humans is disgusting to God. “ Moses’ Teachings/The Law and the Prophets were in force until the time of John. Since that time, people have been telling the Good News about the kingdom of God, and everyone is trying to force their way into it" (Luk 16:15-16). Conventional morals no longer provide a solution. It is not my intention to further venture upon

the thin ice of Biblical interpretation. I do however believe that it can be of some use to call upon the very concrete presentation from the story of creation to focus down on this very fundamental opposition in views on humanity, which is the foundation of many controversies surrounding philosophy of law/right. This I have tried to do in the second chapter above, with specific emphasis on using the story of the Garden of Eden to expose the contradiction within the image of man as a serving or social being. It's most probably also interesting to note that the opposition I wish to discuss further down below is not a recent "finding/discovery", but rather an opposition that has been present as an alternative "since in the beginning".

The task remaining to us now is to determine whether this other view of man, which was put aside in the Old Testament, re-discovered (in my opinion) as a normative principle by Jesus Christ, though later Christendom with its legalistic and social concerns for what is "just in the eye of men" suppressed it once more, does indeed offer us a foundation for a realistic/real order of law/right, for the application of the fundamental principle of law/ right. So much is the thinking of most people apparently ruled by the idea of (external) legislation as sole possible principle for the ordering of human society, that they seem unable to form a coherent image of a society based on total freedom. Never do they make it past visions of the dreadful spectacle of antedeluvian corruption and licentiousness, of chaotic anarchy which must result when "natural" slaves must do without their master, and thus without their "virtue". Never do they make it to realizing the fruitlessness of legislation/law, which is unavoidable is their hypothesis of "man is a wolf to man" were to be correct. For, if one has a wolf as the legislator, what else could be the result than the law of the jungle?

A MATTER OF HAPPINESS*/FORTUNE

It is in a sense ironic that the name of John Locke is so often mentioned in relation to the fundamental principle of law/right. Locke's theory undoubtedly gave the impetus for the development of a more radical conception of the idea of man as a sovereign subject of law/right. Its starting point is however incompatible with the idea of a pure order of law/right (ed: or order of pure law/right). Locke's view of humanity was essentially passive, and not just in his political

philosophy, but also in his epistemology, which is certainly a good example of what Popper calls 'the bucket theory of knowledge'[10]. This is the idea that the human mind is a vessel or bucket which "knowledge", in the form of perception, flows into. There it constitutes itself according to its own laws without the need for any active intervention of the rational, critical abilities of humans, without questions, without hypothetical constructions and purposeful observation, analysis and critical experimentation. The political rendition of this passivity is the idea that people are slavish by nature, that they need external guidance, a legislator to tell them what they can and cannot, to give the lives of the people meaning (or direction). The idea that man is not a giver/imposer of meaning, but a receiver of it. As a giver of meaning a person has their own point of view, to which everything can be related and thus provided with meaning or sense. The passive person is without identity, an empty form without foundation or finality and in that sense infinite, undefinable.

In spite of the spread of the Lockean idea of human rights, Lockean philosophy strengthened the belief in legislation. Legislation was, after all, the foundation of all those rights. But this also put legislation above those rights which lent their sanction and worthiness to legislation, and thus eventually to the goals and policy of the party or group in control of the legislative power. Human rights thus remained "passive" rights, which can be multiplied infinitely. In this the fundamental weakness of Locke's theory is to be found, especially in its later applications. As K. Polanyi[11] correctly expresses, Locke's theory was mainly directed against arbitrary action by the Crown. It did not offer any resistance when various groups later started using the legislative power to create various new "rights" for themselves. As these "rights" are primarily valid against the state, as it is the latter which must vouch for their enforcement or financing, they can easily be used in the scheme of constitutional representative democracy. Locke took peace with determining which boundaries the authorities/government may not violate. He failed to determine which boundaries no person may violate. In fact, he left open the possibility of altering the "rights" of people in any sense/direction, by means of legislation. "Do what you will, but do it legally. Change the legal path as you see fit but do so

10 K.R.Popper: “The Bucket and the Searchlight: Two Theories of Knowledge” in Popper: Objective Knowledge. Oxford 1972, 341–361.

11 K.Polanyi: The Great Transformation: The Political and Economic Origins of Our Time. Boston 1957, 225

by the constitutional path".

Locke's belief in a natural legislation could probably fortify his conviction that individuals would identify more with their "natural" duties than their "rights". When this conviction later started to wane, it was very easy for the impression to arise that people only have "rights" and not duties. As these "rights" merely represented legal, conventional relations, not real opportunities and achievements, they could not contribute to the development of any notion of self-responsibility. On the contrary, such a notion of "rights" can only lead to pseudo-individualism, to a false consciousness of one's own value. It's hardly a wonder that nineteenth-century "individualism", as David Norton notes, was "mechanic, selfish and self-absorbed"[12]. After all, it was not founded in the reality of the individual as a rational and thus moral subject, but rather in the conventional, in the opinions of others most often expressed through legislation.

To attempt to build an individualist theory of law/right decoupled from an individualist ethic is absurd. It was absurd to attempt to derive such an individualist theory of law/right from Locke's popular conceptions by simply pushing the role of the idea of legislation into the background. For to Locke it is the legislation which gives moral contents to said "rights", Furthermore these "rights" were only meant to be guarantees/hedges to allow everyone the opportunity to do their duty. Without this legislation, Locke's "rights" are empty forms/shapes which cannot constitute a coherent whole, as their ratio is precisely the legislation. An individualist theory of law/right superimposed on a social conception of humans (a conception of humans as social beings) lacks any internal coherence. Such a theory must be connected to a different, a political conception of man (a conception of humans as political beings), if it wishes to for a stable, coherent whole which does not need to be completed by some other notion (legislation). In other words: it must be connected with a political conception of society* (a conception of society as polis), rather than with a social conception of society* (a conception of society* as societas).

Polis and societas are two radically opposing normative conceptions of society*, just as zoön politikon and animal sociale are radically

12 D.Norton: Personal Destinies: A Philosophy of Ethical Individualism. Princeton 1976, 43–44 D.NortoN: “Liberty, Virtue and Self-Development” Paper delivered at the Liberty Fund Foundation Symposium on virtue and Political Liberty, Santa Barbara, April 24–27,1980

opposing normative conceptions of man. The point at which these contradictions are brought to a head is the question of the good or beautiful life, and thus the question of the nature of human happiness or of human perfection. In what follows I will make a distinction between political philosophy and social philosophy, based solely on aforementioned contradiction. That is to say it is not based on the traditional division by object, the state one the one hand and society on the other, but on the contradiction between two radically different conceptions of the meaning of life in general and of society*/living together in particular. I believe the state itself to be a social, rather than a political entity. It is a system of social relations, not political ones, and that as such there is little utility in upholding the traditional determinations of social and political philosophy (eg: orig. “wijsbegeerte”, desire for being wise).

We will see that the fundamental principle of law/right provides foundation for the polis as a pure form. This means: not the Greek city-state, but that part of the Greek city-state which made it so special to the Greek philosophers, Aristotle in particular. The negations of the fundamental principle of law/right which, as we have shown above, all premise the relation of master-slave and are as such connected to the image of serving man (animal sociale), capture the essence of societas, the cohabiting/living together of people under an external legislation. We've already seen that these alternative fundamental principles for law/right are either contradictory or totally undetermined. What I must endeavour to do here is to show that the inadequacy of these alternatives is not simply due to my formulation of them, but that it is truly unavoidable. This in the sense that the social-philosophical conception of people and society* itself is insufficient, and inapplicable to the deduction of a coherent system of normative implications. That is to say: the social conception of happiness* is incompatible with several elementary givens/facts regarding human existence.

People want to be happy*[13](13), but many seem to not succeed at being so.

13 Which is to say people want to live a "gelukt" or a successful life. See a.o R.Nozick: Anarchy, State, and Utopia. New York 1974, pp.42e.v. over “the experience machine”; en D.Norton: op.cit., p.236: “For as the intrinsic reward of integral living, eudaimonia is not reserved to the conclusion of the process of self-actualization, but in full measure attends every step of the process. Similarly meaning and objective worth are not confined to the terminus but are manifested within the process of self-actualization and—unlike eudaimonia—increases as self-actualization increases…Eudaimonism consists not in living for the future, but in subsuming one’s future within one’s present.”

This failure can be partially attributed to external factors that are either not under human control, or only so to a very small degree: illnesses, disasters and accidents/misfortunes of many kinds may afflict people. It is undoubtedly true that a perfectly happy life would be spared such misfortunes, and that this makes caution and practical knowledge (applied science) into positive values. No happy life is possible if you do not attempt to arm yourself against all these natural misfortunes/setbacks, either by gaining some control over nature, or by getting to know nature to such an extent that you become capable of predicting, and preparing for natural occurrences in an effort to limit the damage they inflict.

Another part of this failure in the quest for happiness* is rather a consequence of a different sort of human failing. Many people make themselves unhappy, by living unwisely/unintelligently, or by a lack of self-knowledge, or willpower. Many people make others unhappy by their cruelty, lack of consideration or through other means. Some people are so caught up in unreasonable conceptions of themselves and others that they are exceptionally vulnerable to what others do: they can find a reason to be unhappy in nearly anything another does. Just like life itself, happiness*/fortune is not guaranteed. It is something which must be won, day after day. Not only do you need to be "fortunate/lucky" in order to be happy*, you also need to master a certain art of living in order not to be more unhappy than the external natural or social environment allow for. For every person, misfortune/unhappiness/discontentment can come from two directions: from within and from without. This seems to suggest that happiness* can only be attained by those that succeed in mastering not just themselves, but also the environment that they are a part of.

This idea, that happiness*, freedom (from all those things that make us unhappy), is a question of control, or power, is undoubtedly one of the most influential in the history of Western philosophy. It is however immediately evident that, to the extent that the external world or environment contain other people, mastery of that environment also implies mastery of other people. This poses the question: how can one master another, while the other masters them and each still remains their own master? Fundamentally, there are only two attitudes one can take regarding this question: one can either accept its presupposition, or

reject it. Either one can say that happiness* is indeed only possible when everyone masters themselves and all others (and also, to the extent possible, the natural milieu); or one can say that happiness* requires no more than for each person to master themselves, because in that case no-one has a thing to fear from others. The first answer is characteristic of the social conception of man and society*, the second for the political conception. The first one corresponds to the principle that each person is both master and slave to all others, though it bears remembering that the formula "X is master of I" does not necessarily imply that X actually masters I. The second corresponds to the fundamental principle of law/right.

We can define happiness* as the undivided, contradiction-less joy-of-life of a person living in perfect harmony with themselves, nature and those around them. The question is if, and if so how, such a state of happiness can be achieved for all. Possible, not in the sense of "realizable today, tomorrow or in the year 3000", but in the sense of logically coherent. The matter at hand is to determine whether or not this perfect happiness* is a coherent ideal which may serve as a basis for a coherent system of normative implications.

Since the natural environment, including the human organism (to the extent to which its functioning is not consciously controllable) is quite likely to remain a source of unpredictable possible misfortunes, and since there it's no use formulating norms for regulating activities outside of the control of human consciousness, we can reduce aforementioned question to if, and if so how, it is possible for all to live in harmony with themselves while living in harmony with all others. Neither social nor political philosophy would deny the coherence of this possibility. If you were to look, you'd find among proponents of either theory the entire range between optimism and pessimism in relation to the actualization of the aforementioned possibility at any point in human history. Where they do differ is this: to social philosophy the main cause of human unhappiness is the fact that people do not succeed, or in any case have not yet succeeded, in mastering their environment, neither natural nor social. To political philosophy on the other hand, it is not the environment which is the main cause of

human sorrows, but rather the fact that most people do not succeed at mastering themselves, knowing themselves, and actualizing themselves.

For social philosophy psychic misery will disappear as people learn to remove all external obstacles which threaten their happiness*. In other words, as people learn to control their environment. For political philosophy, the impact of externally caused misery will decrease as people learn to control themselves. In economic terms: for social philosophy happiness* is a matter of abundance ("more is better"); for political philosophy happiness* is a question of "costlessness". This in the sense that some who knows what is good for them will not experience a choice they are forced into by scarcity as a cost or a sacrifice. After all, a cost is an alternative sacrificed, and as such in taking a decision it forms a greater obstacle the greater the uncertainty of whether the value of the preferred alternative will truly turn out to be greater than that of any sacrificed alternative.

One way of conceptualizing the opposition between the social and the political conceptions is by noting that they represent two opposite opinions in relation to the production of human happiness*. When considering this, something stands out: as a whole, political philosophy sounds a lot more positive and optimistic than social philosophy, because it does not exclude the possibility for an individual to live in harmony with themselves in an imperfect world, knowing that they in no way contribute to the misery and sorrow in the world. The political position that where every person masters themselves, no-one need fear any other implies that no-one has a thing to fear from an individual that lives in harmony with themselves, according to their own personal truth. The social-philosophical view on life on the other hand implies that no-one can truly live in harmony with themselves if they are not able to control their environment, as long as they don't master their environment and fellow people. So it is only when everyone masters all, that everyone can master themselves. Political philosophy emphasizes personal ethics: if you want to improve the world, start with yourself. Social philosophy emphasizes a social ethic: if you want to improve yourself, start with the world.

In political philosophy there is obviously no such thing as an opposition/contradiction

between individuality and society*, at least not in any ultimate or normative sense. The basic conviction is that self-respect implies respect for others as morally autonomous beings: respect for others is an essential component of respect for myself. Living in harmony with others thus does not at all require self-sacrifice, self-denial, but it is a necessary result of the self-actualization of all. The foundations of the political ethic are contained in the two great commandments of Greek moral philosophy: Know yourself, become yourself. Perhaps one could also add Jesus' warning from the Gospel of Luke: The Kingdom of God is in You, no-one enters without effort. No happiness* is possible for those that do not live in harmony with themselves, according to their own personal truth (their personal daimon, as Socrates put it), not even in the best of external circumstances. The uniqueness of each person, guaranteed even in the purely biogenetic sense, and only strengthened by cultural and local differences, means that each person ought to live as an autonomous moral subject, according to their own legislation. Thus each person has the right to be their own legislator. In other words: man is a sovereign subject of law/right.

The fundamental cause of evil in the world, according to the political conception, is that too many people expect others to make them happy*. Too many people believe their personal problems, their personal misfortunes and misery, can be attributed to the fact that others will not let themselves be controlled, that others do not behave as these people think they should. This belief, this expectation, feeds the idea that people have a right (as implication of the right to strive for happiness/fortune) to determine which legislation others ought to live by. This is a conception that goes directly against the convictions of political philosophy.

The social vision of man and society* obviously cannot accept the political affirmation of the right to self-determination of each person. The affirmation of this right would after all imply the right of each person to extract themselves from the control of all, and as such, in the logic of the social conception, the right to make everyone unhappy, to antagonize everyone and in so doing plunging oneself in unhappiness/misfortune. For social philosophy the starting point is after all that happiness* can only be realized by mastering one's environment. People who look at things through a social lens see an alternative, where the political vision

sees compatibility and complementarity[14]. They cannot understand how everyone could live by their own insight, by their own autonomously chosen moral code (even if they don't find it difficult to understand how it is possible that all nations or states live by their own legislations). To them the idea of a moral code is necessarily a collectivist idea, the idea of a legislation which is valid for all members of some group, chosen in some way. Consequently, they see moral perfection of one as identical with moral perfection of all others: a conception which does indeed imply equality, be it equality in the sense of interchangeability. Non-morally perfect individuals, which are therefore not perfectly interchangeable, but qualitatively individualisable, must therefore be in a relation of conflict towards one-another. Among them there is no compatibility nor complementarity, only contradiction and rivalry. Those who wish to respect themselves must affirm their moral code, not just as being the right one for them, but as the right code fore everyone.

The self-affirmation of one, under those circumstances, is also the negation of an other. According to the conceptions of social philosophy is would then be absurd to claim that human beings could harmoniously co-exist as morally autonomous beings, as long as they have not become perfect copies of each-other (qua moral subjects). From a social standpoint self-respect cannot form the foundation for a harmonious society*, precisely because self-respect is respect for that what distinguishes one from the other and as such it must result in the attempt of all to subject everyone to themselves. So, there is a fundamental contradiction between individuality and sociality, between the individual and the social, and this contradiction necessitates a choice. But, since the social conception of man and society* holds that personal happiness* can only be achieved as a consequence of, so after, the realization of a harmonious society, the choice must be:

14 Cf. Norton: op.cit. bij p.265, p.13–14 “The life of the worthy individual does in fact support the manifestation of alternative values. We must notice that it does so, not by actively taking a hand in the affairs of the other, not by so to speak ‘crossing over’, but strictly by being what it is. The importance of this point is that it commensurates integrity with social value. It thereby joins personal ethics and social ethics as domains of one coherent system—no small gain when we reflect that disparity between the two is the rock upon which most of our great ethical systems lie broken…Eudaimonism teaches that the supreme help a man gives to others subsists in his integrity and self-responsibility, and cannot be predicated upon the ruin of these.” Also ibid. hk 9: “Social Entailments: Love and the Congeniality of Excellences”; N.Branden: The Psychology of Romantic Love. J.P.Tarcher Inc. 1980.

for sociality and against individuality, for self-sacrifice and against self-affirmation. This self-denial is the acceptance of an external legislation: in the social sense, harmonious co-habitation is only possible where people live like morally heteronomous beings, who are wholly at each-other's service, which is to say in service of the legislation which prescribes what each of them ought to be.

There are examples of proponents and exponents of social philosophy that defend the opposite choice, and it is certain that in most cases, social philosophers will interpret defenders of the political conception as being proponents of this selfish, anti-social choice. This is, of course, nonsensical, since in the political conception this choice does not even exist. For political philosophy the precondition for society* is not self-denial, but self-limitation, that is to say limiting each person to themselves, just as the fundamental principle of law/right prescribes. The opposition between altruism and egoism, which has such a big part in social philosophy, relates precisely to the choice between individuality and sociality. It could be disputed that philosophers like Nietzsche and authors like Stirner are social philosophers, but in any case it can be understood that most social philosophers regard them in a very hostile manner. If they are indeed social philosophers then they threaten the entire self-conception of social philosophy, as it would mean that they draw the opposite conclusion from the same premises, thus suggesting inconsistency of the starting position.

An egoist lives in service of themselves, and thus in conflict with others. An altruist lives in service of the others, and thus in conflict with themselves. In social philosophy, this hellish problem can only be resolved by positing that living in service of others merely implies a conflict with a superficial, empirical self, but not with one's own true self, which after all is the same for all people. Those who live as a social being, in service of others -according to this conception - thus has a greater chance of living correctly than someone who lives in service of themselves. This is because the external legislation, which is valid for all, is of course more abstract than inner subjective convictions, and in any case is more attuned to that which is the same in all people. The distinction of egoism-altruism suggests a contradiction between self-interest and morality, which is of course just a reflection of the opposition between individuality and sociality,

and implies that violence and fraud are necessary (and thus justified?) to create a good society*: how else could it come into being if it is in no-one's self-interest?

For social philosophy, moral autonomy as a normative concept can only apply to the community as a whole, not for its members. This is the basis for the social conception of the ideal society*: a society* characterized by the acceptance of an identical moral code, a perfect unity in which all people live for and through each-other, and no-one lives for themselves. Which means a world in which people no longer act as individuals, but as parts of a greater whole. As Rousseau noted: "Those who believe society* to be the place to develop the natural sentiments, do not know what they want"[15]. The ideal *societas* demands wholly denatured humans, and can only come to be through a transformation of human nature from a complete, physical being, to a partial "moral" being. That is to say man must be made into a "legal person", a creature/creation of legislation. Of course, one should note that though in the ideal *societas* only one legislation is valid, this legislation is no longer external, as the ideal people are perfectly socialized people after all, people that have completely "internalized" this legislation (or, possibly even better: they have externalized all of their individuality, all of the normative concepts which are foreign to the legislation).

Where the political ethic proposes self-knowledge, self-becoming and self-affirmation, social ethics preaches self-denial and self-sacrifice

(altruism[16]). Where political ethics revolves around, and

15 Rousseau: Emile. (1762) I. Emile is not a "political" piece, which is to say it is not an exploration of social man or to-be-socialized man, but of natural man, of man as man, not as a citizen. As such it should be construed as being an exploration of an alternative hypothesis, compared to Du Contrat Social, on the conditions of human well-being.

16 A.Rand: The Virtue of Selfishness. New York s.d., “Introduction”, p.viii: “Thus the beneficiary of an action is (made into) the only criterion of moral value…Observe what this beneficiary-criterion of morality does to a man’s life. The first thing he learns is that morality is his enemy: he has nothing to gain from it, he can only lose; self-inflicted loss, self-inflicted pain and the gray, debilitating pall of an incomprehensible duty is all he can expect… Apart from such times as he manages to perform some act of self-sacrifice, he possesses no moral significance: morality takes no cognizance of him and has nothing to say to him for guidance in the crucial issues of his life; it is only his own personal, private “selfish” life and, as such, it is regarded either as evil or, at best, amoral.” Also D.Norton: op.cit., 13–14: “Were the worthy man’s support to others to require his actively taking a hand in their affairs, then it would be purchased at the cost of his own integrity and on condition of his default at his own responsibility, for the life of the other is incommensurate with his own and can only be lived by him through relinquishment of his own. But such ‘help’ is a tragic contradiction. It is a contradiction because the only help that be truly such must be grounded in the integrity and moral responsibility of the helper. It is tragic because it is just this contradiction that is perpetually lived under the name of altruism and social service, availing nothing.” The criticisms of altruism by people like Nietzsche and Sartre are well known. It is fruitful to consider that "altruism" is in fact simply the "social" term for heteronomy. In this regard refer to: L.E.Lomasky: “Harman’s Moral Relativism” Journal of Libertarian Studies 3,3, 1979,279–291: “If you are obliged to come to my aid whenever (the ratio of the value of aid received to the cost of that aid being extended, as stipulated by a strong Principle of Mutual Aid is exceeded, then you are potentially always on call to aid me (and I to aid you). Since the world contains many individuals and since they are frequently to be made better off by some other individual, there is no limit (except that set by the stipulated ratio) as to how often you will have to interrupt the pursuit of your own goals to dash off and provide help to someone else. You will perhaps still be promoting the attainment of ends, but they will no longer be your ends. Rather your actions will be continually governed by what is of value to others and whether circumstances are such that it is causally possible for you to produce those values… Ends are being viewed as a kind of community trust, to be realized by whomever is able to do so with the greatest efficiency… accepting a strong Principle of Mutual Aid involves a curious dissociation between agents and their ends… there is (then) no respect in which the fact that S is integral to your life plan provides you with greater reason to promote S than is provided someone else.”

is bound up in the concept of the self-respect that each person owes themselves as a morally autonomous subject, the social ethic revolves around the central idea that each person first of all owes respect to all others, and thus that they should use others as the norm for their actions. This follows from the basic principle of social philosophy itself, that happiness* is only possible for those that succeed in controlling their environment, and thus that a harmonious society* is only possible where everyone masters everyone. This situation is however impossible to realize when attempting to subjugate everyone to yourself, it is only achievable when everyone subjects themselves to everyone. Those who do not want to submit themselves, are thereby standing in the way of social harmony, and must therefore be eliminated, in some manner.

But, who are we to subject ourselves to? The sheer diversity of others, and the contradictions that exists between their goals, preferences, desires, convictions, etc. denies altruism any concrete, unambiguous content -it becomes a purely negative concept. "I'm not doing it for myself (but for another)" is elevated into an independent moral reason, and the entire problem of moral judgment is reduced to the question of whether any personal gain was the actual intention behind the action, or merely an accompanying occurrence that may at most be considered an extenuating circumstance. In this way, the thief and the merchant are tarred with the same brush, just like the philanthropist and the "socially" engaged politician who lavishly spreads another's (tax)money among his clients. The thief that steals to feed wife and child

or to play Robin Hood can find more mercy than the merchant who thinks only of himself. A systematic and universal altruism is of course completely absurd: if everyone keeps saying "After you!", no-one gets a step further. Where altruism is glorified, usually very spontaneously and naturally, an atmosphere is created in which everyone expects to get to go first, to be able to count on the altruism of the others. Where there is a giver, there is also a receiver, why should that be "the other" and not "me"? As long as people are not fully socialized, altruistic propaganda inevitably leads to an intensification of all egoistical expectations. Only the total conquering of all egoistical tendencies can prevent this effect, but what is this "total conquering" to be understood to mean? Altruism requires an "alter", someone that is willing to act as legislator. Is it any wonder that there is no lack of candidates? The foundation of these strongly diverging political and social conceptions of man, must be found within their very different conceptions of human perfection. To clarify this we may make use of two suggestive formulas. For the political conception we have already met the norm "Become yourself!", the corresponding norm for the social conception is:"Become Human!". Indeed, the idea that in the eventual perfection of humans all traces of qualitative individuality will disappear, that each person will realize the totality of all human abilities and possibilities within themselves, is very much characteristic of the social conception. This is the fundamental reason for accepting the validity of a unique, universal legislation: it is an expression of the implications of the ideal end-state, which is equally ideal for all, and points down the path towards this ideal endstate. Conversely,the idea characteristic to the political conception on the other hand is that there is not one ideal that is valid for all, but that there is an ideal for each which corresponds to the reality of their unique self.

As such, the social conception of the ideal community can only account for people that differ from each-other merely numerically, like atoms of some homogenous mass or matter. In the ideal societas each person represents the same generic, generalized-human consciousness, though this consciousness is simultaneously present in a multitude of spatial-temporal positions. Though it may be puzzling/odd to make such statements, still it is essential in order to understand social

philosophy. Political philosophy emphasizes the individual uniqueness of each human perspective, while in social philosophy a great part is played by the idea that experiences, knowledge and contents-of-consciousness of a multitude of people can be "summed up" or "aggregated" (and are thus commensurate). Though this does suggest that each person only knows a part of reality, this is still from the same perspective - so that the idea of a personal truth is immediately rejected.

It is immediately evident that those that accept this conception of human perfection has no room in their conceptual system for the compatibility, or harmonious co-existence of many qualitatively different individuals. To them the only perfect individual is the whole of humanity (if we are to accept that each person is but a part), or that the perfection of each individual should be conceived as the becoming-Human of each individual, which means the unification of all individuals, or in any case the dissolution of any particular individuality. If a and b both become equal to c, they also become equal to each-other. But there can be no complementarity between equals.[17] Morally perfect individuals don't need each-other and don't have anything to offer one-another.

The absence of complementarity in the ideal societas follows from the fact that if all people are able to fully realize their undifferentiated being-human - which is to say are able to fully divorce themselves from their individuality and thus their "imperfection" - then the absence of other people in no way constitutes a loss of value for those present. Everyone is capable of doing everything and anything can by done by anyone, no-one has unique talents. This is the essence of the social conception of the free society* as a society* in which all dependence on others has been removed - and thus in which the presence of others no longer poses a threat to anyone. This all is nothing but another way to say that one masters their environment, which one has absorbed into one's self fully. In this conception, you are only free once all others have been absorbed into you, and you have been absorbed into all others. Freedom is only possible in perfect unity, for the One, never for the many, which by their very differences form obstacles to each-other and each-others freedom.

17 See Plato: Lysis, 213(e)–223

To the social conception of man and society, it would be ideal if all individual were subsumed into one absolute homogenous unit.

From a normative perspective it is therefore not possible to ascribe an ultimate reality to individuals. On the contrary: the perfection of each person exactly requires the dissolution of all morally relevant individualising traits. Individuals are but "partial" humans. Individuality is synonymous with imperfection. The individual in a person is that which is distinct from the general, and thus that which is in the way of the realisation of the generally-human. Here we find a form of dualism, as the reality of biogenetic individualization must be denied any normative significance. Physical individuality has not role to play in ethics. Being partial, that which is individual is also determinable which means that it carries within it the negation of all other human possibilities. If this premise is accepted, then one must conclude that an individual as such can never be a full-fledged human/person as this stance requires the claim that a full-fledged human must realize all of human possibilities within themselves "Become Human!" is a prescription which expresses precisely the demand for self-sacrifice and self-denial. This demand is founded in the conviction that human perfection can only be achieved by acquiescing to it. This should also clarify that social philosophy's call to respect the others should not be interpreted as a call to respect the others as other, but rather it is a call to respect in all the same generally-human nature and the same universally-human perfection.

It is easy to understand why the social conception of man and society* does not imply respect for the others as others. The others, as empirically experienceable, individualisable entities are not ascribed any higher grade of reality than the own empirical "I", and this "I" has no normative meaning to social philosophy. As such, the other as a mere empirical other also has no normative meaning. What does have normative meaning is the perfection of all that is human, identical for all people. This is why social philosophy does not allow for attaching normative meaning to the determinations of boundaries corresponding to, and following from, the activities of still imperfect, still individualisable people. Morally speaking all that one creates belongs to all, since the same generally-human abilities are at play in the one - abilities which are not specific to that one, but

rather identical to all.

Social philosophy implies that that which is individual, that which individuates, is without normative meaning and thus without measure/immoderate. The less socialized, the more immoderate: *homo homini lupus0*[18]. Everyone wants everything, but not everyone can have everything. Self-fulfilment and self-affirmation in this vision are only conceived as a struggle for everything against everyone. This struggle increases uncertainty and leaves everyone in discomfort and danger. If each person attempts to subjugate their environment and master it for themselves, then everyone must fail at this intent. A harmonious society* is impossible unless people succeed in conquering themselves and acting in unison. Only in this way can the fact that everyone wants everything be reconciled with the norm that everyone has a right to everything. Everyone should strive for unification with all others, so that every satisfaction of every human need, *ceteris paribus*, gives them equal satisfaction, regardless of whether they themselves or another are the physical recipient of this satisfaction.

It cannot be denied that many people indeed show a tendency to project the causes of their misery, sorrow or suffering onto the outside-world - often correctly, by the way- and draw from this the conclusion that controlling their environment is a necessary precondition for assuring their personal wellbeing. This is however something different than claiming, as social philosophy does, that a harmonious society* is only possible when all master all. After all, the actual people are aiming for their own well-being, as defined in terms of their own values and preferences, while social philosophy refers to generally-human well-being defined in terms of some conception of what is good for a Human as such.

The difficulty with such a conception is of course that it is so abstract and unspecified that it hardly has any concrete implications at all for the practice of daily life. This is why the eyes of social philosophy must always be fixed on intermediate-stages, between the many individual people that, as individuals, have no normative meaning on the one hand with on the other Man, which as a completely de-individualised entity is pure normative principle. These intermediate stages can be found in more concrete totalities which, though of course also only partial and prejudiced in their partiality,

18 Cf. F.Engels: “For what an individual want is hindered by all others, and that which comes to pass is what no-one wants.” Marx and Engels: Basic Writings on Politics and Philosophy. New York 1959, 393.

still rise above inter-individual differences and in themselves concretise a *type* of being-human that is sufficiently general to generate a norm for the regulation of a number of situations. There is no agreement in social philosophy regarding the answer to the question of what these concrete intermediate stages could be.[19] It always concerns some "community" or other, somewhere along the road to the perfect *societas* encompassing all people, but exactly which community is not clear. It could be the immediate environment of the individuals whose behaviour one wishes to impose a norm on, their village, city, state, nation, people, race, class, caste, etc.

The essential idea is always that this community is somehow responsible for what the individual is - causally responsible - and that its presence is identical in all members of that community, because of some process of socialization and assimilation claimed to be communal. Furthermore, this community is ascribed normative value in the sense that it disciplines the individual and in so doing puts them to work in a broader whole with a higher degree of reality and objectivity. The community exists before the individual does, and it will outlast the individual as well. It demands that the individual devotes themselves to the communal interest, and that they identify with the whole, not the part that they themselves are.

Because the community, whatever its precise nature and boundaries or description may be, is "closer" to the all-encompassing pure humanity, it objectively has moral authority over the individual. All rights and duties of the individual, according to the social conception, are founded in the community-ethic - the destiny of the community. It is only as a part of the community that an individual gains an ethical dimension. The moral initiative comes from the community, as it were. The moral question "What should I do?", is a question which must be asked and answered, by the community itself, for it is the moral subject, not any individual person. To them, any morality is necessarily heteronomous.

Of course the introduction of these intermediate stages has far-reaching consequences, both for the theory as for the practice of the social conception of man. Because of their partiality, communities, groups, collectives, etc. are not absolute realizations

19 This notion, in my opinion, is the greatest weakness in the classical theory of natural law/right, of Socrates (a.o in Crito) and Aristotle up to Leo Strauss and his many fellow Neo-Thomists, and even in the 19th century idealism both in Germany (Hegel) as well as in England (Bradley).

of the totality of human abilities, and thus not embodiments of that perfect union which is necessary for social harmony. They are inevitably just as necessarily sources of discord as the individuals themselves are supposed to be. As we noted above, in the second chapter, large communities create the opportunity to create sub-communities, subcultures, etc. This leaves us not merely with the opposition between *individual interest* vs *common interest* but also with also with the oppositions of *group interests* vs *individual interest, group interest* vs *general interest* as well as *group interest* vs *subgroup interest.* This complication of social philosophy confronts people with a mass of non-necessarily concordant normative types. In the end, this makes it so each must choose for themselves what their community, and their moral code, is to be, which ethic is valid for them. What should they base this choice on? This question cannot be answered within the framework of social philosophy.

The notion of an unambiguous social authority has no relevance outside of the context of a small, closed community - family or tribe - and even there usually requires the support of some mystical-religious or magical framing, of some supernatural, unavoidable sanction. In complex communities the notion of subservience of the individual to the community is practically impossible to specify. This causes the social conception to often give rise to conflicts between "individual" and "community", and between groups. Conflicts that originate from the fact that different individuals identify themselves (or the community) with different groups, or even in the fact that individuals can find themselves on opposing sides of one conflict, and allies in the other. This paradoxical result shows the inherent limitations of social philosophy. As long as it cannot offer a method to clearly show that the terms they use have an exact, determinable, well-defined reference, the unity it offers as being normative will necessarily remain chimeric.

EUDAIMONIA[20]

Political philosophy categorically denies that that which is individual is immoderate/without measure, without principle, without normative significance. As such it denies that every ordering of human behaviour must be heterogenous. It does not posit social harmony as a precondition to personal well-being, but rather assumes that every individual has the possibility, under all external circumstances, even the most miserable, to reach an inner nobility that will allow them to face even the harshest of adversities, without losing their self-trust or self-appreciation. For this the Greek term "eudaimonia" tends to be used, rather than the

20 Refer mainly to: op.cit., 216–240. also N.Branden, P.Breggin, Maslow e.a. psychologists. It is misleading to associate "eudaimonia" too strongly with the striving for happiness* (see for instance H.De Vos: In-leiding tot de Ethiek. Nijkerk 1977, 153e.v.) which makes the distinction with hedonism and utilitarianism fade. The main problem is that the term "happiness*" (orig: geluk) is so ambiguous: it can signify a passive "feeling of happiness" (which can vary from extatic or orgasmic experiences to a simple feeling of contentment of satiation) as well as the contradictionless joy in living of someone that knows that their life is worth living and that they are capable of leading it (this is to say to give direction to their own life as acting being), knowing what this implies for them. Self-appreciation, self-trust and self-knowledge are the main preconditions for eudaemonic living. Or as Aristotle put it: to live according to one's virtue (with the demands of as perfect a degree of self-actualization as possible). See a.o . Zie o.a. Branden:The Psychology of Self-Esteem. New York 1981, hk 7 (“The Nature and Source of Self-Esteem”); P.Breggin: The Psychology of Freedom. Buffalo, N.Y. 1980, hk 3 (“Self-Love, Self-Esteem and SelfInterest”). Where the striving for happiness* refers to the satisfaction of desires as such, eudaimonia refers to satisfying the right desires. Where being happy* refers to desires having been sated, eudaimonia refers to the knowledge that you are on the path to the satisfaction of critically appreciated desires which were selected by an objective measure. (“In the psychology of self-determination, self-esteem is defined as the good feeling generated by placing high value on the conscious, ethical and rational exercise of free will, personal sovereignty, personal freedom and self-determination”, Breggin, op.cit., 19—“Because pleasure attends the gratification of right and wrong desires indiscriminately, it offers no guidance to worthwhile living, and, as ‘pleasure in the long run’ happiness is in the same condition. The mistranslation of eudaimonia as ‘happiness’ is therefore fatal to the guidance that true eudaimonia offers. Eudaimonia is both a feeling and a condition. As a feeling it distinguishes right from wrong desire. Moreover, it attends right desire, not upon its gratification, but from its first appearance. Because eudaimonia is fully present to right living at every stage of development, it cannot constitute the aim of such living, but serves instead as merely a mark, a sign. It signals that the present activity of the individual is in harmony with the daimon that is his true self.” Norton, op.cit., 5).Eudaimonic or intelligent reasonable living thus escapes the "paradox of happiness*"which Anthony Kenny: “Happiness”, Proceedings of the Aristotelian Society 66, 1965–6’,102 describes as follows: “The greater a person’s education, and sensitivity, the greater his capacity for the higher pleasures and therefore for a richer life; yet increase in education and emancipation brings with it increase in numbers of desires, and a corres-pondingly lesser likelyhood of their satisfaction…To increase a person’s chances of happiness, in the sense of fullness of life, is eo ipso to decrease his chances of happiness in the sense of the satisfaction of desire.” This paradox only exists for those that identify with their own subjective desires, and it simply disappears for any that see that the measure of their wellbeing is not to be found outside of themselves, in the things that elicit their desires, but in themselves.

more familliar terms "happines*" or "well-being" which muddle the distinction between external and internal causes of unhappiness.

Eudaimonic living is living in accordance with one-self, with one's "true self", and thus presupposes a certain knowledge of and becoming of one's self. It is living at harmony with yourself, as a person of integrity, without contradictions, not merely happy* in the sense of "content", "sated", "satisfied", etc. The eudaimonic ethic is based on the insight that each person is a completely unique individual (an insight that far predates its confirmation by modern genetics), with a completely unique perfection which excludes all other perfections as incompatible with one's own principle. This is the Socratic conception of a *daimon* being hidden within each person, their true "I" which determines their entire life in a moral sense. Not in the sense that it "predetermines", rather in the sense that no happiness is possible for those that do not live in accordance with themselves. The "daimon" is the concept which allows for an explanation of the fact that some people who seem to have it all, something which conventionally is a sign of success, still live such miserable lives, or are so deeply unhappy, or are deemed pitiful or despicable figures without substance by those that know them. The same goes for the opposite situation, where people who are faced with great misfortune such as illness, accident, opposition, can still be examples of strength and conviction and unshakable consistency, able to continually inspire their environment. The presence of this daimon also shows itself in the, at first seemingly paradoxical, experience of dissatisfaction or indifference which at times accompanies the achievement of a goal, even though you put your full effort into realizing it, defending it publicly, making many sacrifices. Once again this also applies to the converse, where a failure of a consciously chosen project is accompanied by a sense of satisfaction, contentment and relief. It is reflected too in the fact that it is possible to truly enjoy certain things, even though you have learned, and believe, that it wrong to do or have those things. As a final example consider the feeling of immense pride you can feel in persisting in the execution of a freely chosen project, which you know and feel to be right/correct, even though you know it takes a heavy toll, and you are under a lot of pressure to cease the endeavour.

All these experiences express the realization that there exists a reality which

cannot be discounted/effaced, which cannot be circumvented by convention, and that one cannot arbitrarily redefine one-self. The reality of the own self[21] makes it so that we are unable to choose who we

21 Cf. L.Strauss: “Socrates deviated from his predecessors by identifying the science of everything that is, with the understanding of what each of the beings is. For ‘to be’ means ‘to be something’ and hence to be different from things which are ‘something else’.” Natural Right and History. Chicago1953, 122.The fact that human individuals exist justifies the question what each of these individuals is. This means to say the question of the identity of these individuals. The fact that people are definitely not cognitively infallible justifies the demand for a critical study of the identifications produced. "No entity without identity" - but this does not mean that, when we know something exists, we therefore also know what it is that exists there. This is true even when we ask such questions in relation to ourselves. In any case it seems absurd to deny the reality of one's own self. As I have suggested in chapter 3, biological data alone seems to provide a foundation for this hypothesis, and undermine the opposite hypothesis (or at least it forces the proponents of this opposite hypothesis to develop a perfectly ascetic ethic, in which it is posited that that which is good for people has nothing to do with what these people are i.e. individualisable psychophysical specimens of an identifiable species). It remains of course a logical possibility for the "social" hypothesis to be correct, and that there is only one true self which is the true self of each person (or of each member of a certain group or race), so that perfect communion/community would be possible. It is however evident that we do not know this hypothesis to be correct, and even that there are reasons to doubt it. This leaves the social philosopher in the situation where they must plead for some interim-organisation of society* in which people are maximally enabled in developing their self-knowledge. Which is to say, to have maximal opportunity to critically test their self-conceptions, and this in a way which puts each of them under the same methodological rules. This condition is necessary because the social philosopher still hopes that it will eventually become clear that all people are fundamentally the same. However, this comparison would require a unique methodological procedure, differing for each person. For this task, the fundamental principle of law/right is the only appropriate one, as it is the only principle which does away with the master-slave relationship and thus the only fundamental principle which does not imply that some have the right to push their experiments on others. In other words, the fundamental principle of law/right is the only fundamental principle which can be true unconditionally for all people, regardless of their positions in time and space, and regardless of the number of people in the world. As such it is the only principle that the social philosopher can appeal to when they admit that the true self of people is not yet know, and can only be determined experimentally. Compare in this regard A.Gewirth: Reason and Morality. Chicago 1978, p.135: “The Principle of Generic Consistency (Act in accord with the generic rights of your recipients as well as yourself) is a necessary principle in two ways. It is formally or logically necessary in that for any agent to deny or violate it is to contradict himself, since he would then be in the position of holding that rights he claims for himself by virtue having certain qualities are not possessed by other per-sons having those qualities. The principle is also materially necessary, or categorical, in that unlike other principles, the obligations of the pgc cannot be escaped by any agent by shifting his inclinations, interests, or ideals, or by appealing to institutional rules whose contents are determined by convention.” Gewirth correctly emphasizes the fact that a fundamental ethical principle must be valid independent of any particular conception of the good, even though it naturally must also be compatible with any conception of the good which would turn out to be the right one for any person. This explains the great importance of a consistent an (in regards to any particular conception of the good) impartial order of law/right. Sadly, Gewirth does not apply his insight in a consequent manner at all, so that his "theory of law/right" eventually ends up coloured by Gewirth's personal conception of the good. In other words, it gains a distinct "ideological" character. See R.Pilon: “Ordering Rights Consistently: Or What We Do and Do Not Have Rights to Do” Georgia Law Review 13,4, 1979, 1171–1196.

are, and thus unable to determine what will make us happy* and what will not. People are who they are - even though they sometimes don't know who they are, through a lack of self-knowledge (and some may never find out). The self, the daimon, the true "I" is an objective reality which subsists in each person, just as in social philosophy undifferentiated human-hood, Man, subsists in each individual. The daimon we refer to is however unique to each person, a real, completely determined and principally determinable something amid other individuals of the same kind, but qualitatively different from them.

So, the human daimon is not infinite in the sense of being unbounded. It's finitude implies a normative importance. The social vision on man posits that the perfection of each person is perfectly identical to the perfection of all other people, so what is good for one is eo ipso good for all others. This perfection is not individualisable, not determinable without concrete normative implications. It does state what "one" should do, but not what you or I should do. It does state that "one" should perfect all human abilities, but not which abilities you or I should perfect. The paradox of social ethics, as shown above, is that it creates an illusory normativity, but has no normative implications for daily life in its unlimited variability and caprice. Who could possible fully actualize all human abilities and possibilities? It is not very relevant to claim that this may not be possible under the current circumstances, but that it will be once the stage of social harmony has been achieved. This idea that everyone should perfect all human abilities, that everyone should "become Human" (instead of themselves), leads, as we will see, to a maximalising ethic whose only principle is that "more is better".

This general human-hood, this undifferentiated being-human, is without normative value to the political or eudaimonic ethic. It is a starting point for each individual life, not the final fulfilment of it. Every child starts with the illusion that it can do everything, or will be able to once it has grown up. It does not take long, however, for the child to discover that certain feats and ways of living are outside of *their* capabilities, and will remain so. It does not take long for the child to realize that all human abilities do not form some homogenous mass, but rather an incredibly complex structure of alternatives

which exclude each-other and thus force one to make a choice. Man, as totality of human abilities, or the perfection of all human abilities, has no normative or guiding value in the eudaimonic ethic precisely because it keeps its eyes on the true nature of this choice. If this undifferentiated humanhood is posited to be a/the fundamental value at once the claim is also made that any choice at all makes no difference, and that one should try not to choose: for to the degree someone chooses to devote their life to something, they also choose not to devote it to anything else. This, to social philosophy, means choosing not to realize certain human values - an "immoral" choice which can only be vindicated if it is presented as a "social", rather than an individual, choice. After all "the community" is the true moral subject to social philosophy, and it is up to the community to develop all human abilities. If the community then were to charge a certain individual with a certain task or specialization, this does not imply that the community makes a choice against other possibilities and abilities: it is merely choosing to assign these to other individuals. This "solution" amounts to nothing but a play on words from the view of political philosophy: what could it mean for the community to be the actually choosing, moral subject? Only individuals are thinking, judging beings; only individuals are moral subjects. The social ethic is an ethic without a moral subject.

The conclusion eudaimonic or political ethics draws from this is that if there is no objective basis, for each individual person, for judging all possible ways of life, then all ethics would necessarily have to be subjectivistic - arbitrary and unfounded. We have seen above that the weight of this criticism is also expressed in social philosophy, as an acknowledging of the necessity of a community-ethic, a compromise between the complete indeterminability of the ideal of the complete man, and the full determinability of the individual people deemed to be partial and thus lacking/flawed. We have also seen that there is no objective criterion for determining exactly where this partial concretisation of the supra-individual must cease, and certainly not for determining if the state encompasses the correct relation between concreteness and normativity. Once the path of concretisation has been started, there is no reason not to follow it to its end. If the

normative community does not encompass the whole of humanity, which part of it does it encompass? Of course, it is nonsensical to push this concretisation too far if one believes the individual to be without principle, measure, bounds; but why should one cling to this belief?

The "community ethic" is no more than an unstable compromise, an abstract interpretation of certain individuals looking for meaning in a complex mass of historical data which can only be interpreted as a coherent pattern by use of a strong selection and just as strong a bias. The community ethic is a hypothetical construction which represents a consciously normative interpretation of a conceptually isolated and abstracted whole, which is however in no way the only conceptually isolateable whole which can be built from the same historical data. Judgments of value can only be founded in relation to these conceptual models. The same data may be used to defend the position that the community is evolving into a higher phase, or to claim that it is in decline - it all depends on the model applied, which level of abstraction is chosen and which data are considered relevant to the "identity" of the community as a spatial-temporal system of interactions.

All this makes the objective validity of an ethic based on the concept of "the" community a very dubious matter indeed. It also makes the strategy for attaining social harmony, the acceptance of the same moral code by all members of the community, a matter of party-formation and power-relations rather than of moral growth. This incites discord in the name of unity, which means normative bankruptcy for social philosophy, leaving the latter no other choice than to fall back on the claim that only small, closed communities can be harmonious. But, as we have remarked before, this does not tell us a thing about what the relations between these different small communities should be, and furthermore it goes against a mass of empirical data from sociology, ethnology and other social sciences which have studied the processes of social control in small communities. Emerson worded it like this: "Every ship is a romantic object, except the one we are sailing on ourselves".[22]

The cohesion of many small communities is often a purely externally generated effect, e.g. a consequence of the absence of manageable

22 R.W.Emerson: “Experience” Essays. 2nd series (1844)

alternatives. This is made apparent by the flight from familial and tribal bonds which takes place as soon as the opportunity arises. This phenomenon, which manifests itself nearly everywhere in the so-called Third World, illustrates the paradox and theoretical weakness of the social ethic. Though a small community might indeed produce a concrete moral code, with clear normative implications for daily life for the members of that community, this seems to be precisely the reason that the normative force of it is usually repressive rather than liberating, commanding rather than guiding. The social harmony that comes from it seems to not at all result in any inner harmony, but rather in feelings of insecurity and powerlessness which inevitably accompanies the insight that any failure of the communal moral code, even the most trivial, implies the radical unintelligibly of the entire world. Such an ethic does not allow for marginal adjustment, after all, which would allow for each member of society* to solve their own problems by their own insight. It closes itself off from the formation of alternatives, and those that do seek such alternatives put themselves on the margins of society*, or outside of them. Precisely because such an ethic is ascribed to the community as a unit, it makes the world appear as a monolith, to be accepted or rejected in totality. Such a viewpoint is not at all of a sort to take into account the specific problems and circumstances of the individual. That which looks like harmony to the casual observer upon closer scrutiny reveals itself to be no more than a continuously repeated ritual of pacification and subjugation.

The end-point of any such social ethic is a complete moral dislocation of the individual. The latter is forced to always see the world from a perspective other than their own, which is to say to see themselves as something alien, as something purely external - an object, not a subject. Since it is both biologically and logically impossible to truly take a perspective outside of their own, people are forced to play a game they cannot win, a game that will allow them no opportunity to develop any self-trust or self-appreciation. Their only hope lies in obediently subjecting themselves to the rules of the community, to legislation - and in doing this to take care not to think or judge, but rather to passively execute and obey - even though this means that all their personal successes will be claimed by the enforcers of the legal order, while all their failures will

be ascribed to their personal shortcomings. This principle - "privatise loss/failure and socialize profit/success"[23] - which is so absurd and paralysing in the economic sphere, cannot lead to any good in the social sphere either.

The impasse which the concept of social ethics inevitably leads to can only be broken by taking the individuals themselves as the ultimate moral subjects. This is the law of the political ethic: the reality of the individual daimon of each person is the foundation of the eudaimonistic ethic. The political conception of self-fulfillment is not that of gorging oneself without measure on any- and everything capable of satisfying needs, wishes, desires and cravings. On the contrary, the latter conception is the one that presupposes that each person is in fact "all people" and it conforms to the idea that all limitations must come from without. The ideal of a eudaimonic life is that of someone who has found themselves, and has developed a fully integrated, contradiction-free self-conception, which, while serving as the basis for all their actions, is not contradicted by their experience of the results. Knowledge of self is fundamental to this, and thus the awareness of the reality of the own self, and the awareness that not everything one does is compatible with what one in fact is.

The fact that we are not born with knowledge of self does not mean that we can avoid ourselves, our daimon. The fact that no-one is born with knowledge of the real, factual world doesn't mean this real, factual world has no influence of the success or failure of what we do. No-one can choose themselves, no-one can decide what will make them happy and what will not. No-one can choose what their strong suits or weaknesses will be. No amount of effort or devotion can make someone into any other than who they are. As such it is besides the question to ascribe all failure to the lack of ambition, or seriousness, or effort: it is possible to choose incorrectly. This is precisely the case because knowledge of self, though possible, is not automatically guaranteed. One can also choose incorrectly because of the fact that, initially, all human possibilities, all ways of living, present themselves as possibilities of and for the individual.

23 What is meant by this is best observed in bureaucratic organisations: the successes of the actions of a subordinate are claimed by their superior. If the subordinate were to fail however, they themselves would be the one to blame. This explains the tendency to an uninspired, conservative following of "safe" (to the officials) rules.

Nothing human is alien to me: this is the initial position. It could not be otherwise. After all, you need to specify yourself as a human before you can specify yourself as an individual. "What am I?" logically precedes the question of "Who am I?".

The crucial step towards the moral development of the individual is the insight that all these human possibilities do not form some homogenous mass, of which all elements relate to the individual in the exact same way. Rather they are a complex structure of alternatives. In other words there is not but one, uniform perfection connected to all human possibilities, but a multitude of mutually exclusive perfections, a multitude of possible lives. This insight generates awareness of choice and thus of the moral problem: not all possible lives are equally suitable for me, which life should I choose, who am I? Ethics, the art of living, is in this context not a matter of achieving everything which is humanly possible to achieve, but rather of achieving that which conforms with one's own true self.

In this context, self-fullfillment, if you will, is a transition from infinity into finitude. Without self-knowledge all possibilities, without distinction, seem to be mine, and as such I could only construe my self-becoming as my becoming of everything which is humanly possible. It is only when I start to understand myself as something determined that it makes sense to ask who I am. At first the answer to this question is a very rudimentary self-conception, which is more than likely to be incorrect, but which still implies the ability to order the world *around me*: I can test my *self*conception - and this is what is ultimately meant by "living critically". Said initial conceptions of self are not merely likely to be incorrect, they are extremely likely to not be self-conceptions at all, but borrowed conceptions. Initially, you likely start seeing yourself as that which conforms to the opinions of others. This isn't a bad thing, as long as you do not start conceiving of these borrowed conceptions as authoritative definitions, or start dogmatically identifying with them.

The great import of such a self-conception, regardless of how true it is, is that it makes it possible to experience existential contradictions, which is to say that it makes it possible for someone to discover that they are not who they think they are. Here too, learning from mistakes is possible, but in order to do so one does require a willingness to determine how this experience of contradiction will be resolved, which of the contradictory elements will be

parted with and which will be kept. Knowledge of self is only possible when one learns to realize that conventional valuations/appreciations, based on those initial, borrowed conceptions of self, are not necessarily a reliable guide for one's own life, and that those that live by the valuations of others can expect little more than a desolate existence in which even the greatest successes are little more than immaterial events, or a charade, a life of self-deceit filled with vexation at the irreverent mockery by those that bear critical witness to the whole affair.

Self-knowledge presupposes a permanent willingness to consider one's own momentary self-conception to be a hypothesis, and to apply it as such: to assay it, to test it against experience, to analyse it and correct it where necessary. Self-knowledge requires a willingness to experiment. Not in the sense of experimentation for experimentation's sake, like a game, as the "eternal teenager" seems to think, but for the sake of self-knowledge which is - let us not forget - a precondition for all knowledge. After all, all knowledge rests on judgment, and all judgment is judgment by a judging subject. Every judgment has the form "I am of the opinion that" - regardless of whether it concerns an athletic, aesthetic or ethical judgment, and it can only be understood from the perspective of a judging subject. This is the reason why knowledge can never be "pure": all knowledge is perspective-bound, its objectivity is always relative in relation to a certain frame of reference (in this one does have to consider that relativity and objectivity do not exclude each-other) - there is no perspective-less knowledge. It is the reality of the judging subject that keeps this perspectivism from degenerating into mere subjectivism. This is precisely the reason why all knowledge depends on self-knowledge.

The goal of experimentally testing one's own self-conception is thus nothing but the creation of the possibility of eliminating all alien judgment, including all alien truths, as premises for one's own existence and action. This is the function of those difficult years called adolescence - which do not appear to end for some people. Adolescence begins with the experience that you are not who you think you are, with the discovery that the identity which you had in your own eyes and those of others, is inadequate, is an alien and cumbersome cocoon from which grow expectations that you cannot. or do not want to, live up to. The transition into adulthood demands a symbolic "patricide", which does not necessarily

need to be destructive in relation to the contents of the self-conception you had borrowed up until that point, though it must be destructive in relation to the motives which led to its acceptance - it must anchor the conception you have of yourself in the own self, relating to its object as well as its source. Only after this is done are the preconditions present for the development of the self-trust and self-appreciation in which the meaning and value of life are manifested. Self-trust and self-appreciation presuppose self-knowledge, not in the sense of completed self-knowledge, but in the sense of insight into the reality and knowability of the own self. With this insight comes the possibility of making all experiences commensurate, to relate them all to the answer of the fundamental question: "Who am I?", and to use the gradual answering of this question to build an increasingly coherent basis for judgment.

Self-trust and self-appreciation are the essential aspects of a eudaimonistic existence: I can make something of my life; I am worth the effort it costs to make something of my life, completely worth it. The concept of the individual daimon also serves as the criterion required to deprive the fundamental ethical rule, that you should make the best out of your life that can be made of it, of its formal tautological character. This rule is morally valid, on the grounds of the fundamental principle that you should respect yourself as a rational being, and the realization that life presents itself to you as a field of possibilities rather than as a mere monolithic potentiality requiring only time in order to be actualized. Of course one should make the best of their life that can be made of it, but what does this mean if no measure is given in relation to which one can determine what is more and what is less good? We've repeatedly ran into the fact that looking for such a measure outside of the judging subject is hopeless. But why would we look for that measure outside of the judging subject? Such a decision could only be justified if we were to know that the judging subject, the individual, is an entity without identity, without principle or finality, something completely indeterminable or infinite, without measure. However, not only do we not know this, it is even an extraordinarily improbable, not to say absurd, hypothesis. This hypothesis interprets the fact that self-knowledge isn't simply a given as evidence for the position that there is nothing to know there, that the individual as such does not represent any ultimate reality at all. This leap from an epistemological premise to

an ontological conclusion is completely unacceptable, and even contradictory from a dialectic perspective (since any statement about the knowability of reality presupposes the reality of the knowing subject involved).

The political or eudaimonistic ethic regards each person as a unique entity with its own fundamental principle and its own finality (using both these concepts in their normative sense): each person is a new beginning, a being without precedent, which will need to confirm the premises of its own existence over and over again. In this sense, initiating, showing initiative, creating, is the sum of all truly human activity. To political philosophy, the life of a person appears as a work of art, as the concretisation of an abstract conception of self. Judgment of it, like any judgment of any piece of art, has two dimensions: an intrinsic dimension - how good is the product as a concretisation of a certain, determined conception?- and an extrinsic one -how much truth is to be found in the conception itself? Not even the perfect execution or concretisation of a self-conception will render any satisfaction when this conception itself does not conform to the real, though not yet explicitly known, "true I" - with the daimon of the individual. Nor, for that matter, can much of what is called art render any satisfaction that goes deeper than the admiration for the perfect execution of a "good find", when what is found is but an arbitrary construction, devoid of metaphysical meaning, without any level of truth.

The idea of life as a work of art implies that the individual, whose life it is, is the only and ultimate measure for the judgment of that life. It concerns their life, not the life of any other. To propose another measure for judging it is to level purely subjectivist criticisms, without any objective relevance. It amounts to claiming that the other is not what another would want them to be. Of course, the person whose life it is is also the only one with a definite say over the level of truth of the self-conception they live by. They alone are capable of "first-hand experiencing" with the totality of their consciousness, what it is to concretise this particular conception. Only they can definitively judge whether the contradictions they experience between their different ideas, between an idea and an emotion, between different emotions - should be resolved in this way or that. Contradictions simply point to the existence of a problem. They must be resolved through a re-evaluation of all premises on which they rest. In some cases, this is simply a matter of

thinking about it. As we've previously concluded, there exist objective, generally valid norms, valid for all, which regulate the formal validity of a self-conception, but not its content-related validity. The thief or the ruler will, if they make the attempt, easily be able to identify a number of the contradictions they experience as being consequences of the fact that the actions and productions which he boasts are not factually his, but that they rather embody the possibilities and achievements of others. How could he live in contradiction-less joy when he must constantly be on guard against meetings with people whose hostility or subservience reminds him of the formal invalidity of his self-conception. Or, if the only way he can attain peace of mind is by surrounding himself with sycophants, yes-men and bootlickers, who reflect back unto him only his own cowardice?

Self-actualization is something you must accomplish yourself. No-one can do it for anyone else. That is not to say that you don't need anybody's help. On the contrary: not all contradictions or perplexities you face can be blamed on a formally invalid self-conception. For starters, a self-conception is a very complex thing, a complex bundle of ideas, views, abstract characteristics and evaluations of true or supposed properties. Such a whole can be represented symbolically, but it cannot be concretely presented. It is possible to experience what it is like to be such a person, but this complex whole cannot be perceived. It is not given to perception. And yet, self-knowledge requires for a person to "see" themselves. In other words, for a person to be able to concretize, perceive and judge, as a whole, their own self-conception. As Nathaniel Branden[24] remarks: a person requires a mirror in which they can perceive their soul, in which they can see themselves as they are. This mirror can only be another person, another consciousness: "A person is capable of knowing themselves only conceptually. What is offered by another consciousness is the opportunity to see himself". This requirement of "visibility" is conditioned by the desire for knowledge of self. It is the desire for knowledge of self which drives the man of integrity to "expose himself" to other people of integrity, and to seek out their company, since only people of integrity can be honest "mirrors". Conversely, the best way of avoiding self-knowledge is by seeking out the company of hypocrites who desire nothing more

24 Branden: op.cit. bij p.281, p.201

than not having their self-deceit be revealed, whose ultimate justification is "if I didn't do it, someone else would" which is to say that their actions do not flow from themselves.

The desire for self-knowledge is the essential precondition for the form of sociality which is commonly called "friendship" - Etienne de la Boétie writes:

> "Friendship is a sacred word, a holy thing; it is never developed except between persons of character, and never takes root except through mutual respect; it flourishes not so much by kindnesses as by sincerity. What makes one friend sure of another is the knowledge of his integrity"[25]

Friendship is of course the most concrete illustration of the principle that respect of others is a consequence of self-respect, and through this of the fundamental principle of law/right. The connection in this regard is clarified by Branden's concept of psychological visibility. The individualism of the eudaimonistic or political ethic is not a sterile atomism, it rather implies the the necessity of a free sociality. It does this by means of the methodological requirements of the individualistic ethic. It is not my intention to dwell on said methodological requirements here, nor even to start on the development of the methodology of the individualistic ethic. Yet still it must be stated here, in all clarity: if it is indeed the case that one of the most frequent motives for accepting the premises of social philosophy is that people are afraid that individualism is synonymous with egoism or atomism (in the special sense of the word which it often carries in such discussions), then this fear is totally and completely unfounded. We've seen multiple times that it is social philosophy which cannot explain human sociality[26]: its concept of the empirical person is that of a measure-less individual, that wants everything, while its normative concept (which confirms that each person, or rather each full moral subject, has the right to everything) denies precisely the complementarity which explains why even perfect people need each-other. Social philosophy has no other option than to consider the social as a sui generis, which is useful towards the end of muddling the distinction between free and unfree sociality, but which brings no clarification to matters whatsoever. On the contrary:

25 La Boetie: op.cit. bij p.254, p.160

26 See C.A.Conly: “Alienation, Sociality, and the Division of Labour: The Contradiction in Marx’s Ideal of Social Man”. Ethics 89, 1979, 82–94

we'll see that an analysis of the social idea of justice shows that it is impossible to provide the latter with any rational foundation. This conclusion is of course a reflection of the negative conclusion of the investigation into the duty of obedience and the problem of representation, which proved to be necessary during the discussion of the fundamental principle of law/right. First however, it should be clarified that the concept of visibility does not express the only "link" between individuality and sociality. Another, much more important connection is made by the conception of man as a finite individual, which is to say something which necessarily has a complement.

In the above, I called self-fulfilment a transition between infinity and finitude. This is because the political ethic is indeed an ethic of individualization, and individualization implies the determination of boundaries and thus of finitude. The primary identification is no more than a generic specification "I am a person/human" (or, maybe: "I am a member of this community") and this specification means, using Terentius' famous words: Homo sum, nil humani a me alienum puto. It is however both a painful as well as a liberating experience to discover that not all that is human is simultaneously within the scope of one's own possibilities. It is a liberating experience because it brings with it the first recognition of a structure within the field of possibilities which was initially experienced as an undifferentiated mass, and with it the insight that not only is it not necessary, to set the full realization all human abilities as a goal, it is even impossible to achieve. It is a painful experience because it brings with it the consciousness of the need to choose, to limit yourself, opening up the possibility of choosing poorly/wrongly. The choice must be made however, lest you be left empty-handed.

As the knowledge of self increases, you don't just see more clearly who you are, but also who you aren't: you learn to see that there are values which will have to count on the efforts of others for their realization. Self-determination, like any determination is also negation - the negation of all alternative possibilities, all those alternative human lives which beckon the individual with their specific temptations, distracting them from the life which is specifically theirs. As Chesterton wrote in his Tremendous Trifles: “The perplexity of life arises from there being too many interesting things in it for us to be interested

properly in any of them".[27] How to choose, from all these interesting possibilities, those which are interesting to me?

Eudaimonistic life is only achieved when one succeeds in identifying said life, to make that life one's own which is wholly suited to what one in reality is, while denying one-self all other lives. This self-denial is not borne from a blindness to the intrinsic value of said alternative lives, but rather because of the knowledge that you yourself are not capable of realizing that value, of making good on the promises they hold. The perfection of all these other lives, is a job for others. As such, self-affirmation and self-determination include the affirmation of the intrinsic value of all other people. Each of them holds the promise of the actualization of some one of the possible perfections. This is why, in the political conception of man and society*, the self-affirmation of each is compatible and complementary with the self-affirmation of all others. The human striving for happiness cannot take the path of self-denial and self-sacrifice. On the contrary, it requires taking the path leading to the most resolute but critical self-actualization, of the most thorough individualization. The more you affirm yourself, the more space you leave to others. The greater your self-appreciation, the greater the appreciation for others that realize the values which are outside of your own reach. Only when giving the best of yourself do you give others something of irreplaceable value. All the talk of altruism, pity and solidarity cannot conceal that these primarily involve self-denial, compromising the integrity of a person, and intimidating their personality. The technique consists of eliciting feelings of guilt, making everyone believe that their happiness is the cause of other's unhappiness, their fortunes the cause of an other's deprivations. The tragic contradiction of this trafficking of guilt, unbefitting of man, is that it can subvert even the most intense interpersonal relations (like helping another become themselves - eg parent-child relationships, husband-wife relationships) into mere external duties, thus depriving these relations of their potential as a source of undivided joy-at-life. This degrades society* itself into an inherently and irrevocably bankrupt enterprise in which each is both debtor and creditor of all. Such a conception makes society* itself into something unexplainable and perverse.

In stark contrast to this, the political conception of society is eminently

27 Chesterton: "The Secret of a Train" Tremendous Trifles (1909)

clarifying. It shows us why and how the closeness of a society* depends on the growing moral perfection of the individuals that constitute this society*, the polis. The individualistic ethic encourages each person to look for their own moral truth within themselves, and to realize it from themselves. In so doing it introduces a process which allows everyone to actualize themselves fully without entering into conflict with others also following the ethic of self-actualization. Furthermore, this process makes it clear to every person just how much they depend on others for the realization of this human values that they, as a person, do recognize but cannot fully develop in themselves without compromising their own values. No other conception of society* is meaningful/ sensible, as a society* only has meaning/purpose if it has a reason for existing to all its members.

The perfect societas on the other hand is the actual negation of society* - in the sense that in such a perfect societas each person is supposed to identify fully with all others. The social conception of self-fulfillment demands the subjugation of the environment, since each individual is considered to be unending, without boundary and without measure. However, since everyone acting in this way can only bring forth conflict and disharmony this subjugation of the environment must be transformed into a subjugation of all to their environment. An individual cannot expect a thing from society*: for society*, in the social conception, is the union of all others against the individual. The individual's only hope lies in forgetting themselves, and to let other impose their legislation on them. The perfect polis does not exclude self-fulfillment, it rather includes/encompasses it. The initial struggle of all against all is not decided by a universal subjugation of all to others, but by each withdrawing into their own borders, and beginning the process of perfecting their unique possibiilities and achievements. The Bard summarized the eudaimonistic ethic and its political implications as follows: “This above all: to thine own self be true, And it must follow, as the night the day, Thou canst not then be false to any man”.[28]

Above, in chapter 3, we've seen that each person has the right to do or not do with their means as they see fit, that we should understand the expression "their means" in the naturalistic sense (not in a legalistic

28 W.Shakespeare: Hamlet 1/3

sense), and that each person has the right to expand their means without limitations, and to exchange them for other means. It is immediately clear that if this position is connected to the social ethic, more is better, it is easy to discredit the fundamental principle of law/right as a heartless materialistic principle. It should be clear by now that there is no possible way to connect the fundamental principle of law/right with an ethical theory that implies that everyone has the right to everything (and because of this, a right to nothing that is not allocated to them by some universal legislation). The proof of the validity of the fundamental principle of law/right relies on the principle of the moral autonomy of each person, which is to say on the principle that each person must themselves develop their own moral code, their normative fundamental principle.

It is of course true that many people simply do not have a life's goal, and thus no principle for the composition of their estate. They simply gather what they can and know no other criteria for success of their actions than the growth of their estates. We cannot make the claim that such behaviour is always without principle. It corresponds, after all, with a certain normative conception of people. The anti-individualistic ethic, with its ideal of each person actualizing all human possibilities, opposes the principle of division of labour, and mutual dependence implied in the idea of the finite human being, and the multitude of finite human beings. Marx wrote in a well-know passage:

> " For as soon as the distribution of labour comes into being, each man has a particular, exclusive sphere of activity, which is forced upon him and from which he cannot escape. He is a hunter, a fisherman, a herdsman, or a critical critic, and must remain so if he does not want to lose his means of livelihood; while in communist society, where nobody has one exclusive sphere of activity but each can become accomplished in any branch he wishes, society regulates the general production and thus makes it possible for me to do one thing today and another tomorrow, to hunt in the morning, fish in the afternoon, rear cattle in the evening, criticise after dinner, just as I have a mind, without ever becoming hunter, fisherman, herdsman or critic."[29]

29 K.Marx & F.Engels: “Die Deutsche Ideologie” Werke, Berlin 1960, dl.3,p.30. Later, in Das Kapital, Marx toned down his opinion and accepted the division of labour, though not as a phenomenon which can be explained by the existence of human diversity and individuality, but as a social necessity: the community requires specialists; and as such it is the community which will determine the division of labour, by assigning to each their place in the societal chain of production. This division of labour fits into Marx' conception of "the realm of necessity", which is to say the struggle of Man against Nature. It is organisational in nature, not spontaneous: it does not answer the individual need for self-limitation and for complementary individuals, but rather the need of the organized community to satisfy its needs as efficiently as possible. (See the quote by Lomasky, supra note with 320). The realization of this scheme of course requires a system of slavery in all circumstances where people have not yet all become undifferentiated and undifferentiateable species-beings. This delicate point is admitted by at least some marxists and socialists: e.g. Trotsky at the IXtj Congress of the KP in the USSR, R.L.Heilbroner: Marxism: For & Against. New York 1979, hk 5: “The creation of socialism requires the curtailment of the central economic freedom of bourgeois society, namely the right of individuals to own, and therefore to withhold if they wish, the means of produc-tion, including their own labour. The full preservation of this bourgeois freedom would place the at-tainment of socialism at the mercy of the property owners who could threaten to deny their services to society—and again I refer to their labor, not just to material resources—if their terms were not met.” In an earlier article in Dissident, summer 1978, Heilbroner emphasised the necessity of a "collective morality" in a socialist society, and of the means to enforce it. Compared to the vague pronunciations by Marx himself about "...a community... of free individuals that do their work with communal means of production, and in which the labour of each individual is concsiously applied as being the collected labour of the community"(See R.Freedman (ed.): Marx on Economics. Harmondsworth 1976, p.232) The question here is: consciously applied by whom? For whom? Under which conditions? (A hint as to the answer to these questions may be found in a recent study by Hungarian sociologists G.Konrad & I.Szelenyi: The Intellectuals on the Road to Class Power. New York 1979) Only when a fully and spontaneously socialized Humanity is established can this scheme exist without repressive means, but in that case it must be a new sort of person, since even the best of habits are not hereditary. Also refer to F.Engels: “On Authority”, Selected Works I, Moskou 1958, p.637:, “At least with regard to the hours of work one may write upon

This passage clearly expresses that the purported ideal of an amorphous life of people for whom the distinction between the particular and the communal or generally human has disappeared, actually presupposes the absence of scarcity, abundance. The naivety of the proposition that "society regulates general production" while we all go fishing or sun-bathing is disconcerting. Especially striking is the idea that each caprice is worthy of being explored, that the dilettante-ism of the financially secure playboy is the actualization of human perfection: "And now, I shall farm, and then, I shall paint. Tomorrow I shall write a play and the day after, I will climb Mount Everest!". It is the life of Don Juan, wrapped up in, as Kierkengaard expresses it, a "soulless aestheticism", without principle, attuned to the fulfilment of any momentary caprice - without sustainability/durability and without integrity.

the portals of these factories: Lasciate ogni autonomia, voi ch'entrate!" This description of the communist system of production no longer has a thing to do with the "mere supervision over production" of the Communist Manifesto, nor with the claim that, in the Grundrisse, "the labourer will no longer be the main source of labour, but will exist beside the production-process" D.McLellan (ed.): Marx' Grundrisse. New York 1971, p.142.

As soon as we account for the fact that scarcity does and must exist as long as people do, we can see that people whose ideal is to be everything and then some must reach the conclusion that they can use everything, but that they will never have enough to do all those things they feel called upon to do. Especially: never enough money, for money is the universal means of exchange, with which you can buy "everything/anything", and as such it is the most proper means for those that do not know exactly what they will do with their lives. Many people do indeed believe that they are nothing if they are not everything, or at least as much as possible, and in so doing they ignore the ethical significance of their own "I", of their own intrinsic values. To them, self-actualization entails not just maintaining, but deepening the rift between the particular and the general. The practice of living your own life as something that is both unique and exclusive, to take your own position and to develop from this a strict personal vision on all things, is rejected precisely because such an attitude is recognized to be asocial and competitive rather than social and submissive - as the affirmation of a unique perspective of values rather than the acceptance of a universal, communal system of values. What, then, remains but to leave yourself open to everything, and to regard the accumulation of all means, which is to say of abstract wealth (in the form of political power or money) as the sign of a successful life?

The amorphous nature of so many estates finds its origin in the amorphous character of so many people, certainly not in the application of the fundamental principle of law/right itself. The fundamental principle of law/right has its own foundation in the individualist ethic, but it is not concerned with the moral judgment of any person. It has no other object than to determine the boundaries within which people may organize their own endeavours, regardless of their motives and moral convictions. In that sense we must say that everyone has the right to waste their own lives. Their own lives, not that of any other. So long as someone respects said boundaries we cannot say that they are damaging another in said other's possibilities or achievements, not even when they surrender themselves to the most "restless and endless accumulation of more and more wealth": they are not depriving any other of something the other has a right to. The only one they are harming is themselves. By sacrificing the goals for the means and elevating the accumulation of means to a goals. From the

perspective of the individualistic ethic we may judge such a person critically, but we must also acknowledge that, as an autonomous subject, they have the right to be their own legislator.

EQUALITY AND JUSTICE*

The starting point of philosophy is the awareness of human fallibility. Human existence consists of a string of attempts to solve all manner of problems. Implicit in each attempt is a series of judgments regarding how the world is connected, and which state it is in; regarding the nature of what would be a satisfactory solution to the problem; and regarding the suitability of a certain method of getting to this solution. Time and time again, however, acting on those judgments does not seem to achieve the result we expected: either we do not achieve the goal we aimed for, or it proves not to be a solution to the problem posed, or the solution itself proves to be less than wholly satisfactory (eg when we figure out that the problem was conceived of incorrectly). Apparently people are free to misunderstand reality, but they are not free to escape it. The price they pay for said misunderstanding is pain, fear, apprehension, dis-satisfaction, misery, death. Living in beauty is not simply given to a person, and this is true to such an extent that to many "living" is synonymous with "suffering" and "living together/society*" with "comiseration/ compassion" (ed: "medelijden" pity, compassion. "Mede" = together with, "lijden" = to suffer, to undergo. So: to suffer together with another). Not a few people are of the opinion that the highest calling of the intelect consists in rationalising and exalting suffering itself as being the deepest meaning of life, as being the justified ransom people must pay to discharge an inherited debt. A debt people must bear for the sin of existence itself: for to a person, to be is to be guilty.

From this awareness of human fallibility springs the necessity of judgment. Just as living in beauty is not simply a given to people, so life itself is not guaranteed to them. Just like living, survival, staying alive, is a task, not an automatically fulfilled precondition. Nothing is achievable to people if they do not try to ensure it by their action. But action is the goal-oriented application of means based on judgments. People have the ability to choose their goals, their means and their methods. They even have the ability to choose their theory regarding the world on the basis of which

they might identify certain relations between means and goal. Knowledge, means, goal: the concept of action implies that the acting subject is in possession of the fundamental categories of judgment of the true, the good, and the beautiful.

The thing that integrates these three categories is the notion of the action. Each action implies an affirmation, strong or weak, that "this is believable, this is desirable, this is efficient". An acting subject is a judging subject. As Ludwig von Mises expressed it: thought and action are "cogeneric": thought is action and action always involves thought. Every judgment comes from a judging subject, it is subject-related, but this does not necessarily make it "subjective" (because the judging subject itself possesses an objective reality). Every judgment presupposes, as a judgment, an answer to the question "And why should *I* believe that this is true, beautiful, good?" Every judgment implicitly refers to one's own, personal criteria for truth, goodness, beauty, that need not be decisive to anyone but the judging subject. There isn't a person for whom the relevant question is whether or not a specific action should be taken: but rather the question is what action should I take? This, as we have seen, is a question which makes the necessity of self-knowledge evident. The true, the beautiful and the good are not free-floating abstractions, but categories of judgment whose necessity is made manifest by the experience of one's own fallibility, in the awareness of the fact that all judgments come from the same subject and cannot be ordered as long as the subject itself is not known. As long as that is not the case, any attempt at resolving these problems of judgment are necessarily of an arbitrary character.

Self-knowledge must be acquired. We can be wrong about ourselves. Just as we are free to misunderstand/deny the reality of our environment but not to escape it, so we are also free to misunderstand/deny the reality of our self but not free to escape it. Simply claiming: "this is me, and this is the life that will allow me to actualize myself", does not bring any guarantee that that life will allow me to identify as the best of my possible options. To a certain degree we can choose our environment for ourselves, and in so doing control it - but in no case are we free to choose who we are. Know yourself! This is the first imperative of life. Though it is true that within each person each human perfection exists as a potentiality, it is certainly not true that

that it is an arbitrary matter to each person which life they lead. On the contrary, the ethical problem itself consists of the questions: which life to choose? what is my personal perfection? which life is the best one for me? which principle should I actualize? This choice alone makes it possible to give meaning to the concept of moral greatness, as exemplified by the person of integrity. The latter is the person that actualizes themselves, which is to say actualizes their own fundamental principle distinct/distinguishable from all other possible principles, and whose life is an integrated coherent whole precisely because it is the development of all the implications of their unique personality.

This development is not an automatic process, of course. Integrity presupposes self-knowledge since self-knowledge alone makes a person capable of generating all of their judgments from the same fundamental principle, to generate all their judgments as judgments of the same subject. It is only knowledge of self which creates the opportunity of judging coherently and of finding the confirmation of one's self in the actions which are guided by these judgments, the practical confirmation of the correctness of a certain self-conception. The person of integrity is capable of making a principled decision, because they actualize a determinable principle: they know their calling, they have found themselves among all the possible people that subsist within them. Precisely because they know who they truly are, which human perfection is truly theirs, they also know which aren't. Omnis determinatio est negatio. Self-knowledge is also knowledge of the other as an other. To use the same figure of speech as before, self-determination is leaving space for the other. This is why the person of integrity, who only wants to be themself, is the only truly "social" person, since they recognize in each other person a different principle, and thus sees that the actualization of all human values can only be achieved by a multitude of people - all people are complementary, and thus certainly not mutually interchangeable. Only those who perfect themselves, those who make the best of themselves that can be made of it, can give the best of themselves, and it is exactly there that his existential value lies for all others, in the fact that they can accomplish what no-one else can.

Knowledge of self must be produced, and this can only be done experimentally: the road to self-knowledge is that of "trial and error". A person can only come into self-knowledge by forming and testing hypotheses regarding themselves. Such hypotheses are the basis of their actions, and are what are evaluated in judging the result of said actions. A hypothetical self-conception is tested by

concretizing it, by making good on the promises or predictions it contains and ascertaining whether the self-perception thus rendered possible confirms the self-conception, or not. By doing this we may gradually come into self-knowledge, by the experience of growing integrity, increasing harmony of conception and perception, thought and feeling. This is of course very much a practical process. Self-knowledge is not pure "theoria", and it cannot be. Self-knowledge is gained by doing: by doing you get to know not just the world around you, but also and especially yourself.

There is no life more miserable than the life of one who willingly and knowingly ignores himself, spending the time in his life to concretizing a self-perception he knows to be false (eg because he expects his social environment to appreciate it more). No culture will produce creatures more miserable than one which sets some sort of "social ethic" in the place of the moral autonomy of the individual, demanding people to behave differently from what they are. Such a social ethic presupposes an unsolvable contradiction between self-interest and common/general interest (the interests of unnamed others), while the propaganda for such an ethic is actually one of the main factors in the appearance of said contradiction, as we have discussed above. Worst of all is that such an ethic is contradictory in and of itself, which means that it, in fact, makes any experience of that which is moral impossible, by reducing it to a purely externally suffering of a sense of duty which has no foundation in the rational nature of individual people. This position which I have repeatedly alluded to now must be further scrutinized. If we can defend it, at once it will be shown that the idea of man as an animal social has no normative implications, and this would once more confirm the hypothesis that the contradictions and imperfections of the alternative theories of law/right (the negations of the fundamental principle of law/right) are connected to, and may even spring from, the contradictions and imperfections of the social view of man itself.

From the fact that the problem of the good, the true, the beautiful is immediately connected to that of self-consciousness and self-knowledge, it follows that there exists for each individual a personal truth, a personal beauty (or "nobility" as is often said) and a personal goodness. This does not imply subjectivism, since

the individual's own self is the ultimate criterion of their judgments, and this, though often enough unknown, still objectively exists. It does not even imply a radical relativism: though the answer to the question "Who am I?" necessarily differs for each person, the answer to the question "What am I?" is still necessarily identical for us all: "a person/human". This makes the meaning of the existence of personal truths and values the fact that each person holds the promise of an individual, yet human perfection, and thus also of a completely unique perspective on all things - unique, but human and thus akin to all other human perspectives.

It is absolutely vital to understand that this kinship is not equality. If two different things are both perfect and complete they are necessarily incommensurable in the sense that it is equally incorrect to say that one is "better" (or "worse"), or "more (or "less") than the other, as it would be to say that they are both "equally good", or "equally much". This is because each of these judgments would have to come from a judging subject, who necessarily can only represent one perspective, so that the commensurability expressed in said judgments is nothing but the trivial confirmation of the fact that that subject too is a subject, a perspective on all things. The "better", or "just as much" in these judgments is always a "better-from-my-perspective", an "equal-from-my-perspective", etc. There is no judgment free from perspective/standpoint, and there cannot be. Though all things may seem commensurable from a certain perspective, and are made commensurable in judgment, still we cannot conclude from this that all standpoints are commensurable. This would have to presuppose a subject which can understand all things simultaneously from all completed perspectives - an infinite and thus totally undetermined and indeterminable subject. Such a subject would immediately also be a subject without objective identity, a subject without the possibility for self-knowledge. But such a subject cannot exist as a judging subject, since judgment always implies choosing, and thus requires an objective criterion, a well-defined perspective on the available alternatives. Without this the choice must always be arbitrary, the expression of an isolated whim. To a finite and thus determinable subject, this criterion is necessarily their self, which as an objective ens reale subsists in the subject itself and is thus completely outside of their realm of choice. But for an infinite

and indeterminable subject, this possibility is excluded: it cannot find within itself a principle for its judgments. As non-determined, as infinite, it cannot provide foundation for negation, and so neither can it do so for choice. A judging subject can only find the principle for their judgments in themselves (since all the rest is the object of judgment) if this subject is finite and determinable - only then can a fixed position be taken, things be viewed in a certain perspective, and can the subject see themself as but one of many possible perspectives. Only when capable of seeing oneself as but one among a multitude of possibilities can one, through the uniqueness of one's own perspective, commensurate all other perfections, which is to say, relate them to themself, just as one can only determine what is further, and what closer from a determined position. The formation of judgments is possible only because of this commensurability. Said commensurability however, only captures things as they appear in a certain perspective, it does not capture the different perspectives themselves. It is impossible to imagine a coherent meta-perspective, one which considers things from multiple perspectives simultaneously.

This is the contradiction which expresses the perplextion of the theologian: the logical impossibility of thinking God to be both acting and judging, as well as an infinite being. As an infinite being, God's freedom and will are nothing but groundless randomness, and thus without any moral significance. To an infinite being, what could the sense, the direction, of anything be? How can an infinite being sensibly/meaningfully choose? To God, all possibilities are implicit in his being, and they are all just as much a part of him: He is everywhere, everything is equally close and equally far. But if all possible worlds, each with their own perfection, are within God in such a way, then his choice can never have any sufficient grounds[30]. His choice is necessarily and irrevocably arbitrary: we cannot imagine God being able to justify why he made precisely this world. It is patently contradictory to think of God both as an infinite being as well as acting or judging: either he is finite, or we cannot ascribe any normative meaning to him. As an acting or judging subject he must be finite, and thus an individual which represents but one among a multitude of possible perspectives.

30 G.H.Smith: The Case Against God. Los Angeles 1974. Kai Nielsen: Ethics without God. Buffalo, N.Y.:973 Norton: op.cit. bij p.265, hk 5 (“The Metaphysics of Individualism”). See also C.A.Campbell: Selfhood and Godhood. London 1957.

While this would not make him without moral significance, it still wouldn't make him a moral authority in the sense of an authority which one owes obedience and must justify oneself to. An example, perhaps, though not one to imitate (for this would be self-betrayal, self-denial, and failure at the attempt at acquiring the self-knowledge and self-being which one found so exemplary in the idea of God as the being of the greatest integrity) but one to equal.

Of course, it is not the theological problem as such that is of interest to us here - we may leave that to the theologians. It is however interesting to question why this problem is posed. In the answer to this question we may find the source of the most fundamental of all the controversies in the philosophy of law/right. Even the most vague and intuitive conception of justice* is sufficient to understand that justice* implies some form of equality. What form? This is a question the philosophy of law/right must contend with. Is it the equality of commensurability: the equality of "just as much" or "just as good"? Or is it rather the equality of incommensurability, which can only be stated in the negative, as the absolute non-reductibility of the one subject to the other? Those who wish to follow the first path must necessarily seek some standpoint/perspective from which all people, with all their possibilities and limitations, all of their physical, moral and intellectual differences, still appear as "equal". Furthermore, this standpoint must be unique and superior to all human standpoints, of which there are many. Egalitarianism, as we can call the defense of equality as commensurability, lays claim to a divine, or in any case superhuman, perspective which can brook no competition from any human standpoint. For, if it were not superior, it would have to be treated on equal footing with all other perspectives, at which point it appears as not merely an unlikely, but a thoroughly unjust and immoral perspective, since it would have to be an explicit rendition of total indifference in relation to all people. This is the inescapeable conclusion of the claim that "everyone has the right to the same amount", regardless of what they are or do, or of the claim that, in an objective sense "everyone is worth equally much". If someone were to truly judge themselves and their fellow people in such a way, they would be completely incapable of entering into relations with others, and of partaking in "social life". In order to do that, they would have to be able to discriminate between people, and this is

only possible if they do not consider all these people as "equally much".

Equality as commensurability only makes sense in relation to a superior, extra- or super-human value-scale, relating to a non-acting, non-judging subject. For a person/human, it has no practical implications. On the contrary: it would doom man to total moral passivity. For there is only one way in which all people are "equal": they are all people. So, those who define justice* in terms of this commensurable equality, in fact claim that justice* can only exist where the "generally-human" has the upper-hand over the strictly individual, where individual people subjugate their selves -who they are- to what they are. This form of justice* is therefore a denial of the unique value of each individual: each individual person is after all manifestly not equal to all others. Defined as such justice* demands self-denial, self-betrayal, self-sacrifice. Justice* is opposed to, incompatible with knowledge of self, becoming of self and self-respect. It is a form of justice* which must conceive its impartiality as an impersonality, since the standpoint from which it must be conceived cannot possibly be someone's standpoint and cannot possibly pay any attention to personal characteristics. This means it can only have an eye for objectively measurable differences which are identical from all possible perspectives, which is precisely why they fall outside of the domain of moral judgment, outside of the domain of judgment about people qua rational, acting beings. It also means that everyone ought to regard themselves in this impersonal manner. For instance, to an egalitarian all "the poor" have too little and all "the rich" have too much - the causes of these differences in income or distribution of wealth, which actually are in the domain of human action, is of no interest to them. The egalitarian expects of "the poor" that they ought to feel slighted, and of "the rich" that they should feel guilty - regardless of the causes: after all, all people are "equal" to them, so that all inequalities are unlawful by definition.

The impersonality of this idea of justice* introduces a fatal contradiction in people however, that between *who* they are and *what* they are. This contradiction manifests in that terrible situation which is the object of the ancient moral-philosophical problem, namely that no satisfying answer is possible to the question "And why should I be just? What's in it for me? It's irrelevant that X, Y and Z find your

arguments convincing: what arguments do you have to convince me?". It is rather evident that these questions cannot be given any sort of satisfying answer if one starts from a conception of justice* which precisely denies any moral significance to the "me" of each person. Such a conception doesn't let you convince anyone on why they should be just. Their questions presuppose precisely that self-confirmation that disqualifies them as a moral subject. The moral "discourse" is not directed at them, but to some universal being, the non-individualized human within them.

So, in order to convince them, only the alternatives to rational argumentation remain: use of violence, physical, emotional and fraudulent; quote Rousseau:

> "So the law-maker, being unable to appeal either to •force or to •reason, must resort to an authority of a different order that can •constrain without violence and persuade without convincing. That's what has down the centuries compelled •the fathers of the nations to appeal to divine intervention and credit the gods with •their own wisdom, in order that the peoples—submitting to the laws of the state as to the laws of nature, and recognising the power that formed the city as the very one that formed mankind—might obey freely, and bear with docility the yoke of the public happiness. What the legislator puts into the mouth of the immortals are decisions based on a highflying reason that is far above the range of the common herd, the aim being to constrain by divine authority those who can't be moved by human prudence."(II/7)[31]

The social order cannot be rationally founded (cf. Plat's "noble lie"), at least not in terms of the reason of the average person whose obedience is demanded. Between reason and justice yawns an unbridgeable chasm.

This stalemate is the final result of an anti-individualist ethic, of the conception of justice* which defines "equality" as numerical and commensurable, and thus imposes a measure on all people that has no foundation to these people themselves, as individuals. Man is the measure of all things - but not a single person is man. Either one subjects one-self to an incomprehensible duty, or exposes oneself to incomprehensibly "justified" repression by those who

31 Rousseau: Du Contrat Social. ii/7

make themselves out the be the keepers of justice* while being unable to put forth any argument to answer the question on why they should be, nor to prove why their opinions are so valuable as the be given to force of legislation over others. In other words, if this conception of justice* is accepted it must be said that the relationship between individual and justice* must necessarily be authoritarian, that is, until people no longer make any distinction, in thought and speech, between the generalized, undefined "one" and the defined "me". As long as the "me" is not fully reducible to all others, there is incommensurability and thus, no justice*. This pits the individuality of each person, with their promise of a unique, absolute own vale and reason for existence, against the perfection of Man, as that which each person ought to be but from which their individuality alienates them. Such a conception evidently denies each person a reason for existing: there is no reason, for anyone, why they ought to exist. Their life represents no unique value whatsoever.

Small wonder that this conception of justice so often refers to a long by-gone Golden Age. After all, it is a fact that self-awareness and individualization are historical acquisitions and as such presuppose a time in which these abilities were yet to be acquired, just as it is the case that it is only during the course of each individual's own life that they become aware of the fact that not all human possibilities are equally within their capabilities, that the conventional identity given to them by their environment, their parents, their guardians, is not their own, and that becoming an adult is impossible without a destructive phase, a symbolic "patricide" in which alien truths and standpoints must be purged. Whether this Golden Age is seen as a hypothetical construction or a historical reality is of much less importance than the normative implication that humanity must somehow regain this era, though at a "higher level", as "the transcendence of human self-alienation" -which is to say the regaining of the unity which was lost by growing self- awareness.

I've often enough had the occasion of pointing out that this unity does not in fact have any normative meaning. It was Hobbes who

derived from the equality of all, both relative equality of power, as equality in the striving of all for everything, the conclusion that the war of all against all was unavoidable. This conclusion seems inescapable if you assume that everyone identifies with everyone, which is to say that they claim other's possibilities and achievements for themselves. Furthermore it cannot be logically disapproved of by those that are of the opinion that everyone should identify with everyone. To Hobbes, as for the Yahwist, or Plato, and others, unity was only possible as rulership - not as some spontaneous, self-regulating unity such as in Rousseau or Marx. This traditional connection between unity and rulership probably explains the tendency to see self-awareness, the awareness of the distinction between the own, the particular, and the social or general, as the fundamental disintegrating force. Indeed, in a close-knit social unit only at the top is there space for self-awareness. This is true to such an extent that self-awareness and leadership, authority, are experienced as being co-extensive concepts, eg when someone is called a personality (ed: I think in the sense of "media-personality", "political personality"). When it comes to many ancient historical societies, we only know the name and fame of their kings. When this king, in their person, is expected the represent the entire society, or even the gods as was the case in the ancient river-civilizations of the Levant, it is clear that there is no space/place in society for self-awareness and independence of spirit.

From such a perspective it is not surprising that, as more and more people became aware of themselves as full, autonomous moral subjects and stepped outside of the unassertiveness/silence which was designated as being theirs by heteronomy, the call for democratization of the right to rule became ever more explicit. For many millennia this right, as an attribute of a personality manifesting itself above the masses, of the leader, the hero, the do-er of great deeds, was the privilege of a few. So, psychologically it is no wonder that those that started to feel like the moral equals of the ruling elites, would also ask to share in their privilege.

That the rule of the few over the many becomes more unacceptable as more and more people step outside of unassertiveness/silence is no more than normal. But this does not show the logical compatibility of assertiveness and the right to rule.

This does not a fortiori show that the assertiveness of all demands the democratization of said "right".

On the contrary, there is an evident contradiction between assertiveness and hegemony, and this is not removed by making the right to rule into a universal right of everyone. We have seen that the possibilities of rule are constrained by two extremes: no-one rules over anyone, and everyone rules over everyone. Between these two extremes stretches a vast area spanning one-man rule, oligarchy and majority-rule. History proves that the rule of a few over many can stay stable for a long time. If the same can be said of a society in which all try to rule over all is a totally different question, one that many political philosophers have answered in the negative, and not because they would have had a negative view of the assertiveness of all.

When everyone tries to rule over everyone, and no-one simply subjugates themselves to the (often contradictory) will of the others without a fight, we are faced with Hobbes' war of all against all. It's hard to see how formally institutionalizing this attempt, which means to say the democratization of the right to rule, could lead to anything else than the formal institutionalization of the war of all against all. This was the self-evident matter Frédéric Bastiat gave expression in his well known quote: "L'état, c'est la grande fiction à travers laquelle tout le monde s'efforce de vivre aux dépens de tout le monde"[32] (ed:The state is the great fiction through which everyone strives to live at the expense of everyone). The idea behind this saying is of course much more ancient than the mere one hundred and fifty years or so which separate us from Bastiat. From the premise that in a democracy everyone has the right to rule, Plato[33] incorrectly concluded first that everyone is equal before the law, and secondly that in a democracy no-one in fact rules over no-one, conflating democracy and anarchy. Not much later Aristotle set the record straight when he posited that democracy is in fact not much more than an oligarchy of demagogues: "for while the people rule over everyone, the demagogues rule over public opinion"[34]. Michels' iron law of oligarchy[35] is not some new-fangled twentieth century

32 F.Bastiat: L'Etat. Paris 1848, 11
33 Plato: The Republic. viii, 555c–558c
34 Aristotle: Politics. Iv/4
35 Michels: Zur Soziologie des Parteiwesens in der Modernen Demokratie. 1911

idea when it comes to the critical reflection on democracy.

The democratization of the right to rule lies along the line of the ideal societas - the community ruled by a spontaneous and universal consensus. Starting from a political conception too it can be considered in a positive light. It should, after all, be at least partially construed as being motivated by the desire to give more of a say to the "base" regarding the deliberations and decisions of the "top" of the social pyramid. This positivity must however be thoroughly qualified. There is a world of difference between, on the one hand, the position that A and B should have a say in Z's decision, insofar as these decisions relate to the life and work of A and B, and on the other hand, the position characteristic of the political conception that there is no reason at all why Z should have a say in the decisions relating to the life and work of A or B. The democratization of the right to rule, from a political standpoint, is more of an inhibiting, conservative development, which confirms the right to rule of the "top" in the same breath with which it demands a say for the "base". Furthermore, this right to a say/a voice means that A not just has to contend with what Z wants, but also with what B wants, just as B now has to contend with both Z and A. The pyramid is flipped on its head. Instead of a system in which one rules over all, comes a system in which for each it is true that everyone rules over them - a system in which the individual is even denied the weapon of regicide.

As long as one uses a model with a "top and base", as is often the case in the social way of thinking, democratization and participation can be considered to be a liberation of the base from the hegemony of the top. This model is obviously far too simplistic, as the previous inversion of the social pyramid shows: as an individual, everyone is at the bottom of such an inverted pyramid[36], everyone is ruled by all others. Liberation of the "base" is not at all a liberation for the individuals that constitute this base: the rule of the people by the people is the rule of each separate person by all the rest. The collectivist fallacy which considers the "base" to be a homogeneous mass (the people, the labourers, etc) is re-iterated in the conviction that

36 J.S.Mill: On Liberty (1859) “Introductory”: “…the self-government spoken of is not the government of each by himself, but of each by all the rest”.

the individualist's counter-arguments are adequately addressed by admitting that even in a democracy "protection of minorities" remains necessary. These minorities are of course always collectives - never the smallest imaginable minority: the individual person. Only as a member of a recognized group or sub-community can an individual enjoy any "protection".

The democratic model of decision-making conforms to the idea of commensurable equality as the touch-stone of justice*. The central component of this model is not convincing dissenters, but drowning them out/overruling them, putting them in the minority. This is of course pure naked exercise of power. It is once more Rousseau that we should turn to for an explicit attempt at dissimulating this idea.

> "There's only one law that from its very nature needs unanimous consent, namely the social compact; ... Apart from this primal contract, the vote of the majority always binds all the rest. This follows from the contract itself. You will ask: 'How can a man be both •free and •forced to conform to wills that are not his own. How are the opponents at once free and subject to laws they have not agreed to? I reply that the question is wrongly put. The citizen gives his consent to all the laws, including ones that are passed against his opposition, and even laws that punish him when he dares to break any law. The constant will of all the members of the state is the general will; by virtue of it they are citizens and free. When a law is proposed to the assembled people, what they are being asked is not (1) Do you approve or reject this proposal? but rather (2) Is this proposal in conformity with the general will? —the general will being their will. Each man's vote gives his opinion on that point, ·i.e. his answer to question (2)·; and the general will is found by counting votes. When therefore the opinion that is contrary to my own prevails, this proves neither more nor less than that I was mistaken, and that what I thought to be the general will was not so."(IV/2)[37]

So I can never independently discover what the general will is, what is right and what is wrong, only the majority can enlighten me in this regard. But, each member of this majority is just as much in the dark as I am regarding what is truly right and good. The general will has no rational foundation to any person. This shows how essential it was to Rousseau to

37 Rousseau: Du Contrat Social. iv/2

contest the validity of Diderot's definition of the general will in the article "Droit Naturel"(Sect. 9) of the Encyclopédie. Diderot had written that "the general will is, in each individual, an action of pure thought, reason without passion".

To Rousseau this general will specifically is not to be found "in the individual", but in the state, in the community as a whole. To Rousseau the general will speaks not to the individual but to some being that subsists within the individual, and which is identical in all individuals of the community. It is this being, this entity which must be "liberated". But the liberation Rousseau speaks of has nothing at all to tempt the individual people, since it is not the liberation of you, or me, or anyone at all, but the the liberation of something within us which must precisely be freed from us. It is unnecessary to show yet again that this Rousseauist conception of the general will is in fact purely negative: the only thing that follows from it is the denigration of the individual and his reason. No positive content is to be found in it, and the site of this general will, the communal self, identical in all members of society, remains chimeric and "transcendent". It is but an intimidating mental construction devoid of any content, waiting for its Robespierre.

Justice* as undifferentiated equality necessarily leads to the glorification of the power required to counter the ever-threatening growth of differentiation and individualization. This growth can be partially "absorbed" into hierarchical social organizations or by democratization. These may offer self-affirming individuals a way out of their passive and unassertive status which is still reconcilable with the idea of an external law that does not speak to anybody as a person. These formalized and institutionalized inequalities leave intact the fundamental patterns of undifferentiated equality within each class or rank, and at once also motivate an ideal of justice* which strongly relies on the display of power. Both in order to maintain the relative rank of various positions in the social system, as in order to equalize different people in a certain position.

One paradox of this conception of justice* is that it must choose between treating people that aren't equal, equally, and unequal treatment of unequal people - equality in action versus equality of results, between a purely "formal" and a "material" conception

of equality. The tension between these conceptions, within the general frame of social philosophy, is well known enough. Equality in action, also called equal treatment, may not leave existing inequalities unmolested but at least it is not specially tailored to making them disappear. Equality of outcome opens the way to a multitude of arbitrary discriminations and "temporary" inequalities which are just as incompatible with the idea of commensurable equality. Think in this regard of the endless discussion about the merits of, on the one hand, general legislation and the prerogatives of the executive power on the other, about the so called "rule of law"[38] and bureaucratic and administrative arbitrariness. In any case, the logic of the social conception of justice as commensurable equality points clearly in the direction of equality of outcome.[39]

The formal conception of equality "under the law/legislation" conforms to a rather pessimistic conception of the nature of the "rule of men", which is what rule always is. We've had occassion to analyze this pessimism as a necessary consequence of the basic social intuition: man, made to serve, is not capable of rule/governing. In contrast, the material conception of justice* often goes side by side with an exaggerated optimism in relation to the abilities of the rulers to achieve the "correct/right" result.

But the "pessimists" also face the problem: equalizing is differentiating. Repeatedly hammering down the idea of universality of legislation and their abstract character while denouncing the idea that any complex society could be governed with particular, concrete orders and rules is not sufficient: at some point they'll have to state what the content of said legislation must be. Equality under the law/legislation, right to equal treatment - all well and good, but what is the criterion of equality

38 The most well-known defender of this concept is F.A.Hayek: The Constitution of Liberty. London 1960. F.A.Hayek: Law, Legislation and Liberty. 3dln. London 1974–1979. also refer to B.Bouckaert: De Exegetische School. Antwerpen 1981, passim.

39 Even Locke posited that "a good prince, aware of the task entrusted to him, takes care of the welfare of his people, cannot have enough prerogatives", which is to say not enough "power to act on his own will for the common good, without authorization of the law/legislation or even against the law/legislation"(II/14,par164,160), and that the legal limitations on executive power were only justified as protection against the possibility that the ruling prince is not as "God-like" as one might like. Cf. L. Arnhart: “The God-Like Prince: John Locke’s Executive Prerogative and the American Presidency.” Presidential Studies Quarterly 9,1979, 121–130. The best study of this tendency probably remains: A. De Tocque-ville: De la Démocratie en Amérique. Paris 1835 (pt.1) en 1840 (pt.2), especially part 2

to use? Equality under what legislation? Equality under whose legislation? The big problem remains that in the conception of justice* as commensurable equality, the so-called objective scale of value which is supposed to make all people, all human endeavours and goals commensurable, is not manifest, not a "given". The transcendental subject (God, Man, the Community, History) whose reason and judgment is supposed to produce said scale, does not possess a self-representing presence. Its existence can only be deduced from a sign, but which sign? As we have discovered, there is no possible rational answer to this question. Rousseau considered deceit to be necessary, but not sufficient: "But it’s not just anyone who can make the gods speak, or be believed when he claims to be their interpreter"(II/7)[40]. Rousseau predicts that good legislation will persist, but this criterion is wholly ex post facto, and it does not provide an ex ante solution to the problem: which legislation to obey? To Rousseau, for whom the moral passivity, the heteronomy of the citizen was an essential component of his social philosophy, this could not be much of an issue. He himself took peace with a marked conservatism. As he wrote in his third Dialogue: "I have always insisted on preserving the existing institutions"[41]. He did not hold revolutionaries in high regard. On the contrary, he considered obedience to the legislation to be the highest virtue of the citizen, even if this legislation is susceptible to criticism.

The radical solution to the undetermined nature of this ideal of justice* can be found in Pascal, expressed very nicely: if justice* justifies the use of state-force for the repression of individual self-affirmation, then why not interpret the state's power itself to be the signifier of justice*?

> "If we could have put force in the hands of justice, but as force cannot be handled as we want because it is a palpable quality, instead of justice being a quality spiritual which we can dispose of as we wish. We put it in the hands of force and thus we call just that which he is forced to observe... Without doubt the equality of goods is just, but cannot cause him to be forced to obey the force. justice we have made it just to obey force. Unable to strengthen justice, we justified force, so that the just and the strong could be together and there would be peace, which is the

40 Rousseau: Du Contrat Socia1. ii/7
41 Rousseau: Dialogue. (postuum, 1782) iii

> sovereign good. Wisdom sends us to childhood"[42] (ed: couldn't find a good source, machine translated)

A conception of justice without any rational foundation need not be diffident in regards to power - power is the essence of it, the only "unmistakable" sign of it. La sagesse nous envoie à lénfance: wisdom leads to uncritical acceptance, submissions, to the pre-critical unity in which all is as it should be. This same idea of course plays a part in Rousseau and the romantic movement. Though, to Rousseau the Social Contract was a rationalization of said uncritical subjugation, a rather mechanical reconstruction of a lost unity. This is especially evident when we compare this theory with his writings on pedagogy. The latter can be best understood, in my opinion, as conforming to Rousseau's pessimism and scepticism regarding the chances of success of the state as a solution to the discord and alienation in man. This discord must eventually be conquered in the individual itself, by regaining their child-like innocence. Critic Irving Babbitt rightly wrote:

> "The whole movement is filled with the praise of ignorance and of those who still enjoy its inappreciable advantages—the savage, the peasant and above all the child. The Rousseauist may indeed be said to have discovered the poetry of childhood of which only traces can be found in the past, but at what would seem at times a rather heavy sacrifice of rationality. Rather than consent to have the bloom taken off things by analysis one should, as Coleridge tells us, sink back to the devout state of childlike wonder. However, to grow ethically is not to sink back but to struggle painfully forward. To affirm the contrary is to set up the things that are below the ordinary rational level as a substitute for the things that are above it, and at the same time to proclaim one’s inability to mature.... He is ready to assert that what comes to the child spontaneously is superior to the deliberate moral effort of the mature man. The speeches of all the sages are, according to Maeterlinck, outweighed by the unconscious wisdom of the passing child."[43]

Is this childlike acceptance of appearance as reality (taken that this acceptance is a fact, but then what of that very early experience of dreams and lies?), this willing slavery , actually the highest wisdom? La sagesse nous envoie à lénfance. Beautifully phrased, but not very convincing, certainly not as a motto for accepting the equivalence of right and power/might.

Undoubtedly the poet among philosophers

42 B.Pascal: Pensées. Texte établi par Louis Lafumaï Paris 1958: I/5, nrs. 85,81,82 (Brunschvicq: 875,299,271)
43 I.Babbitt: Rousseau and Romanticism. New York 1955, 53–54.

cannot compete with the philosopher among poets in this regard: "What's in a name? That which we call a rose, by any other name would smell as sweet"[44]. Injustice is still injustice, even if we call it "right/law". Why would we call injustice "right/law"? Solely because of social convention? In order to keep the peace? Is institutionalized violence peace? Maybe Pascal's argument is convincing to a gullible child, but who are those "they", who supposedly at their wit's end, gave right/law into the hands of the strongest, and have made it so that it is right to obey the strongest and to make others obey the strongest. Who are these "they" who declared rule of violence/force, whether in a barbarous or civilized form, to be lawful? By which right have "they" done this? Why should we lend any weight at all to the fact that "they" did so? Pascal's recommendation amounts to an abdication of philosophy, just as his infamous "wager" amounts to the abdication of moral integrity and the contradiction-free will this integrity implies.

Peace isn't a question of semantics. The sovereign good, as he calls it, is not a play on words but an objective state of affairs. So too, right/law is an objective quality, and though it is indeed true that peace can only exist when right/law and power/force go hand in hand, this does not mean that the victoria pacis is identical to the pax victoris. It would probably be rather handy to be able to rid the world of all problems by choosing a fitting name. But the correct name for an attitude of living based on such a conviction would be "magic", not "philosophy". Pascal, and any who wish to follow him in his magical ostrich-policy, are completely free to extract themselves from the demands of a rational consciousness of reality, but not to achieve the goal this aims at. Problems don't simply disappear by repressing them from consciousness by some misleading label. Reality always finds a way to destroy the consciousness that attempts to misunderstand its priority. It is clear that this false consciousness is self-destructive. The labels can only mislead as long as they are associated with their actual meaning; as soon as their meaning is associated too much with the reality they are supposed to mask, they lose their magical power and they just become the names of a reality, the experience of which is determined by the connotations of the label. The meaning follows the awareness/consciousness of the thing/the matter, and in the long run it is the thing/matter which determines the content

44 W.Shakespeare: Romeo and Juliet. ii/2

of the consciousness/awareness. The use of the term "law/right" to mask what is in fact injustice, on a grand scale, cannot but end in the general recognition of the dishonorable and despicable character of what is called "law/right". In our times, we have undoubtedly reached this stage. To paraphrase Pascal: Ne pouvant forti-fier la justice, on a fortifié la force; ne pouvant faire qu'il soit forcé d'obéir à la justice on a fait qu'il soit forcé d'obéir à la force (Unable to strengthen justice, we strengthened force; unable to force him to obey justice, we forced him to obey force).

The fundamental weakness of Pascal's strategy becomes evident when we take a closer look at its premises. Pascal says that the use of physical force is a tangible quality which cannot simply be bent to one's will, while law/right supposedly is a spiritual quality which can be manipulated at will. This is clear nonsense. Spiritual qualities are the ones which cannot be manipulated, while physical ones can. You could just as easily claim that the intellectual inertia of the masses, and the lack of intellectual discipline of the majority - and not a small majority at that - of people, are a physical, tangible and "therefore" uncontrollable datum, while mathematical truths are naught but spiritual truth which can go any way whatsoever. Should we conclude from this that mathematics should be handed off to the patterns and habits of thinking of the masses "so that there may be knowledge, which is a sovereign good"? This would probably seem wholly unacceptable to Pascal, who was, after all, a mathematician.

Contra Pascal, we should say that the matter does not revolve around a relationship between "law/right" and "power", but the accordance of concrete human behaviour with the demands of law/right. This accordance is a choice, for each person. Namely, the choice between considering yourself both as a means to achieve your goals and as the goal or measure of your own goals, or, contrarily, to consider others to be your means, or your goals. Power is not the independent, uncontrollable variable "for people", but rather right/law is. Right/law is what it is and is necessarily so. Power is that which is controllable, dependent, precisely because it can be used both for law/right and injustice. What right/law is, this we cannot control. Of course, we have to take into consideration that to Pascal jusitice* should be understood in terms of a Legislation equal for all people - and that identifying this legislation is impossible. This explains Pascal's[45] acceptance of the "given" condition, even though this given is nothing but a double-sided negation: "L'homme n'est

45 Pascal: Pensées. cit. on p.318. ii/25, nr.678(358); I/9 nr.143(464), I/11, nr.149–430

ni ange, ni bête, et le malheur veut que qui veut faire l'ange fait la bête". (Man is neither angel nor beast, and unfortunately he who wants to be an angel becomes a beast.).

Let it be said here: Pascal is stuck in the contradiction of the social conception of man. He realizes that the secularization of this conception (the attempt at replacing God as the ruler that people must serve) is doomed to failure, but he bases this conclusion explicitly on the inner void/ emptiness of people - in the fact that people are not capable of finding the answer to their questions themselves: "Les philosophes ont beau dire: rentrez-vous en vous-mêmes, vous y trouverez votre bien; on ne les croit pas et ceux qui les croient sont les plus vides et les plus sots"(Philosophers may say: go into yourself, you will find your good there; we don't believe them and those who believe them are the most empty and stupid). All light must shine in from without "ce n'est point dans vous-mêmes que vous trouverez ni la vérité ni le bien"(it is not in yourselves that you will find neither truth nor good).

All value is outside of man/people. People/humans (and possibly only people/humans) are the worthless thing. According to Pascal, we cannot do without religion. The only road he leaves open is that of submission. We can follow Pascal when he poses that it is fruitless to attempt to replace God by some transcendent, absolute, communal-to-all Ego or Self, construed from non-differentiated concatenation of all that is human, of all human possibilities and abilities and specifically not construed from the recognition of the alternativity of all these many possibilities and abilities, like the individual ego or self. To the extent that "philosophy", Pascal's bugbear, presupposes such a limitless Ego as a replacement to God, it does deliver us unto a pseudo-subject which is supposed to encompass all perspectives equally (and can thus in fact only be perspective-less).

Without faith/belief, Pascal claims[46], people are not capable of knowing truth, nor good nor justice. To him, there exist only two options: God, or the environment. Man itself is an endless void

> "that he vainly tries to fill with everything that surrounds him, seeking from absent things the help that he does not obtain from the present, but which are all incapable of it because this infinite abyss can only be filled by an object infinite and immutable, that is to say that by God himself"

Nothing finite, nothing of this earth can complete/satiate man: happiness/fortune is everything that life is not. The finite person is a measure for no thing: there is no choice for the individual than to accept the established order: "La justice est ce qui est établi; et ainsi toutes nos lois établies seront nécessairement (Justice is what is established; and thus all our established laws will necessarily be)

46 Pascal: Pensées. op.cit. i/10 nr. 148(435), ii/25, nr. 645(312).

tenues pour justes sans être examinées, puisqu'elles sont établies (held to be just without being examined, since they are established)".

We should not forget that the previous discussion regarding justice* as commensurable equality did not have a logical ground in the discussion which preceded it, that of the individual self as the integrating principle of all judgments on which the existence of a person as a conative-cognitive being in the world depends. The result of that exposition was the incommensurability of individual perfections. Furthermore, we did not find in this any grounds on which to found a claim of some mysterious contradiction between being yourself on the one hand and being human on the other. For a person/human, being themselves is naturally (ed: Fvd makes a note here, orig word used instead of naturally is "uiteraard", which means obviously, naturally, or course, but can be broken down into "uit-er-aard" which means from its nature/character, and he specifies this meaning) being human. It is as a human/person that someone can become aware that they need a self-conception in order to make something of their lives, that their valuations are not alternative-less givens or impulses which govern their life as if in a dream. Their humanity/personhood/being-human is what creates the problem, but it is not the normative principle which would automatically bring the solution if only that alienating self would get out of the way for a moment. To truly be human is to fully be yourself. Only those who perfect themselves has anything to offer others. Those who live for others and deny themselves in order to serve others more fully should not be surprised when, eventually, they are granted no more honour or respect by those others than any other means those others could dispose over, or that they will bite the hand that feeds them without scruples. How could someone that doesn't value/appreciate themselves be valued/appreciated? How can you value/appreciate others if you don't even value yourself? Those why claim: "my valuations and my moral code are valuable, but I myself am without worth/value", contradict themselves; and are not capable of independently confirming the value of another.

Equality as a fundamental element of the idea of justice* must be conceived of as being the incommensurable equality of a multitude of in-themselves-perfectable individuals, each representing a completely unique perspective on all things. The concept of justice* thus defined offers us the solution to the problem of the co-existence of many incommensurable perfections. Identifying the principle on the grounds of which this becomes possible is the main task of philosophy of law/right, as we have seen in chapters 2 and 3. The idea at the basis here is not that

there is one transcendant (or socially-immanent) subject, whose perfection should be the norm and measure for all that is human; but rather that there exists a completely personal and individualized perfection for each person, which is the norm and measure of themselves. Though this allows you to judge others from your own standpoint, because of its incommensurability towards all others, your perfection can still not have a claim of validity to any other.

It is only when starting from this fundamental pluralism that the central problem of philosophy of law make any sense. If each person ought to be themselves, then each person has the right to become themselves - then everyone has an absolute right to self-determination. That is the fundamental principle of law/right, which has turned out to be a coherent fundamental principle of law/right, and which is here confirmed by moral philosophy. After all, the only way it can be coherent is by presupposing a finite but positive view of man/humanity, a view of each person as finite but yet determined in and from themselves, as self-determining, and by rigorously applying the perspectivistic implications of this presupposition. Once again: this perspectivism, the denial of the existence of one perspective which encompasses all others (God, Man, Whatever) does not imply subjectivism. It is objectivist. It does not imply radical relativism, since not a single person starts off with their own standpoint, but they must gain/conquer one in a space in which all other perspectives, ideally in an increasingly profiled manner, are and remain present. If each individual ought to live according to their own personal truth then each person should consider each other person as an alter ego, as an alternative and therefor complementary possibility to fulfill that totality of human possibilities subsisting in each person. Those who do not, are guilty of tyranny: for they attempt to make theirs a judgment which goes against the reality of the other as an other. He misunderstands/denies the boundary that defines him as opposed to the other, and in so doing misunderstands/denies himself. For knowledge of self obviously implies knowledge of your own boundaries. Not just a formally adequate self-conception, but also a materially adequate one. To be fully yourself requires both expansion, fulfilling yourself, as well as contraction, fulfilling nothing but yourself. The incommensurability of individual perfections means, after all, that attempting to find yourself in an other or something other, can only result in contradiction.

CONCLUSION

In this chapter I have tried to show how great an importance the fundamental views on/of man are to the interpretation and justification of a theory of law/right. The similarity between the fundamental principle of law/right and the Lockeian theory of "natural rights" is shown to be manifestly superficial when we account for the degree to which the Lockean definition of man conforms to the traditional definition of man as an animal sociale, as a servant animal, as a natural slave (of God). We saw a very concrete representation of the internal problems in this conception through the Biblical story of Genesis. The main problem is the idea that people in themselves do not have any principle of self-limitation. This means that they must be limited, determined, from without. The further implication of this view on man is that true human happiness/fortune can only be achieved if each person is capable of controlling everything, which is only possible if all people were to become one. The lifting/dissolution (ed: "opheffing") of the individuality which requires each person to step outside themselves fails to provide any stability/certainty however: qui veut faire l’ange fait la bête (those who attempt to make an angel make instead a beast), or as Adam Smith would put it: I have never known much good done by those who affected to trade for the public good[47].

The contradictions of the social conception of man conform to the contradictions in the negations of the fundamental principle of law/right, which we've considered in the second chapter. The notion of social philosophy connects the concept of man as a servant with the theories of law/right which hold the master-slave relationship to be lawful. The contrasting notion, that of political philosophy, has not yet sufficiently been explored. The idea of man as zoon politikon, and of human society* as polis is still unconnected to the development of the fundamental principle of law/ right. This is not very surprising: in the way of thinking dominated by Jewish and Roman conceptions of legality the supremacy of social philosophy is the cause of the fact that the political can easily be interpreted as a part of the social, namely that part that occupies itself specifically with the state

47 Adam Smith: An Inquiry into the Nature and the Causes of the Wealth of Nations. (1776). iv/2 (p.423 in de Cannan edition, Modern Library, New York, 1937

as the most developed societal institution. This, ironically, often creates the impression that the state is opposed to society. This is ironic because this creates, within the paradigm of social philosophy , a totally bastardized model of the fundamental contradiction between the political and the social, which causes the well-known and hopeless ambivalence of social philosophy and its proponents towards the state. After all, the state reminds them of the failure of social organisation relating to fulfilling the Legislation which defines society and its members, while also offering them a hope at remedying this failure since the state, as superior power, will have to manifest by compulsion and violence that which does not manifest spontaneously. The state is supposed to compensate for human weakness and imperfections, but turns out to fall short itself.

In the next chapter, I should like to devote a bit more attention to the contradiction between social and political philosophy, but more specifically relating to their different implications for the organization of human society*.

6 Polis and Societas

> “Freiheit kann der Sinn von Politik nur sein, wenn wir unter dem Politischen einen öffentlichen Raum verstehen…Theoretisch aber ist der Begriff der Freiheit überall im Verschwinden, wo entweder der Begriff der Gesellschaft oder der Begriff der Geschichte an die Stelle eines Begriffes van Politik getreten sind.”
>
> — Hannah Arendt

UNITY/SINGULARITY AND MULTITUDE

In common parlance, "political" means something like "relating to the state". The state is a mostly territorially defined, more or less stable system of hegemonic relationships (master-slave, government-citizen, etc.), and political action is aimed at conserving or changing this system of hegemonic relationships, or at changing the relative positions of various people or groups within said system, mostly aiming to either bring about or prevent changes in the policy of the master or authority/government.

What seems to be lost in this oh so familiar way of speaking is a clear awareness of the fundamental, irreducible tension between

unity/singularity and multitude. Society as a whole is a unity/singularity, a collective actor, ideally acting in harmonious unison, of which government forms the deciding, judging, planning, intitiative-taking component, while the mass of citizens constitute the executive, servile component.

This of course does not exclude the citizens themselves from taking their own initiatives, making their own plans, judgments, etc., but this scheme does imply that this must concern private decisions, taken in a sphere which is clearly distinct from the res publica, the public life of the citizens which is to say the life of the citizens qua citizens.

Our contemporary conception of the political is undoubtedly dominated by this idea of unity/singularity. Politics appears precisely as the process for the reduction of this multitude which is after all (and: at least) a biological fact, into a societal unity/singularity. Thus, it appears as the cause of this unity/singularity, while society itself becomes the necessary condition which brings politics into being.

So close has the connection made between politics and society become, that we tend to look for the foundational meaning of "politics" in the concept "policy", more specifically the policy that characterizes a society and distinguishes it from other societies. Implicit in this presentation is the idea that the societal form of cohabitation is the only possible one. I believe that it is precisely this sort of conceptual myopia which hampers a proper understanding of law/right, and that such a proper understanding is an absolute necessity in order to free the political from its social connotations. The key to unraveling the conceptual confusion we are dealing with is the fundamental distinction between unity/singularity and multitude, which forms the thread around which the previous exposition was woven.

As such, I will make it my task to clarify here that there does exist an alternate and intelligible conception of the political than that which both common parlance and academic culture have so familiarized us with. There is an alternate conception of the political society* and the political life than the one which simply translates into terms of societal relations and networks of societal relations - a conception of the political in which the political is precisely not the process of reduction that characterizes society, but on the contrary the process in which the non-reducible multitude of people in society* affirm themselves as a positive value, as that

which people should attempt to acquire or maintain. This political conception, as we shall see, gives us a conceptual framework within which the fundamental principle of law/right can come into its own as the binding agent between individual and society*, which is to say as the principle for harmonious co-existence between irrevocably different individuals.

I believe the best method for defining this conception as an alternative to the conception of society* as societas can be found by going back to the sources of our political culture. Mainly to Greek political philosophy, but also to Jewish-Roman traditions. I believe that the most clarifying illustration of the contradiction between politics and societal living is to be found within the tension created by the confrontation of certain central concepts of these two traditions. I would like to emphasise, however, that my intent is to illustrate, not to conduct a study of Greek political philosophy as an object in se.

Yet still I would attempt to sketch out an image of the, in my opinion fundamental, contradiction which is at the basis of the ambiguity of Greek[1], and thus also our current, concept of law/right. For both the latter and the Greek concept of polis refer both to justice* and subservience, both to equality and inequality. This ambiguitiy can be traced back to what we could call the internal contradiction in the Greek polis (and Greek political philosophy), which is the attempt to construct political equality without first abolishing or dissolving pre-political inequality, the attempt to create a political space by means of *societal* structures.

Pre-political or societal inequality is still what characterizes the state. So, when we consider the state, and more specifically the control over the state's power, as the focus of political activity, we show ourselves to be captives of this undigested and undigestible contradiction between the historical reality of the polis as a societal or quasi-societal structure on the one hand and the ideal of the polis, the ideal of political life, on the other. The reality of the polis was that that the societal structure choked out the political space, while it is precisely the creation and maintenance of the political space, as

1 In fact, here I refer mostly to the Athenian experiment, as it has become a continuing source of inspiration and a source of speculation in political philosophy. But, because the emphasis is on the conceptualization rather than the historical reality of Athens, I will use the term "polis", which has far fewer concrete associations than "Athens".

an alternative societal living, which is the necessary precondition for the complete emancipation of people, and the development/flourishing of all human abilities. The polis, or city, became a state, an all-encompassing societal structure, and was unable to live up to its promise. This is why the polis could not escape a societal definition of right/law as an authoritative, central delineation of conventional "rights" and "duties", "prerogatives" and "responsibilities". Which means to say the polis could not escape the paradigm of legislation, of monarchy and telocracy. One principle, one path, one goal. This unification meant the total negation of the promise the polis offered.

What was the promise the polis held to classical poltical philosophy? The answer to this question is most likely open to discussion, as things always are when discussing a complex historical phenomenon. For our purposes here however, it is more important to isolate an interpretation which is maximally clarifying in explaining the distinction between polis and societas, rather than to seek an interpretation which properly expresses the complexity of the historical material involved. To put it into other words: our approach here will be more ideal-typical than historical. After all, what we care about here is not so much reconstructing the Greek's situation *twenty-five hundred years* ago, as it is finding in the past some materials we can use to construct models which allow us to judge, and act, better. This is of course a very specific approach. According to one of the most influential interpreters[2], the promise of the polis was exactly that it would create the space for the exercise of the most specifically human of abilities: the ability to judge and speak (lexis) and act (praxis). These two abilities allow a person to reveal themselves, expose themselves, and thus to live a public life, which means to say to truly live with and in the face of others, and this in an active, connecting way rather than merely in a connected way, rather than just being forced to share the same space. To live as a person is to speak and act. Hannah Arendt wrote:

> "A life without speech and without action, on the other hand—and this is the only way of life that in earnest has renounced all appearance and all vanity

2 Reffering to Hanna Arendt: De Mens. Bestaan en Bestemming Utrecht-Antwerpen 1968 (translation of Arendt: The Human Condition. Chicago 1958). Though one can rightly remark that Arendt does not do justice to the historical reality of Greece, among other things by pushing its mystical and primitivistic elements into the background a bit much, she in correct in so far as these elements are not specifically Greek.

> in the biblical sense of the word—is literally dead to the world; it has ceased to be a human life because it is no longer lived among men."[3]

Speech and action express the uniqueness of each individual human. It is in speaking and acting that humans/people show themselves to each-other as humans/people, rather than as physical objects or natural forces. Arendt however makes the following correct observation:

> "This appearing before each-other rests, besides mere physical existence, on "beginning", the taking of a first step, but it is a step no human being can avoid taking and still remain human."

Speech and action show initiative[4]. To be human is to be able to start something, to undertake something, to bring something new - to break free of a given structure. Speech and action show evidence of freedom. You speak from yourself, you act from yourself - as an auctor. If this is not the case, you are merely the spokesman, the executive, the agent, without moral responsibility for what you do or say. Speech and action are, after all, always a source of potential surprises. They are not preprogrammed nor pre-programmable, since these activities are precisely intensely related to the investigation, exploration and judgment of ever-changing situations, and as such they continually play to new possibilities.

Speech and action are the political activities par excellence. To understand this Greek vision we must consider how few occasions for speech and actions were, and are, available in pre-political societal relations. Where people do not have the occasion to take their own initiatives, to make their own plans, there they do not have the occasion for speech or action. There, their action or inaction is determined outside of themselves, so that there can be no personal choice, personal "engagement" or "commitment". For such a choice presupposes a context in which there is not but one "obvious" goal, but one where there is a choice in goals, where it is not merely the

3 Arendt: op.cit., p.175

4 This idea plays an important role in the far too neglected so called Austrian School of economics, especially in Mises: Human Action. Chicago 1966. I.Kirzner: Competition and En-trepreneurship. Chicago 1973. L.Lachmann: Capital, Expectations and the Market Process. Kansas City 1977. Compare the approach of these authors (also G.L.S. Shackle: Epistemics and Economics. Cambridge, 1972) with Arendt's criticisms directed at the classical and neo-classical schools of economics.

means and methods which can be discussed and in which the goals of one do not necessarily also need to be the goals of the others.

Political life is precisely the taking part in such argumentations: speaking and listening, to engage in dialogue, reasoning and argumentation about the many possibilities people have of giving meaning to their lives. This is not idle chatter: political life is speaking action, the action is essential but the speaking enhances the consciousness of the contingent, speculative nature of each action because it starkly emphasizes the contestability of the choice of both the relevant goals as well as the chosen means and methods. This means: speech which embeds the action into a whole of motives and theories brings to light the non-universalizable character of the action, draws attention to the fact that the true, the beautiful, the good to one is not necessarily the true, beautiful or good to another - while the essence of speech is still an announcement. In speaking, you present yourself as an *alternative* ego, related but different. Political life in this Greek sense of the word is saturated with the awareness of the uniqueness of each individual and only becomes possible through respect for this uniqueness.

The relevance of these considerations can only become clear when we compare the polis to its alternatives, the pre-political societal relations in which there was no space for speech and action. The Greek philosophers considered the polis to be "natural" in the sense of in accordance with nature and more specifically with the perfection of man, but not "natural" in the sense of being a given fact without alternatives. The Greeks were well aware of living differently from the barbarians and the Eastern despots and their subjects. In any case there can be no doubt that to the Greeks, political life relied upon the human abilities of reason and argumentation. Aristotle, who more than any other man tried to give the concept of the polis a philosophically adequate form, had the following to say:

> "The polis is not just a matter of working together, it is clear that man is a political animal in a sense of the word that some other socially living animal is not. As the saying goes: Nature does nothing in vain: and so that man might be a political animal, Nature bestowed upon him alone, among all the animals,

> the capacity for reasonable speech. This speaking is more than merely having a voice: other animals have a voice which they use to express pain or pleasure. It is a fact that the nature of some animals allows them to feel pain and pleasure and announce these feelings to each-other"
>
> "On the other hand, the ability of speech allows for the designation of what is useful and what is harmful, and thus what is right and what wrong. The fundamental difference between humans and other animals is that only humans are aware of the distinction between good and evil, right and wrong, just and unjust. And what makes society*, a household or city, possible is the fact that there are people who have the same opinion on these matters."[5]

This is in fact the basic text of political philosophy. The distinction made between voice and speech touches the heart of the matter. Merely having a voice is not sufficient in order to take part in political life. This lifts political life up above and outside of social life. Nothing is further removed from the Greek conception of the political than the idea that political emancipation is achieved when someone becomes "elligible to vote", which is to say when they acquire the right the make their pleasure or displeasure known, and to participate in a vote on who will govern, or what policy the government must enact. In this conception a polis is not a societas rules by a balance between pleasure and displeasure, but a society* of speaking, acting individuals. Voting is a pre-political, non-specifically human activity. It marks a failure: the lack of agreement and the inability to proceed without an agreement. In other words, it aims at an artificial reduction of an otherwise irreducible multitude. In doing so, it draws attention to the unnatural character of the unity in which decisions are made by a vote.

From this it follows that we should conceive of the polis as qualitatively different from the pre-political societal relations. Aristotle was of course attempting to conserve a certain continuity when he posited that even a slave must share in human rationality in order to be able to function in a household. Though this participation is passive, like that of the wife and children of the pater familias. Slaves, wife, children, these are all passive members of the household: within the household they have no right to vote, nor do they require it. After all, all rights to taking initiative and making decisions are isolated in the hands of the head of the household. The fundamental

5 Aristotle: politics. I/2

household makes the right to vote superfluous, since a vote is only needed when there are differences of opinion among equal members of the same organization. By placing the emphasis on speech, not voice (ed:original "stem" means both voice and vote) Aristotle makes it clear that the polis should not be conceived as a collectively run or many-headed household. Political life is characterized by the fact that differences of opinion are discussed, not put to a vote. However, the Greek polis was, in many ways, still far too close to the household in order to detach itself fully from it.

Even though the household, like the polis, rests on a consensus of normative and value-judgments, it it not at all a place where these judgments can be discussed. All power of decision is concentrated in the person of the pater familias who knows no equal in the household, so that there can be no true dialogue. To Aristotle and other observers this inequality was a part of the very essence of the household, but this inequality was rationalized and justified as being "natural". This interpretation obviously has grave consequences for the idea of the polis. This idea of the polis must after all be made compatible with this conception of the nature of people. This probably helps explain the fact that Aristotle's conception of the polis was still quasi-domestic in nature. It is however fully possible to deny this proposition of the "natural" origin of inequality, without ignoring that inequality (sub-and superordination) is essential to the functioning of the household. We can consider the household to be a "contractual" product, in which this inequality is founded purely by convention and does not presuppose a natural inequality.[6]

This is not the way Aristotle saw things. To him the household was a natural unity, which needed to be integrally assimilated into the polis.

Though the polis and the household have in common that they both

6 Cf. Sir H. Maine’s interpretation of the history of opinions of right/law as an evolution from "status" to "contract" —Henry Maine: Ancient Law (1862). A recent renaissance of this problem, as relating to business households, cf. R Hessen: In Defense of the Corporation. Stanford Calif. 1979. N.Horn: “Aktienrecht und Entwicklung der Grossunternehmen: 1860–1920.” Ordo 30, 1979. It is clear that the fundamental question is which principle will win out: the social or the political? It all comes down to which principle the specific rules of some household (family, company) or another organization (church, party, etc.) should be tailored to or made subservient to.

are founded on consensus, there is a major structural difference. The polis is essentially a multitude, or rather a space within which many act. Political life is the resultant of the actions of many independent, but also interdependent actors. The polis is essentially polycentric. This is its most fundamental characteristic: the political space has no centre. On the contrary, it is made of a multitude if entities which each constitute their own centres. These different centres necessarily have an own identity, an own nature/character. The polis is not a homogenous collection of interchangeable, qualitatively indistinguishable elements.

The household on the other hand, is monocentric, not to say monarchic. The polis and the household are both societies*, but the polis cannot be thought of as being aimed at some specific concrete goals, and thus cannot be conceived of as an actor, not even a collective actor. Contrary to this, the household is most definitely aimed at the realization of a specific package of concrete goals, according to a given plan. This aspect of the household is often called "telocratic", as opposed to "nomocractic"[7]. A telocractic order involves coordinating and integrating the activities of many towards the aim of the execution of one plan. A nomocratic order only determines a few general rules in regards to how goals may be striven for, but does not mention the goals themselves, the choice of which is left to the individuals or units of this order. Because of its polycentric character, the polis cannot but be nomocratic. Political life is of course still goal-oriented, aimed towards the good, but this cannot be conceived as a concrete good but rather as the general form of the good which can be realized in an unlimited number of ways and in an unlimited number of circumstances. As Aristotle put it: the meaning of political life is to make the good, beautiful and full life possible. This is why the polis must offer the space for all these different ways of living which can each be called a concrete realization of the good life.

The life of the household on the other hand, takes place wholly within the context of the satisfaction of very specific goals, given or posited. Where in the polis, the characteristic properties of each of

7 For these concepts refer to a.o M.Polanyi: The Logic of Liberty. London 1951. M.Oakeshott: Rationalism in Politics. 1962. F.A.Hayek: Constitution of Liberty. London 1960. Hayek: Law, Legislation and Liberty. London 1974–1979 (3 part) See also Thomas Sowell: Knowledge and Decisions. New York 1980.

participating entities are absolutely irreducible, the execution of household-policy requires the members to conform to their allotted tasks. Their performance, being the reactions they bring about, must be judged from the perspective of the current plan: the household as a whole is the relevant actor. It is characterized by a strict separation between functions of leadership and executive functions, between planning and executing, even when it is the same people making and executing the plans, as is the case in a democratically organized household. The need,for both a coherent plan as well as unity in its execution are the main, primary factor towards a good understanding of the household as a pre-political form of society*.

Political action on the other hand is free from this limitation: everyone participates with a contribution they make themselves, they do what they like doing most, or what they do best, and they speak freely as they will. This is possible because the political space is not defined by a task, by some work which must be done, unlike the household. In the political space, another already being engaged in a certain work, a certain activity, is no hindrance to starting something similar. As such, politics escapes the control of each of the members, precisely because each member escapes control by all others. Here-in lies its great value: it brings people into contact with each-other without making one subservient to another. In so doing it does not just guarantee to everyone the opportunity to learn from experience, but also to apply this acquired knowledge. In other words, the political space creates precisely the correct experimental context that conforms to the ethic of self-actualization I sketched out in the last chapter and which I then characterized as political in anticipation to this point.

Within the context of the household there is no room for such a learning-process, no room for those ethical experiments which may lead to self-actualization. The repetitiveness of activities within the household does offer the members to opportunity to become ever more competent in executing a certain task, but since this task was imposed by the needs of the household as a whole, it has no ethical contents to the person involved as a person. The task was allotted to them, it does not start from them, and as such it does not contain any information critical for the executor. The participants of the household, its members (mainly of course the slaves and children), are merely means, instruments, factors of production. This means that, from the standpoint of the household, its members do have to be

conceived of as interchangeable elements. For even though the household does indeed rely on the specific talents of its members (just as it does on the specific properties of other means and factors of production) for the attainment of its goals, these members participate only as the bearers of said useful properties, as functionaries, role-fillers, deputies, not as intitiators with a truly original contribution. So too is the quality of the work measured by the standards of the household, not by the personal development of those involved. Which human abilities are developed depends upon the available roles to fill within the organization of the household, which of the abilities of a person will be developed depends on their place within the household. The domestic activities of the members thus require a great degree of moral passivity of said members, and this is incompatible with the speech and action characteristic of political life.

The multitude characteristic of the political space cannot be reduced, precisely because it cannot be a priori determined which way of life is the best for any particular person. The goal-oriented - or more correctly goal-bonded - nature of domestic activity does require a reduction of the spontaneous multitude of the human materiel the household has to work with. The consensus on which the household rests is a consensus about the goal. If you want the goal, you also want the means, more specifically the delineation of various powers/permissions and responsibilities valid within the household which ascribe to each a place and a task. The consensus which the political space rests on is necessarily of a wholly different nature. It is unavoidably a consensus regarding the irreductibility of the multitude, and thus regarding the openness of the political space or polis. Any attempt at reducing the multitude, the pluralism of the polis must lead to the destruction of the political space. Aristotle was very explicit on this point.

> "Multitude/plurality is part of the very nature of the polis. The further the polis strays from a plurality to a unity, the more it starts to resemble a household, and eventually an individual person. I say this because a household clearly shows more unity than a polis, and an individual clearly more than a household. Consequently it would be inappropriate to want to establish such a unity in the polis, even if it were possible to do so. It would destroy the polis. For, the polis does not merely consist

> of people, but of people of all sorts. It is impossible to form a polis from people that are all identical"[8]

This clarification leaves no doubt: he is referring to a qualitative, not simply a numerical multitude/plurality:

> "Consider in this regard, the difference between a polis and an alliance. The goal of an alliance is military aid, and the utility of it is dependent on the amount of it, not in any qualitative difference: quantity is decisive... Contrary to this, qualitative differences are essential to establishing a political unit. As I have said in my ethical writings: the existence of a polis is a question of the maintenance of a perfect balance between parts which are inherently different."

Here, Aristotle clearly distances himself from Plato[9], who had conceived of the state as being analogous to the individual as a unit. Plato's most famous "political" work is in fact a discussion on the virtue of justice in which the state is presented and defined as a macroscopic model of the human soul. Plato's conclusion was that justice is a holistic property, which can be defined as the harmonious cooperation of all parts of the soul, in other words as the health of the soul, just like a good state forms a harmonious unit in which each conforms to the execution of their allotted task, necessary for the maintenance of the unit. Though Aristotle too speaks of "a perfect balance between parts which are inherently different", clearly he speaks of a balance between people, not, as in Plato, a balance between functions or tasks. Where Plato's state is characterized by a hierarchy of people which conforms to a hierarchy of tasks deduced from the essence of the state itself, this is not so for Aristotle. As he carefully expresses, the polis is characterized by a tendency towards equality and non-differentiation. This may be noticed even when we only regard the way the polis is governed: political functions are open to all, and one day's governors are another day's governed, and vice versa.

In fact, Plato's state is nothing but a grand household, a community or societas, but not a polis in the sense Aristotle envisions. Plato's state

8 Aristoteles: politics. ii/2

9 Plato. A similar conception in Marx, in regards to the eventual communist society. (see note with 347).

demands that people conform as much as possible to the needs of the state itself. Aristotle sees the polis as a space in which different/diverse individuals can come to their right.

To Aristotle, domestic activity cannot be a model for political activity. The former are governed by the principle of efficiency, by the degree to which they realize a given goal. This principle, Aristotle claims, cannot be applied in all cases in which all have the same rights - competence is not a criterion of law/right/justice: in the polis all are "equal of/by nature". The balance between the different entities in this polis is a question of right/law, of upholding the equality in right/law. Any deviation from this principle amounts to an excessive unification, and thus to a destruction of the polis. Without upholding this principle the polis loses its reason for existing, for it is after all only within the political context that the full wealth of human potentials can be actualized. Only there can a person become themselves, take part in higher values and live a life that rises above the limitations imposed by the designated domestic tasks and in particular above the limitations imposed by the necessity to provide for the vital necessities of biological life. Only the political space creates the opportunity to not just choose the means and methods, but the goals themselves. The plurality that characterizes the polis is indeed the expression of the unimaginable possibilities of human self-development, a mirror of and for people in which each may discover possibilities for themselves in the other. These facets of themselves will have to remain unknown to them in any context in which a person is only a functionary, a worker, in which they are defined from without, in which they have no occassion to define themselves from within, in which they are merely a representative not a presenter.[10]

This juxtaposition of household and polis should not be interpreted as positing some necessity of choosing between domestic and political activities. Domestic activities are by definition necessary, unavoidable activities which will likely always remain so. The question is: can they work within a political space, and if so how? Which structures are compatible with respect for human plurality, which is the basis for any culture, and which are not? The Aristotelean vision furthermore implies

10 Cf. R.Sennett: The Fal of Public Man, Cambridge 1977.

that the political space itself has an identifiable structure, is an identifiable unit: to what extent can we say that this fundamental political demand for respect for plurality is truly compatible with this determination of the polis as a unit with a certain structure of goals?

Don't the questions we just raised threaten the intelligibility of the concept of the polis? To Aristotle, the polis was defintely a unit: the polis, he said, is a plurality unified through upbringing/education.[11] This unity in plurality is obviously problematic: what is its principle? What is the principle on the basis of which we can decide if there is too much unity, thus destroying the polis, or too little of it, also destroying the polis?

Aristotle seemingly recoils in fear from the implications of respect for plurality, which is a necessary but not sufficient precondition for the good life.

When he says that the polis is a plurality unified through upbringing/ education, he is referring to the final remarks of his Ethics for Nicomachus, where he remarks that knowledge of the "virtuous" is not sufficient for making people virtuous.[12] Neither is the existence of a political space sufficient for making people virtuous: within this space some definite activity must take place which generates the discipline without which the vast majority of people would never be able to acquire the right mentality, the right habits needed to be able to understand, appreciate and apply knowledge of "virtue". To Aristotle politics is first the practical side of ethics: how to realize acquired ethical knowledge? How to generate the discipline which would ensure that ethical knowledge be put into action? To Aristotle, as it was with Plato, the answer is to be found in a system of upbringing, and as with Plato Aristotle too gives preference to upbringing by the community over upbringing by the authorities of the household, though Aristotle does display his typical ambivalence in regards to the whole matter. For instance, he does admit that the latter type of upbringing is in some respects preferable.

It is in this way that the concept of the polis gains, to Aristotle, a meaning which

11 Aristotle: politics. ii/5
12 Aristotle: Ethica for Nicomachus. X,ix,2

far exceeds that of the political space. The polis becomes a quasi-domestic entity[13], with a given goal, to make people virtuous, and a clear need for an organization which must attempt to realize this goal as efficiently as possible. The polis becomes a state, and furthermore a state with an explicit educative function. The fact that the object of the state is to make people virtuous rather than provide for some vital or animal need is not sufficient for avoiding the massive problem faced here: does the Aristotelian conception of politics not lead to an "excessive unification" in the polis? If we consider legislation and jurisprudence to be educative techniques, then it will have to be determined who will decide on which rules to follow and apply, and in that case whether we will be able to hold on to the principle of equal treatment in jurisprudence becomes questionable indeed. Aristotle claims that legislation is required to discipline not just the children, but also of the adults, and even to regulate the entire lives of everyone "because the majority heeds force far better than reason and virtuous considerations"[14]. The Aristotelian conception of the polis thus ends in a totalitarian vision[15] which has nothing at all to do with the respect for plurality and diversity, the openness, which initially seemed to determine the identity of the polis in contrast to pre-political society. An "educative function", embedded in a system of manipulations and punishments which bears no likeness at all to dialogue and speech as the typical forms of political interaction.

13 M.T.Owens: “Aristotle’s Polis: Nature, Happiness and Freedom”. Reason Papers, 6, 1980, 69–78, especially 74–76. Also F.Miller: “The State and the Community in Aristotle’s Politics”. Reason Papers 1,1974, 61–69 B.Delfgauw: “De Politiek” in Van Rijen e.a.: Aristoteles, zijn betekenis voor de wereld van nu. Baarn 1979. L.H. Hunt: “On Improving Mankind by political Means”. Literature of Liberty. 3,3,1980, 45

14 Aristotle: Ethics. X,ix,9; and X,ix,17 See also D.J.Den Uil: “Freedom and Virtue” Reason Papers 5, 1979, 1–14, for a refutation of the idea that it is possible to create a virtuous person by force.

15 Aristotle writes: "It is not sufficient for people to have gotten the right upbringing and discipline in their youths: they must also put into practice the lessons they have learned and confirm them with their habits as adults. Consequently we need laws/legislation to regulate the discipline of the adults, and even to regulate the entire lives of all people/" (Ethica. X,ix,9) Insofar that Aristotle's work constitutes a plea for an educative dictatorship, it is essentially like that of Plato, and it is indeed one of the grand sources of conservative political thought, which sees the state as the institution which ought to "make people virtuous" (and as such that it should first act as a police of vice and virtue, rather than say an economic police). See also Th.Gomperz: The Greek Thinkers. Vol.4. London 1964, 399: “Is it too much to say that the Stagirite retains an ideal based on war and conquest, while rejecting its aims and fundamental principles?” Gomperz describes Aristotle’s political ideal as “an unwarlike Sparta”.

Of course, Aristotle tentatively adds that he is not at all sure if it is possible to make people be "good" by means of legislation. Yet he still expresses that he suspects there to be a science of the legislator for "those who wish to discipline others"[16].

In my opinion, Aristotle does indeed end up reducing the polis to a domestic or quasi-domestic entity, thus pushing its true political nature to the background. In doing so he does conform to the reality of the Greek polis, which certainly should not be considered to be a realization of the political way of life. It is probable that his entire philosophical teaching was a strong impetus towards formulating a goal for the polis, as the nature of a thing has the character of its final goal, that which the thing in question "strives" towards. As such, according to these teachings, the legitimacy of the concept of the polis can only be assumed if one also accepts that the polis is a thing that has its own final aim/goal/destination.

It speaks for itself that the political space can never be more than a necessary prerequisite of the good life. This position has the nature of an analytical truth, since the concept of "space" implies that there are multiple ways of filling this space. The Aristotelian conclusion that, besides this space, an activity is required to make use of this space, is also irrefutable. The same cannot be said for the next step, which consists of the making of the claim that this activity must have the political space itself for an author. This line of reasoning is not valid: it changes the meaning of the term "polis" from "space" to "active entity". As I said, this is probably an unfortunate application of Aristotelian metaphysics. This implies that the polis can only be considered as an object of study if one is willing to posit its formal perfection as the end-goal, or rather as the measure for judging its striving or its actions, which is to say if one is willing to ascribe unity of action to the polis. The polis only gains a being among the things "which are so by nature" if it can be interpreted as a subject of action, with a specific action. This seems to also be a necessary condition to be able to speak of political philosophy. Aristotle very expressly affirms that the polis is a "natural association", and as such is a "thing" which has its own principles of motion and rest. This

16 Polis en metafysica. See a.o. Owens: op.cit. with p.341.

"reifying" presentation of the polis is, however, incompatible with the idea of the polis as a political space. A space isn't something that has its principles of movement within itself, though naturally a space can have an influence, impose a limit, on the activities of the things within that space. It can, in some sense, "select", or "give direction", etc. without having to conceive of the political space as being "aimed at", or as a subject with its own action.

The fallacious reasoning Aristotle uses to support his transition from ethics to politics is evident when he admits, in the Ethics for Nicomanchus, that an upbringing by the state cannot possibly be diversified enough to do right by the individual differences between people. But, he adds, individual treatment must certainly be founded in general ethical knowledge, knowledge of what is good for either everyone or everyone of a kind. This general ethical knowledge is equated with the science of legislation, and the existence of this science seems to be sufficient foundation for the right of the legislator. Thus, political philosophy can continue its career as "conseiller du prince".[17]

So, we will not find in Aristotle an adequate solution to the problem of the tension between unity and plurality. In fact, respect for plurality can best be put off, until after the educative process is complete, at which point everyone will be motivated to immediately put their ethical knowledge into ethical practice. This idea has an expressly utopian character. The polis is no more than some vast household, the actions of which are aimed not at the satisfaction of purely material needs but for "higher", "spiritual" needs which will first need to be built (ed: orig uses "kweken", to breed, but in this context like building a habit), for the development of "moral virtues". In the household in the strict sense the master "causes" the virtue of the slave, and so in the polis conceived domestically the legislation "causes" the virtue of the citizens[18]. This approach not only seems strange to those who expected freedom and self-responsibility in the polis, it also clearly reveals to us to which extent Aristotle remained a prisoner of the rulership-model of society*. His definition of the citizen is eplicitly expressed in terms of the execution of public offices, governmental functions and

17 See a.o. Quentin Skinner: Foundations of Modern Political Thought. Cambridge 1979, vol2, 349. For the term "science of legislation", see Aristoteles: Ethica. X,ix, 16.

18 Aristotle: Politics.iii/1. for the definition of the concept "citizen"

authority in general. The equality, which to him is the actual hallmark of political association, is a merely numerical one, a commensurable equality: everyone (which is to say every citizen) can exercise governmental functions, no-one has more of a right to political power than any other. And, of course, Aristotle got stuck on the familiar paradox that if it is indeed the case that the availability of ethical knowledge is not sufficient to elicit ethical behaviour, then the availability of political knowledge, or a science of legislation is also not sufficient to guarantee an adequate governing of the polis. The idea that some semi-societal organisation of the polis as an educative institution is required in order to "put our theories into practice" does not offer any solution, it merely shifts the problem. What is certain is that there is no reason for a politcal philosopher to believe that the power to rule is simply in the hands of "the good", those who are willing to listen to reason.

SOCIETIZATION OF POLITICS

We've introduced the concept of the polis using notions such as respect for plurality and diversity, and the priority of speech and action. This idea of the polis I have represented with the term "political space". In Aristotle there is a shift, as we have seen, to a much more substantial concept of the polis, which posits the polis not as qualitatively different from the household, but only quantatively different. A shift where it is no longer the political way of life which is front and centre, but the problems of political management. This makes the distinction between polis and household, with which Aristotle started his book in such a promising fashion, ever more vague. This already becomes clear when he states that the way in which the man rules over the woman should be characterized as "political".

It is my belief that if we truly wish to understand that which is specific to political life, as something radically different from social life within the household and the quasi-domestic organizations of eg. Eastern despotism, which to Alexander the Great's contemporaries certain was an alternative way of life to the Greek (more specifically Athenian), we should turn our attention to the political space. The perfection of the polis is indeed the perfection of the people who are

living together in the polis. Though we can confidently claim that it is the political space which makes human perfection achievable, we cannot follow Aristotle in his claim that the polis is the author of human perfection, and the state as the cause of it. The "conservatism" suggested by Aristotle, in the end is incompatible with the eudaimonistic ethic.

It is easy to understand the way in which Aristotle went far past the political space in order to cling to the "educative mission" of the state by remembering the rule that the ends justify the means. However, the perfect polis, a community of ethically perfect individuals living in mutual respect and free dialogue, cannot be achieved by destroying this respect and dialogue, or by transforming them into mere formal exercises, for the sake of this goal. You can't learn how to swim while out of the water[19]. It's probably true that a political space characterized by the fact that the people that constitute it have no virtue other than respecting each-others boundaries (and thus the plurality of the political space), will not provide a very exalting spectacle. But to draw from this the conclusion that this virtue should just be sacrificed in order to teach people *other* virtues by means of a moral or educative dictatorship (even if it is founded on the so called "science" of the legislator) is a complete non sequitur. We've previously seen, a.o. in chapters 3 and 5, that respecting each-others boundaries is the conditio sine qua non for any moral development. As formulated in the previous chapter, a formally adequate self-conception is a precondition for a self-conception adequate in content. Without awareness of your own finitude, and thus of your own boundaries, moral growth is impossible. This is the sense in which we must understand Kant's claim that the best, or only legitimate, political order can be introduced even in a nation of demons: the political space makes ethical progress possible, but it is not the driving force behind it. It does not presuppose ethical knowledge, just the need for such knowledge. As such one could even say that it is the very absence of this knowledge, or the will to apply it, which underlines the meaning of the political space.

19 Cf. T.B.Macauley: “Many politicians of our time are in the habit of laying it down as a self-evident proposition that no people are to be free till they are fit to use their freedom. The maxim is worthy of the fool in the old story who resolved not to go into the water till he had learned how to swim. If men are to wait for liberty till they become wise and good, they may indeed wait forever.” Cit.in F.A.Hayek: Studies in Philosophy, Politics and Economics. New York 1969, 231.

Here we find that the political space coincides with the order of law/ right (as defined above). Right/law, in the sense of the fundamental principle of law/right, is the expression of the demand to preserve plurality which Aristotle deemed to be part of the essence of living together in a political relation. Peaceful, orderly society* is only possible where there is right/law. For, how could a multitude live together, while retaining their plurality, if they do not have an insight into the rules and principles that allow them to find out where one begins and an other ends? If they don't have the insight that living *together* (ed: *samen*leven) requires respecting the others *as others*? How could people live together if they cannot even be identified, bounded, distinguished from each-other and from themselves? An objectivist ethic (even if it is relative, which is to say only valid for one specific subject) can however not settle for an arbitrary or purely conventional delineation of these boundaries. A household, too, has a need for a delineation of responsibilities and permissions, of "rights" and "duties", but as we have seen previously, such cases involve the identification of tasks, positions within a goal-oriented, goal-bound, organized instrumental structure (*taxis*, in Hayek's terminology)[20]; not an identification of the others *as others*.

Right/law, we can say, *defines* the members of a society*; it is the conclusion that they are finite and irreducibly diverse. It gives them a political identity (which is not an ethical identity in the sense of self-knowledge and self-actualization, but which makes the former possible).

It is from this political identity that the specific criteria for the specification of permissions/authorizations and responsibilities of each member of society* must be deduced. The inverse is impossible, as this would imply that the political identity of a member of society should be sought not in that which makes their contribution to the political sphere into something unique, but rather in a certain role or function, the determination of which is wholly decoupled from any reference to said member.

As such, there is something fundamentally wrong in the saying: ubi societas, ibi jus. (ed:Where there there is society, there will be law) After all, the term "societas" refers to a unity which far exceeds the polis, to a unity of action, unity of goals,

20 For this term, as opposed to Cosmos, refer to F.A.Hayek: Law, Legislation and Liberty. Part 1: Rules and Order. London 1974.

rather than a unity of the space in which the many have the opportunity to be themselves, to act by their own insights, on the basis of their personal judgments of value. Society has the same general character the household does. It is monocentric, telocratic, it is bound to an aim, it has the same instrumental attitude. If you speak of society, you must speak of its goals, its organization and its hierarchy regarding decision-making. Society is just as much the antithesis of the political space, the polis, as the household is, though it is of course far larger and far less personal. Because of this, society must rely more on general legislation than on direct commands: ubi societas, ibi lex.

Undoubtedly, the size (and the impersonality) of society is a possible explanation for the tendency to equate society and the political space. Excessive attention to this merely quantative aspect will easily bring one to neglect the essential differences in structure between polis and society. This will leave one blind to the meaning of the conceptual shift which takes place when right/law, which is an inherently political phenomenon, is interpreted as being a societal or even a domestic phenomenon, with a purely economic (that is to say domestic) function, and in so doing make the domestic the model for the political. This is the case, for instance, when the role of the societal sovereign is compared to the head of a family or *pater familias*. It is not without irony that in this comparison, the head of state, the prince, or the government is often ascribed superlative domestic properties. In particular: the absolute rule of the *pater familias*, the *dominus*, over his household is often transferred to some sovereign royal or legislator, tasking the latter with the same care ("responsibility") for the wellbeing of the citizens as the pater familias has for his children and the *dominus* for his slaves "from the cradle to the grave". This transfer of domestic power into the hands of the societal sovereign necessarily implies the violation of the domestic authority of the *pater familias*. The societal dimension of the household is incompatible with the retaining of the "privacy" of the seperate household.[21]

The loss of the autonomy of the household as a concrete,

21 Arendt: op. cit. bij p.330, 43–56. Cf. J.Bodin: Les Six Livres de la République (Paris 1576). Bodin understands the sovereignty of the royal as analogous to the patria potestas of the pater familias.

goal-bound community, which is the consequence of the processes of societization is more than just a unification of all individual households into a larger household, the society or state. It is simultaneously also the destruction of the political space formed by these different households. The plurality of households constitutes a political space, after all, in which the heads of the family (but only them) are free and equal, which is to say they are in a political relationship towards each-other. It is this political relation which disappears when the domestic or economic form is detached from the individual households and starts encompassing them in a societal connection.

This societization of the (already macerated) political space constituted by a multitude of autonomous households means that now the heads of the families too are caught up in a net of permissions and responsibilities flowing from the societal definition of the goals which ought to be realized "by society", not from, their own political identities as free and equal people. As Hannah Arendt correctly remarked, the societization of societies* eventually leads to a situation in which no-one can escape the demands of the positions, functions and status they hold in the societal context. People are defined societally. From the perspective of society no-one is more than a "dummy", a functionary. The societal definition relates to the place, the function, not the functionary. The key-word in the societal construct is "statute": all sorts of things must have a statute. The question of whether this actually makes any of the parties involved any better off is hardly ever given any consideration at all. The question is usually not even understood: the representatives of social philosophy seem to think that it is self-evident that blocking rental prices, expanding the permissions and decreasing responsibilities of "tenants" is to the benefit of tenants, people that rent. Is a tenant something different in this case, than a "tenant" determined by X to have certain statutory "rights" and "duties"? That the protection of "tenants" will inevitably be detrimental to tenants is inconceivable to them, just as much as the fact that minimum-wages and so-called "social" benefits will end up being detrimental to precisely that category of people they are supposed to help. The current economic crisis is precisely the result of the cumulative effect of a continuing policy in which "rights" and "duties" were created

on purely convention grounds, without taking any account for the fact that people are who they are, even in the most societiezed of orders, and not what the legislation says they are. Social-humanitarian positivism cannot stand up to the test of reality, just as the positivism of those who claimed themselves to be the *Herrenvolk* could not.

Societization of society* makes any form of true political living impossible:

> "What is decisive in this is that society excludes the possibilty to act, which used to only be excluded inside of the household, across the whole line and at all levels. Instead society expects each of its members to conform to a certain system of behaviours, imposing countless prescriptions on them, of all conceivable kinds. It wishes to press each member into the mold of (societally) good behaviour, excluding any and all extra-ordinary achievements or spontaneous action. What counts is societal status, regardless of whether it rests on some title of nobility as in the semi-feudal society of the 18th century, or property, as in the class-societies of the 19th century, or merely on function, as in today's society of the masses."[22]

Of the head of the family you could say that, as a member of the polis, he "acts". He chooses his own, or his domestic, goals and methods and bears the responsibility for his own decisions, and thus he is moving within a political space. The same could be said for the absolute rulers of the 16th and 17th centuries. Today, there is no longer any political space to speak of. The head of the family was above and outside of the household, and the absolute ruler was above and outside of the society he ruled. Today, all we find are top-level functions and elevated positions, that don't derive their lustre or weightiness from the person that holds them, but from society, from the state as an organized unit.

There is a sense in which the political space still exists, but exclusively between the states, which are impersonal, depersonalized entities (which is probably why they are so often personified). The difference with the already very much limited political spaces constituted by the households and kingdoms of the past is immense: the authority and responsibilites of these collectives were almost completely born by identifiable people. The political space was -despite an exclusive character- at least still a *human space.* When, however

22 H.Arendt: op.cit., 47

literally outgrows itself, the political space is completely dehumanized[23]. And politics, originally thought to be the most human of all activities becomes a picture of inhumanity. For the modern language-user it is almost unthinkable that "political" once meant the same as "well-considered, intelligent", and had no relation to "cunning, deceitful, devious" or "espèce de député", to the perversion of all that is human with which the word is commonly associated today. The dehumanization and inhumanity of contemporary politics is expressed not only in the numerous "political" horrors the twentieth century provides ample examples of, but also in the total impossibility of understanding, analysing and assimilating "politics" in the familiar terms of right/justice/law and morality.

"Politics" mystifies. How often does one hear the phrase "I don't understand a thing about politics". And, no wonder: the political space is filled with activities which do not come from humans/people, but from functionaries, representatives of artificial "legal persons", whose authorizations and responsibilities are not determined by a human unity of action and thought, but rather by arbitrary constructions of legislation, treaties, protocols, amendments, which in the final analysis will inevitably lead to the conclusion that the most reasonable solution is illegal and the appropriate person not authorized. Society, in its contemporary form of a state, is an entity which cannot be perceived or questioned, which is not capable of being understood in terms of the usual categories of human action: the state cannot possibly be considered to be a rational being and as such it cannot be a political being in the original sense of the word "political". The most characteristic of all political activity, free and open dialogue, is made radically impossible in society because in society everything has been made "political" (in the contemporary sense) so free dialogue becomes impossible. Everything you say can be used against you. What you say is of no importance, what is, is whose spokesperson you are, which party you serve, etc. In what sense can there be free dialogue when so-one is able to speak for themselves? If no-one is *allowed* to speak for themselves. Who is it that is speaking if none of the speakers are speaking for themselves? Could this be the deep, structurally determined cause

23 Arendt: op.cit., 51: “… bureaucracy, government/rule by nobody…”

of the permanent tendency of societal leaders to use the dubious technique of the cult of personality to elevate themselves above and outside of society. In so doing, the may give the people in that society the sense that "politics" is not so strange after all, that it is a human activity which can be understood as such? Is it not a thousand times easier to identify with a leader, a Fuhrer, than with some abstract network of relationships and positions, in which each and every person can only ever be material, never form as well?

The "political" mystification is complete: it is active in all areas. It is far from rare for politicians to show a healthy understanding of the absurdity of the policies they themselves are enacting, while in private settings or conversations. Collectively, however, in their role as politicians "their hands are tied", and they cannot even publicly repeat that which they so readily admit in private. Societization also means that more and more aspects of human society* are withdrawn from people's direct control. Monetary "politics" offers us a good example. Almost everyone seems to think monetary policy must be some supremely complicated matter, best left to the "experts"[24]. The fact that these experts do not seem to do a very good job themselves (as witnessed by the international monetary chaos which seems to increase more than proportionally as more and more monetary authorities rise up and expand their own authorizations) only reinforces this impression of complexity. In fact, this complexity is a consequence of centralization itself. In a free monetary system, without central banks, monetary monopolies and privileges and thus without inflationary creation of money, the production and trafficing of money would be regulated by the usual principles of law/right, which are rules that everyone understands. It is absurd to stoke fear in people with all sorts of mystifications such as difficulties in balancing the budget, where no-one at all has any difficulty at all understanding their own budget-balance. Similiar remarks would be valid across a wide range of other activities. As more and more activities are societized or socialized people are more and more put at the mercy of "experts" and bureaucrats.

24 Cf. M.N.Rothbard: America’s Great Depression. Kansas City, 1975, part 2, for some background information in relation to the deterioration of the global monetary system as it had come to be during the 19th century. Since Hayek: The Road to Serfdom. London 1944, en Mises: Bureaucracy. New Haven 1944, a whole literature has sprung up around bureaucratic decision-making. —cf. infra text pp.501 and following.

For the latter it is however impossible to fulfill their tasks properly, precisely because of their positions. So they inevitably create chaos and subsequently ask for more powers, more authority in order to come to grips and deal with the "ever increasing problems".

This process creates feelings of powerlessness, confusion and dependence in a large part of the population, which no longer feels capable of helping themselves (which they indeed are not, since socialization of the means has robbed them of the "right" to help themselves). Such feelings can rather easily translate themselves into resignation and compliance, or docility - which means to say: into "political" power for the societal elite. The foundation of this power is always the same. Who or what is identified as the holder of said power, nor which manner they wield it in, nor the aim the wield it to, make any difference. "Political" power always relies on consent: all rule, every state, regardless of its "form", is democratic in the sense that a durable rule is impossible if it does not have the more or less active cooperation of large parts of the population. This cooperation will be given all the more easily if the people are convinced that society can only continue to exist due to the grace of the expertise of its leaders. If they are convinced that they themselves are not capable of living their own lives in an orderly fashion, together with others. The more they tend to accept the societal definition of themselves which is imposed on them, the stronger this belief will be and the more mysterious and unlikely the possibility of spontaneous cooperation will seem.

That "political" power rests on consent is a fundamental premise of political philosophy.[25] David Hume is the author of the *locus classicus* of this position

> "NOTHING appears more surprizing to those, who consider human affairs with a philosophical eye, than the easiness with which the many are governed by the few; and the implicit submission, with which men resign their own sentiments and passions to those of their rulers. When we enquire by what means this wonder is effected, we shall find, that, as Force is always on the side of the governed, the governors have nothing to support them but opinion.

25 See the important study by Sharp: The Politics of Non-Violent Action. Boston 1973, especially part 1: Power and Struggle.

> It is therefore, on opinion only that government is founded; and this maxim extends to the most despotic and most military governments, as well as to the most free and most popular. The soldan of Egypt, or the emperor of Rome, might drive his harmless subjects, like brute beasts, against their sentiments and inclination: But he must, at least, have led his mamalukes, or prætorian bands, like men, by their opinion."[26]

Hume's insight makes it clear that any regime is democratic in a substantial though not necessarily formal sense. The distinction between rulers and ruled presupposes the distinction between leaders and followers, and it mystifies latter distinction. The formal distinction between rulers and ruled, between Prince and People, veils the fundamental fact that the People is not a homogenous mass whose interests (according to one) are opposed to those of the rules, or (according to the other) in line with those of the rulers. Not all of the subjects/ruled are followers of the rulers, but it is also not the case that none of the ruled are followers of the rulers.

As a follower, you chose who to follow. The relationship between follower and leader is essentially a voluntary one. However, no-one chooses their own rulers, no-one chooses whether to be ruled or not. The relationship between ruler and ruled is essentially involuntary. Everyone is ruled by the leaders of the others, and thus indirectly by the actions of the others. It is true that a follower may have a leader that rules, so that one could say that this follower is ruled by his own leaders. This way of speaking would be misleading: as a follower, you are not ruled, you follow, obey, execute. A follower can only find out what it is like to be ruled when they choose to stop following. The power to rule of the rulers is always the emanation of the follower's docility. Docility is the essence of "political" power - which makes the latter a very unpolitical phenomenon since political life is defined by speech and action, by the development of initiative. No-one who defines themselves as a *zoon politikon* would think of putting themselves at the service of another as a follower, and certainly not of allowing such another to rule over a third party in their name. Such an attitude is incompatible with respect for the plurality and variability of

26 D.Hume: “Of the First Principles of Government” Essays Moral, Political and Literary (1749)

people which is characteristic of the political.

The "political" (in actual fact: social) power of the rulers is something given to them, not something that stems from them, not something they can directly control, as the substance of it is the judgments of their followers. This is why a ruler or leader is always a follower as well: they need a power-base, and once acquired it must be followed, lest the leader lose his followers -and thus their power. Leaders are followers of their followers. Those who would try to lead the people will quickly find themselves displaced by those who would placate the people. Hume's insight allows us to place the responsibility for social malpractices, crises, depression and other forms of policy-induced misery squarely where it belongs: with the followers, the docile, the heteronomous mass of impersonal people who enable the phenomenon of concentrated "political" power by fleeing their own responsibility, those who see no issue with casting their vote, thereby signalling that their leaders are welcome to rule over others, even if those others are not followers of the leaders.

Hume's insight also allows us to understand why Spinoza[27] is of the opinion that it is useless for a people to drive out a tyrant or ruler if they do no succeed in removing the causes of tyranny, which is to be found among the people themselves (the heteronomous frame of mind, the willingness to let yourself be defined as a social being). The tyrant is but a symbol; a powerless mark of a power which finds its source somewhere different than the person of the tyrant, or the weapons of his guards. This was also the theme of Etienne de la Boétie's *Discourse de la servitude volontaire* which I have cited previously. No great storm is required in order to blow the yoke off, and away. Tyranny, which does not rest on violence, cannot be overthrown with violence even though it is not hard, or even ridiculously easy, to eliminate the tyrant. Tyranny does not stem from the tyrant, it results in the tyrant. To fight the tyrant and to fight tyranny are two wholly different things. Quote Etienne de la Boétie:

> "It is furthermore unnecessary to fight the tyrant, or to topple him: we will simply collapse if the nation no longer agrees to serve him; nothing need be taken from him. It suffices to no longer give him anything. It is not necessary for the nation to do anything for themselves, it

27 B. Spinoza: Tractatus Politicus. V/7

> suffices for the nation not do do anything against itself. In fact it is the peoples themselves which allow themselves, or rather make themselves be devoured. The people subjugate themselves, cut their own throats and when confronted with the choice of being a slave or being free they prefer the yoke over freedom - the people consent to their own misfortunes, or rather, they chase after it."[28]

Etienne de la Boétie found little difficulty in resolving this seeming paradox by pointing out the distinction between followers and the ruled. The followers, the "good" citizens, they are the true voluntary slaves. They sell their souls in order to share in the spoils of power. They hide behind "the law" in order to participate in the dirty work of ruling, and a dirty work it is indeed. Not the oppressed,not the exploited, but the accomplices of power are the true slaves, the pillars of society.

"I am a man of the people(ed:volk)," Hitler was able to say: "I came from the people and to the people I shall return. My ambition is for there to be no statesman who can rightly say he is the representative of his people(ed:volk)"[29]. The more naked and obvious the tyranny, the clearer its popular base; and the clearer the confrontation of the masses with the consequences of their actions, as the consequences of their actions. The tyrant or ruler can of course later be used as a scapegoat, but only after he has left the stage. Things are quite different in formal democracies, which is precisely why these were not seen as true democracies in the eyes of the Nazi's and Fascists(30): the people hand over their power, they no longer participate in its exercise. This is the downfall of formal, and thus to the Fascists[30], false democracy: the people hand over their power, they no longer recognize its execution in themselves, they only see the workings of the "political" machine, the hand of the politicians.

The politicians rule, not the people, not the mass. Yet still the power of politicians too is theoretically founded on the people, in the mass of the ruled, and it can only be legitimized as being a representation of the power of the people. It's the classic pattern of alienation[31]: the

28 E. de La Boetie: op.cit. with p.254, pp. 110–111, 151–157.

29 Max Domarus: Hitler: Reden und Proklamationen, 1932–1945, kommentiert von einem Zeitge-nossen. München 1965, speech dd. 20 maart 1936, p.609. See also J.P.Stern: Hitler: The Führer and the People. Glasgow 1975, p.18

30 Fascisme: see Z.Sternhell: “Fascist Ideology” in W.Laqueur (ed.): Fascism. Harmondsworth 1979, 325–408, especially 332–354.

31 See the fundamental remarks in P. Clastres: La société contre l’état. Paris 1974, Translated to English by R. Hurley: Society against the State. New York 1977, o.a. pp.167–168, 171: “Society’s major division…is the vertical ordering of things between a base and a summit; it is the great political cleavage between those who hold the force, be it military or religious, and those subject to that force. The political relation of power precedes and founds the economic relation of exploitation. Alienation is political before it is economic… If one wants to preserve the Marxist concepts of infra-structure and supra-structure, then perhaps one must acknowledge that the infra-structure is the political, and the superstructure is the economic.”

people create the power and externalize it into a political machine, the overstructured parliamentary state, comprehensible only to jurists and other "experts", in which the people no longer recognize themselves. But when the people are alienated from the power, the power as such simply disappears. Gradually, ever so gradually, the powerlessness of the parliamentary state is expressed. Legislation, regulations, prescriptions are constantly avoided and violated. The politicians are no longer afforded any respect at all. The state is no more than a hollow shell and inevitable becomes totally irrelevant. The more the politicians try to enforce their authority, the more the citizens become convinced at all that those guys are not good for anything, and that from now on the principle will hold of "every man for themselves, and the state against us all". At this point, there is no more power in the state. State power disappears until only a repressive apparatus under salary remains, mercenaries rather than followers. Such an apparatus surely can still make people suffer, but it has no control over the proceeding of events, it cannot lead.

The result is chaos. The power-vacuum is complete, for though state-power has disappeared because the people no longer supported and believed in the state, this does not mean that the people have taken the power into their own hands and are now exercising it for themselves. They cannot: the people as such cannot exercise power, they can only create it by consenting to the actions or programs of the leaders and the authorities. Power relies on consent, on the confluence of opinions regarding a symbol. The people only participate to the extent that they recognize themselves in the exercise of power: their feelings, passions, sentiments, prejudices, their hopes and their fears. The most direct way this can be done is the identification with a leader, a Führer or a Duce, someone to give shape to said feelings and prejudices, makes them seem credible and important.

No matter how perverse the logic of the fascist political analysis may be - and what could be more perverse than the position of autocracy, tyranny, the most true, undiluted and direct of democracy? - it has a solid basis

in political philosophy. More specifically in the insight that all "political" power relies on a will to follow, a will all the more effective if the power it calls into being is easily and directly identifiable with the power they want to follow. Who can deny that parliamentary democracies show a tendency to end up in a so-called crisis of authority? The rise of fascism in the period between 1890-1930 was itself a sign of political alienation after all, of the awareness that the powers which come from the nation were shown to be incapable of producing a result that showed any similarity at all with the expectations of the nation. Today too, "political alienation" is a key-word. Political philosophy suggests that the perversity is not so much in the fascist analysis, but rather in the phenomenon under analysis itself, in the willingness of so many people to serve in order to reap the fruits of the exercise of power. It further suggests that the people very much appreciate this alienation: it allows people to divert responsibility for the enacted policies upwards, while complaining loudly and vociferously and yet still pressuring their leaders in such a way that it is "politically impossible" for the latter to enact any sort of fundamental reform

CONSTITUTION OF THE POLITICAL SPACE

In the above I have equated the political space with the order of law/ right. More specifically with the individualistic order of law/right which arises from the application of the fundamental principle of law/right. It speaks for itself that the historical polis never realized this order of law/right. The Greek polis was never able to free itself from the grip of the household. It always remained a society. One of the most striking properties of the Greek city-states was indeed their exclusionary character: women, children, slaves and strangers were not truly part of it. This exclusionary character, this emphasis on requirements for membership, is typical hallmark of a domestic or societal order, which is hard to square with the idea of the polis as a space in which people can act and speak on the basis of equality. And it was precisely in the latter idea that the revolutionary character of the idea of the polis was to be found. Hannah Arendt wrote, in relation to the Greek situation:

> "What distinguished the polis from the household, was that it only

> equals, where the household was a mileu of the most total inequality. To be free meant not being subject to the necessities of existence, or to the authority of an other, while not exercising authority yourself. It meant to neither ruler nor be ruled. On these grounds it can be said that there was no freedom within the domestic community. Even the head of the family, the ruler of his domestic society, was considered to be free only to the extent to which they had the power to leave their house and court to enter the political domain, where all are equal. Indubitably this equality had but few similarities with what we understand as equality today: it means to only interact with one's equals, and it presupposed the existence of "unequals" which were of course the majority in every polis. As such, equality had nothing to do with justice, but it what the essence itself of freedom: to be free meant to escape inequality, inherent to any form of rule, and to become part of a sphere where neither ruling nor being ruled exist."[32]

The *idea* of the polis is undoubtedly revolutionary in the sense that is is an expression of a society* based completely and totally on right/law, and not force, coercion or rule. To neither rule nor be ruled over, to be neither master nor slave - that is our definition of right/law. The order of law/ right is the community of equals, in the same way that the political space is the place where we encounter eachother on the footing of equality. The Greek polis however, made an attempt to - and this is shown clearly in the cited passage from Hannah Arendts masterful interpretation of the political ideal -reconcile this equality with the pre-political inequality and thus unfreedom of the household. Not only did it attempt to limit membership of the polis to the heads of the family, which alone have the polis a societal character, it premised a concept of freedom which is essentially anti-political and social - a paradoxical concept of freedom which has unfreedom as a presupposition.

The "freedom" of the citizens of Greek city-states also related to their material living-conditions: to be free also meant, and maybe even first and foremost, to not be subjected to worries of life's necessities (hunger, thirst, shelter, clothing, etc.); as long as a person does not have security in their livelihood, are not assured of their vital needs being

32 H.Arendt: op.cit. bij 385, p.39

met, they cannot be free. This means the Greeks held a concept of freedom which today is called, rather unfortunately and misleadingly, "positive freedom". This concept is still used as an alternative, "richer" or "nobler" conception of freedom than the so-called merely "negative" conception of freedom, which is associated with the fundamental principle of law/right. The Greeks on their part actually did realize that this "positive" conception of freedom had slavery as a precondition: for one to be free, another must toil to supply the labour required to provide for the sustenance of the first. They very explicitly lived this insight, they did not try to hide it as is often done today, by those who try to derive from the right to freedom some guaranteed minimum income, or a right to food, clothing, housing or even to paid leave, without paying much attention to the question of who should supply all these things, to whom, when and in which amounts, and why. Through their acceptance of slavery, specifically the doctrine of "natural slaves", the Greeks were able to consider the theory of positive freedom as being coherent. The free, those were the masters, and the slavery of the others did not diminish the freedom of the master. Modern proponents of the concept of positive freedom however, make the claim that *everyone* has the right to food, clothing, housing, etc. and this position is no longer coherent, as it implies that the obligation to produce said things, and to put them at the disposal of others, must necessarily weigh on the same people that have the so-called right to "positive" freedom. This is no longer a situation of equality in the sense of neither ruling or being ruled. On the contrary, in this situation one must say that, at least in relation to life's necessities, everyone is both master and slave to all others.

So, paradoxically, it was slavery which guaranteed the coherence of the Greek concept of freedom, as Arendt defined it. Freedom and equality are exclusive, elitist values. Of course, one should not underestimate the meaning of those values for the thought around man and society*. Whatever criticism we may level at the polis, we may not forget that the idea of the polis was a clear alternative to the societas, for societal or social organization of human society*.

Undoubtedly the meaning of the city was fundamentally different in the

Judeo-Roman tradition compared to the Greek one. Does it not seem significant that in Judeo-Roman tradition, *fratricide*, the elimination of and revolt against the natural equality among people, is appointed as the characteristic act of the city-builder; while in Greek tradition it is not fratricide but *patricide*, the revolt against natural inequality, which is the first political act, the breaking of the structure of the household and the self-manifestation as an equal? Cain kills Abel; his next act, to found a city. Romulus kills Remus; he is the founder of Rome. The parallel goes further than this: in both cases envy, resentment, is the basis of the conflict. Cain kills Abel out of envy, and the envious Remus is killed by Romulus. While the Greek myths on the other hand put the emphasis on the fear of the father of losing his position to his son, to his jealousy.

"Envy" and "jealousy" are certainly not synonymous. Jealousy leads to an excessive "protection" of that which one, rightly or unrightly, considers to be theirs. It feeds the desire to control the object of the jealousy, to limit it, or even to destroy it lest it escape or affirm its independence. Patricide is the symbol of the liberation which makes it possible to no longer see yourself as the means of another, but rather as a goal in and of yourself. By characterizing patricide as the first political act, the Greek mythos turns against the pre-political inequality of the household in which the members cannot fully develop themselves as they are but functionaries, defined by the "rights" and "duties" connected to various domestic positions and tasks. Patricide symbolises becoming assertive, the transition into becoming a full human being. This is expressed in no longer considering yourself to be the lesser of another, but as an equal. So much so that even if the other, because of a jealous, covetous desire, resists this development, you may rightly and reasonably eliminate them.

Envy, on the other hand, leads to an attempt to destroy an existing plurality. Jealousy presupposes a relationship of property, in which one possesses the other, thus inequality. Envy presupposes equality in independence: envy attempts to control what it does not possess. It is a passion elicited by the occurrence of differences, and it expresses itself as the idea that every benefit which accrues to another

constitutes an injustice done to the envious party. Envy and jealousy are both vices. Both are denials of human plurality. Both ignore the boundaries between people, but the relationships in which they occur are radically different. Envy[33], culminating in fratricide, revolts against an extant, original equality in independence, and aims at transforming this into an inequality in dependence. Fratricide is the symbol of the founding of society, of the upholding of the monarchic principle of the household. It is the ultimate realization of a principle that is usually realized by primogeniture, on the level of the household, and through the continuity of the organs of societial power (denying minorities the right to secede in order to organize themselves next to the majority instead of under them). In that sense, fratricide is the symbol of revolt against the political order, the order of right. of the attempt to transform it into a societal or social order. Patricide on the other hand symbolizes revolt against the domestic, or societal, order. What domestic order is threatened by, is the desire for adulthood, which it cannot accommodate. A societal crisis is precipitated by the jealousy of its leaders, who attempt to consolidate their natural or traditional leadership by means of coercive measures or punishment, and in so doing transform their followers into subordinates. The thing which threatens the political order is envy, the inability of bearing the burden recognizing the other as an equal brings. It is not a coincidence that certain expressions of social philosophy can easily be characterized as "philosophy of envy".

In Thucydides' report of the famous oration of Pericles it is very clear how much the Athenians were aware of being an alternative for existing societies, and how much they identified that which was specific to this alternative with the notions of equality, freedom and voluntariness:

> "Just as our political lives are free and open, so to are our daily dealings with each-other. We do not get angry when our neighbour does as he pleases, not do we look with envy upon those who, though not harmful, are unpleasant. We are free and tolerant in our private lives... Who can deny the benefits of our way of facing danger voluntarily and with a light heart

33 Philosophy of envy, the standard work still remains Helmuth Schoeck: Der Neid. 1966, translated as Envy: A theory of Social Behaviour. New York 1970

> rather than after laborious training as the others do; with a natural courage rather than one bred by the state... I make it know that in my opinion each of our citizens is capable of showing themselves to be rightful lord and master of their own person, in all the many aspects of life, and this with extra-ordinary grace and exceptional versatility."[34]

Regarded from a genetic standpoint, the polis is the result of a union, a meeting.[35] The polis results from the coming together of different units, which do no share a common background, no common tradition, and thus no common structure of authority - none of this is presupposed in the polis. As such, the polis cannot be construed as the result of some internal process of growth: the polis is not some sort of outgrowth of a village, which was characterized by Aristotle as a development of the household:

> "A village usually comes about as the consequence of a natural process. When a household becomes to large, and the sons and grandsons build houses of their own... Because of this composition, their governance inevitably remains monarchical... For each household is led by its eldest member, as by a king, and the households which arise from it are, though bonds of blood, governed in the same fashion."(36)[36]

The polis breaks out of this monarchical structure, and this was the political revolution.

The state, or society, has its origins in the household, with its essentially communist structure: the members of a household (and this still holds true for the modern family) produce for a communal pot, from which the head of the household doles out foodstuff and other necessities. In a "village" as Aristotle calls it, the head of the village takes over this role of redistributor. Contrary to Aristotle's implications, this role did not imply that the head of the village was also a ruler, with a "lawmaking/legislative authority". The process of redistribution undoubtedly mainly served an economic function. In a primitive Society*, without means of adequate transport or communication, without money and thus

34 Thucydides: The Penopelisian War. Book ii (“Pericles' Oration”)

35 Cf. the process of the formation of a city as described by Jane Jacobs: The Economy of Cities. New York 1969, Chpt 1 (“Cities first—rural development later”)

36 Aristotle: Politics. I/2

without "markets", the institution of a regular/regulated process of distribution not only enabled a certain specialization, but also a certain form of insurance against all sorts of risks. Considering the primitive conditions and the limited size of the group, such a system undoubtedly functioned quite adequately in order to provide for the relevant needs, and it is certain that no other system was possible.

In these very primitive conditions, the system of redistribution encourages economic growth and economic efficiency and, both directly and indirectly, population-growth, since the aforementioned insurance-function will have had as its main object the fighting of hunger[37]. These effects and their consequences have had an impact on both the quantity and the quality of redistribution. Growing welfare must have lead to a massive enrichment of the central hoard, and with this of the power and arbitrariness of the head of the village. On the other hand, they also led to the demand for a more rational system, both for the exchange of specialized products as well as for the insurance-functions. Which is to say: they led to the demand for a decrease of the role of the head of the tribe as the central hub of economic traffic. These two opposing tendencies can be combined in an unlimited number of ways. One of the most important factors in this evolution must have been the ability of the head of the tribe of "absorbing" the capital accumulated in his hands. Which is to say his ability to direct this capital to ends others than the redistributive ones, so as to keep the members of the village community motivated to keep contributing to the central hoard, even though this was no longer necessary or even useful to the original aims.

The hypothesis here is as follows: economic growth created a conflict of interests between the members of the tribe and the head of the tribe, and who will be the victor of that conflict cannot be determined a priori. Archaeological and anthropological investigations support the idea that, under certain circumstances, the heads of the tribes were able to absorb the increasing economic wealth into the redistributive process itself. They did this by transforming the latter from a primarily economic institution into a more broad social, religious and military institution. The

37 Among others, refer to . P.Clastres: La société contre l’état. op.cit. bij p.355. M.Harris: Cannibals and Kings: The Origins of Cultures. Glasgow 1978. C.Renfrew: Before Civilization: the radiocarbon revolution and prehistoric Europe. Harmondsworth 1976. R.A.Posner: “A theory of Primitive Society, with special reference to Primitive Law.” Journal of Law and Economics. 23, 1, 1980, 1–54.

impressive monuments built four to five thousand years ago provide evidence of social stratification and, in particular, the presence of a lordly and a priestly class. The latter would not be expected in a system of redistribution based on purely economic motives. At first this process undoubtedly had a stimulating effect on production, but it is obvious that it must have mainly served to channel the energies of the population, during the quiet months when agricultural activity is at a minimum, into projects which were supposed to primarily benefit the central figures, leaders and priests while slowing the formation of what we today would call "private capital". These massive public works did indeed fortify the positions of the elites and the priests as they, even more so than the communal food-supplies of previous times, actually belonged to this social hierarchy, even though they were at the disposal of all.

Once a society* has turned onto this path, it will quickly be able to develop into a state, at least if it does not exhaust itself through the execution of public works and thus neglecting its economic substrate.

Marvin Harris summarized the evolution as follows:

> "The larger and denser the population, the larger the redistributive network and the more powerful the re-distributor war chief. Under certain circumstances, the exercise of power by the redistributor and his closest followers on the one side and by the ordinary food producers on the other became so unbalanced that for all intents and purposes the redistributor chiefs constituted the principal coercive force in social life. When this happened, contributions to the central store ceased to be voluntary contributions. They became taxes. Farmlands and natural resources ceased to be elements of rightful access. They became dispensations. And redistributors ceased to be chiefs. They became kings.
>
> ...By imperceptible shifts in the redistributive balance from one generation to the next, the human species bound itself over into a form of social life in which the many debased themselves on behalf of the exaltation of the few."[38]

Of course, the economic essence of the state is still the redistributive process: every state is necessarily and essentially redistributive. However, the

38 Harris: op.cit. with p.363, p.87, 94

mode of redistribution of the state is force/compulsion, injustice, not voluntariness, not right/law. Under our hypothesis, the origin of the state -which is to say an "original" state, not a "derivative" state which is formed, for examples, through an aggression, an occupation or a colonization by another state - is an indication of the fact that the original redistributive system is no longer in everyone's interest, and thus can only be maintained by fraud and violence. Opposed to this artificial retention of the redistributive system, is the development of a much more flexible system of indirect exchange where the head of the tribe is no longer a mediator, but rather an impersonal medium is. Money, which is to say a commonly accepted means of exchange. This evolution too, stems from the initial, domestically organized redistributive festivities, which were periodic meeting-places which then also immediately could serve as marketplaces. The use of money not just enables non-centralized indirect exchange, it also offers far better opportunities for more efficient and honest/fair systems of insurance, as it allows each person to accumulate personal capital (savings in the form of durable trade-goods which can still immediately be converted into consumption goods), or to engage in borrowing without immediately becoming dependent on some potentate. Right up until the present day, the formation of a personal capital which allows a person to become independent from the central redistributor, the state or society, is still considered to be anathema to the majority of people inspired by social philosophy. The tragedy which is unfolding before our very eyes at this very moment is that, under the influence of various social ideas a) labourers are more and more priced out of the market, and b) the formation of interest-bearing capital is inhibited through various fiscal and regulatory means, so that c) the people that become unemployed in ever greater numbers (they lose their income from labour) cannot fall back on any income from the possession of capital and d) the prospect of a fully automated process of production no longer seems like a bright and encouraging future prospect, but rather gains the character of a nightmare.

This resistance against independence was undoubtedly overcome in many cases, by the development of trade, among other factors. In my opinion, Jane Jacobs made a convincing argument for trade being the generative force underlying the development of cities, or rather, cities of a certain

type: cities of habitation, of markets, not the conglomerations of administrative, military and religious monuments which are to be expected in redistributive systems with their palace-economies. Jacobs argued that the city (as a marketplace) can "fertilize the land" thus creating an agricultural surplus, namely by giving such a surplus a destination. Why would farmers produce a surplus if there's nothing they can do with it?[39] The market gives them the opportunity to acquire things (animals, tools, jewelry, etc.) and thus provides motivation for producing a "surplus" (which at that point ceases to be an actual surplus, as it is produced for a certain aim). This is a process of a wholly different nature than the process elicited by the technique of mobilization used in the redistributive system. The latter does not in fact provide the opportunity to fulfill individual and marginal needs and desires, since the central distributor only possesses very limited information in relation to the condition of the individual members, and as such this distributor will be have no choice but to act towards the satisfaction of "collective" needs.

The market and the market-city give us the model for the polis, and thus the political space. It is primarily a meeting, a contact, a space in which one can be faced with something new at every moment, in which traffic is not pressed into the mold of tradition and rituals, but rather where it is structured by respect for the other. Which is to say by respect for the equality of sovereign partners (not equality under legislation, as that notion presupposes a central point, an authority, to which all involved are subjected, which would mean that they are all already part of the same community, and as such they can no longer meet each-other in an uninhibited fashion). The Greeks were undoubtedly aware that the polis was an alternative, and yet they still failed to complete their political revolution, even in thought. So, in order to understand the tensions to which the Greek polis was subjected, we must attenuate this opposition between market and central system of redistribution. After all, the ambiguity of the Greek polis is connected entirely to the fact that it came into being as a meeting of households instead of individuals. As such, it was inevitable for it to take the form of a class-structure.

39 J.Jacobs: op.cit. with p.362. Chapter 1, 429

This circumstance forces us to add some perspective to Hannah Arendts characterization of the polis as the place where none rule and none are ruled. If it is truly the case that the actual members of the polis, the heads of their families, could meet each-other as equals outside of any structure of authority, then we may still not underestimate the fact that they could only meet in such a fashion because they were the absolute rulers over their households. If, on top of this, this rule over a household is made into a prerequisite for membership of the polis, it becomes very hard to state, as Arendt does, that "absolute, undisputed rules and the Greek conception of politics excluded each-other"[40]. Also keep in mind how I have previously pointed out that the notion of "positive freedom" implies the notion of rule, if this positive freedom is interpreted as a right. It should more properly be said that the Greek conception of politics could only maintain itself as long as the absolute rule of the citizen over his household, his children, wife and slaves, was not disputed.

The members of the Greek polis do not meet without any agenda -they had a common interest, namely their rule over their households, and as such they form a special-interest group. All of them have an interest in maintaining and safeguarding their domestic power, and in fulfilling the aims of said power: the wealth of their respective households.

These same circumstances provide an explanation for the importance of the strict separation between the private sphere of the household, and the public sphere of the polis. In other words, for the essential importance of the exclusive character of the polis. This is a matter of uncommonly grave importance. Only a strict separation between these two spheres, a perfect "apartheid", is capable of allowing the absolutism of the household and the equality of the political space to co-exist next to each-other. This separation is however very artificial: as soon as the household is no longer forced by circumstances to be engaged only in the sheer struggle for survival - and this is the case precisely because of the forming of external relations, which enable a marked increase in productivity - the monarchical absolutism loses its reasons for existing, and becomes a purely an institutional interest of the heads of the families rather than all members of the household. The polis does not make the household superfluous, but it does undermine its

40 Arendt: op.cit. with p.330, 35

"form of government". But it is clear that if the constituents of the polis are the households themselves, as I presume them to have been in Ancient Greece, the polis is a threat to itself. It undermines the position decisive to membership of the polis. In order to maintain this position, the political space must be destroyed. Not by reinstating the isolation of each separate household, but by expanding the domestic structure across the whole polis. Which is to say by societization of the political space, thus removing the equality and plurality which are characteristic of the polis. The polis becomes a societas. The alternative would be for the political principle of equal rights to also be applied within the domestic, which is to say economic, sphere, which would make the polis lose its exclusive character and would require the heads of the families to give up their privileges.

Under these circumstances, the political space could not but be reduced to an afterthought, political activity to a leisure-activity, and eventually mere speculative philosophizing. This is also what happened in reality. Hannah Arendt noted this development, but failed to connect it to the fundamental contradiction in the structure of the Greek polis:

> "In the practice of the polis - which is not unjustly called the most garrulous of all political bodies - and even more clearly in the political philosophy which sprung from it, there came to be a separation between speech and action, which more and more became to be independent activities. Emphasis moved from action to speech, more specifically to a form of speech which was more of a means of persuasion than a specifically human way of reaction to, facing and accounting for all what has happened or has been done. Engaging in politics, living in a polis, meant everything was decided by words and persuasion rather than force and violence. Making people do something by means of violence, to order instead of persuade, were considered by the Greeks to be pre-political forms of rule/governance, characteristic of life outside of the polis, the domestic, the household, where the head was undisputed, all-powerful lord and master, or of life in the barbarian Aziatic empires. The despotism of these empires was often compared to the managing of a household."[41]

The passage cited above starts off with the separation of speech and actions, and ends with the juxtaposition of political and societal forms of

41 Arendt: op.cit., 34

governance. Political activity is narrowed until it becomes a largely passive participation in the exercising of societal power. The societal structure leaves no other option: if there can be no freedom of action, at most there can be freedom of speech. This brings to mind the most sophisticated of all defenders of enlightened despotism, Jeremy Bentham : "Criticize freely, obey punctly!" Such speech is however no longer connected to action, but rather to the exercise of power. "Words and persuasion" may be opposites of brute violence, but not of power: this would only be the case if the "persuasion" leads the persuaded to be actually convinced of the validity of the argument and the truthfulness of the conclusion, and if the latter also enact this conviction, which is to say expresses it in the management of their own affairs. It is impossible if the "persuasion" leads the persuaded to no longer have the freedom to organize his own business in accordance with his own convictions. The latter would not be persuasion but rather *overruling*. This would be a direct negation of the idea of the polis.

Aristotle commences his exposition on politics by pointing out the fundamental distinction between speaking and having a voice. Having a voice merely serves to express feelings of pleasure and displeasure, dismay and joy: this is not at all a political activity. Being *elligble to vote* (ed: "stemgerechtigd" to have a right to your voice/vote) is something completely different from having political rights. It means no more than a recognition of the status of humans as animals, as according to Aristotle other animals also have a voice. Being eligible to vote is compatible with the societal or domestic order, as they have no other reason for existence than the satisfaction of the given needs of the members of the household. It is however not compatible with the political order in the pure sense of the word "political". For the political activity *stricto sensu* the expression of pleasure or displeasure, yay or nay, is nearly totally irellevant. Political action is speech in action, argumentation in action, not acting with the permission of the others. The submission to the permission of the others is a clear negation of the plurality which is the foundation of the polis.

Arendt's opposition between the two aforementioned forms of governance can

therefore not simply be seen as relation to the political versus the social. It rather contrasts a "democratic" and and "autocratic" household, and this is a wholly different distinction - also important, but much less fundamental. Democratic rule remains rule, and as such has nothing to do with a space in which no one rules and no-one is ruled over. In the best case, each speaker in some moot or assembly can have a certain immunity, but this does not amount to freedom of action. Rather it is a serious limitation of the freedom of action when legislation is made during meetings where there is no brake on the irresponsibility, cowardice, or incompetence of the legislators.

The separation between action and speech reflects the societization of the polis, the stratifaction of society* into a part that leads and a part that follows, a head and a body. In these circumstances it is not surprising that the artificial separation between the private or economic and the public or political spheres could not hold. As such, the political space, now consisting of a meeting of heads of families, all but had to gain the societal meaning of a level of governance. This is why, even in Greece, "politics" already related to governing, managing, organizing, ruling over, to corruption and nepotism in public functions. The polis, meant to be a plurality, was unified. The autonomy of the constituent parts is wholly lost, and makes way for a much larger unity.

Where the respect for plurality disappears, right/law/justice will vanish as well. The fact that it is not immediate, brute, physical violence which takes the forefront here, but rather the vote-led violence of the state, is of no relevance. It is hard to see how a crime (ed: misdaad: crime, mis: mistaken, wrong daad: action) (theft, assault, etc) could be justified simply by the fact that it was debated in cold blood at some moot or meet, and that some majority was found who were willing to vote for the execution of the deed. Right/law disappears, but power does not. Quite on the contrary: everything becomes negotiable, anything at all can be thrown onto the scales of public pleasure or displeasure.[42] Speaking with one-another loses its nature of dialogue and denatures into sheer demagogy, since each and every speaker knows full when that if the eventual decision (legislation, verdict, etc)

42 Cf. supra Chapter 2 (under “consensus”). See also Gauthier: “Social Contract as Ideology” Philosophy and Public Affairs 6, 2, 1977, 130–164.

does not conform to their own proposition, it must conform to someone else's.

The characteristic property of the dialogue[43], as so beautifully depicted in the Socratic dialogues, is after all precisely that it does not aim at establishing some binding agreement, some conclusion which will *ex nunc* bind all parties, participants and members as under some sort of legislation. Rather the aim of the dialogue is to give all those involved the opportunity to gain a better understanding of the problem under discussion. This, so that each can come to their own conclusions, and find in the questions and positions of the others, the contours of their own moral identities. Every dialogue is in fact just a fragment, as it can be continued at any time, with different partners if need be. A dialogue is never finished. This is easy to understand when you remember that dialogue serves not to force some collective decision, but rather to improve the premises of one's own thought and action. It is an absurdity of monstrous proportions to presuppose dialogue to be aimed at reaching a compromise, a common point of view which is in fact the view of no-one, and that it has no other reason for existing than the fact that a majority is of the opinion that there has been enough talk and that it is time for action. There can however never be a reason to *end* a dialogue. A dialogue is held, in the first place, with yourself, as you should always ask yourself the question: should I believe this claim? should I let myself be convinced by this argument or not? The counter-party to the dialogue may put forward material to be critically judged by the other, but this is all they can do - and this obviously applies both ways. Freedom of speech within the dialogue leaves freedom of action untouched. Speech and action do not come into conflict because speech accompanies action and is meant to improve practical reasoning. Talking is not a *phase* in some structured or regulated process of collective decision-making which must first be concluded before any action (the execution of the collective decision) can be taken. There can be no reason to force a decision, since the contextual presupposition of the dialogue is precisely the fact that each of the participants retains their freedom of action and their competence/authority to make their own decisions. Each of them has the right to

43 E.De Strijcker: De kunst van het gesprek. Antwerpen 1976. see also G.Calogero: Filosofia del dialogo. Milano 1977

draw from the dialogue, the conclusions that they think they should draw from it. Dialogue, contrary to collective deliberation, aims not for the unification of all minds, not at consensus, but it is totally and completely ruled by respect for the other as another mind. Only in this way can one engage in open and free dialogue, even though this participation, on a personal level, not without consequences as it of course implies some sort of personal engagement, since dialogue itself emphasizes personal responsibility.

Societal deliberation on the other hand, aims at forcing some decision which applies to everyone, while simultaneously collectivizing the responsibility for said decision, so that the responsibility of the actions which follow can de jure only be ascribed to the collective, not to the people who actually made the actions. The participants in such a deliberation do not speak to one another, they do no engage in dialogue: they talk over each-other, at the mass of those eligible to vote, and attempt not to persuade each-other, but to gain the consent of the masses, to make them cry out with pleasure, to gain its voice/vote. After all, it is this voice/vote which is decisive. This whole procedure has no resemblance to a dialogue, as Socrates makes clear to Gorgias:

> "Soc. You were saying, in fact, that the rhetorician will have, greater powers of persuasion than the physician even in a matter of health?
>
> Gor. Yes, with the multitude-that is.
>
> Soc. You mean to say, with the ignorant; for with those who know he cannot be supposed to have greater powers of persuasion.
>
> Gor. Very true. (...)
>
> Soc. And the same holds of the relation of rhetoric to all the other arts; the rhetorician need not know the truth about things; he has only to discover some way of persuading the ignorant that he has more knowledge than those who know?"[44]

The public rhetoricians Gorgias is batting for belong in the context of societal decision-making, not in a dialogue. Dialogue is like the stock-market: only the speculators which are active on the stock-market bear the consequences of stock-price fluctuations; and in the same way a dialogue is an event which interests only the participants. Those who do not participate need not fear that some decision will be made behind their backs, which

44 Plato: Gorgias, 459a–459b, 461e

would be binding for them, too. Dialogue is obviously a contractual rather than a legal institution, a market-phenomenon rather than a phenomenon of the state. In the Gorgias, Socrates also makes it very clear that the right to speech of A does not imply that B, C and all the others have a duty to listen to A.

> "Soc. Only to think, my friend, that having come on a visit to Athens, which is the most free-spoken state in Hellas, you when you got there, and you alone, should be deprived of the power of speech-that would be hard indeed. But then consider my case:-shall not I be very hardly used, if, when you are making a long oration, and refusing to answer what you are asked, I am compelled to stay and listen to you, and may not go away? I say rather, if you have a real interest in the argument, or, to repeat my former expression, have any desire to set it on its legs, take back any statement which you please; and in your turn ask and answer, like myself and Gorgias - refute and be refuted: for I suppose that you would claim to know what Gorgias knows-would you not?"

Dialogue is the way of speaking of the market, when the latter has detached itself from the primitive system of redistribution. Dialogue is a personal matter without supervision of a third party, just like participation in the market is. Furthermore, participation in one dialogue does not exclude participation in others. Dialogues constitute a spontaneous, self-structuring network, in which new sub-dialogues come into being all the time, by a process of splitting-off, while others flow into each-other, some disappear forever, but usually only for a time, short or longer, only to re-emerge (sometimes centuries later). Dialogue implies permanent self-education, exploration, positioning. It is *the* political activity, but it is a political activity precisely because it implies respect for plurality rather than aiming at some reduction of said plurality into some form of final communique, or final vote on some definitive text. Arendt's claim that "living in the polis meant that *everything* was decided by words and persuasion" in fact implies the exact negation of the very core of the idea of the polis, which precisely rests on the constitutional condition that regarding removing the political plurality, the violability of the boundaries which identify the members of the polis, there can be no negotiation. These things can be discussed, but never negotiated. The political space is founded in right/law/ justice, and fades when right/law/justice is questioned. The fact that words are sufficient in order to eliminate or obfuscate these boundaries, is a sign of extreme decay. The entire constitutional tradition in political thought is drenched with this realization, that a good society* needs an objective and absolute basis, which must be untouchable

for criminals, as well as incompetents and philanthropists. The fact that this constitution was often thought to be a (quasi) natural legislation/law (ed: orig natuurrechtelijke wet) , rather than a fundamental principle of law, is a sad fact indeed. After all, such a natural law cannot be founded in an unambiguous, objective and absolutely valid way, not in validity nor in contents, and as such it must necessarily be controversial. However, the basic intuition of constitutionalism is undoubtedly a healthy one. Without some far-reaching limitation of the space for societal negotiation and power of decision-making there is no possibility of salvaging even a thing from the plurality which characterizes the polis, and Aristotle saw this:

> "There where states are governed democratically, according to the rules of right, there there are no demagogues, ... but wheresoever right is not considered to be above all, that is where you will find the demagogues. The people gain monarchical allures; it becomes a king composed from many people... This monarchical mass, not limited by the principles of right, strive for absolute power and acts more and more like a despot, who lavishes favours and honours on those that he favours. Such a democracy is the perfect counterpart to tyranny; they are of exactly the same general nature... The tyrant has his sycophants, the people have their demagogues. The influence of the demagogues can be felt most during the people's meet, since they can bring any matter before it and its decrees can even alter the written legislation. This is the source of the demagogues' power; for though the people rule over all, they rule over the opinions of the people, because the majority follows them... I am of the opinion that those that claim that such a democracy is not a political community at all, are correct."[45]

Of course, the democratic absolutism of modern social-democracy, as the reign of demagogues in our twentieth century is oft called, is not a political regime either. Of opportunity for dialogue, little trace can be found. The entirety of "public" life is locked away into commissions, meetings, party-cenacles, local, regional, national, international and supra-national institutions, in which truly everything is negotiable and anything can be decided. This leaves everyone in a state of uncertainty of right/justice (ed: rechtsonzekerheid; onzekerheid: uncertainty). Truly looking at such a democracy, we can see that a regime in which the people rule themselves is naught but a regime in which all are ruled by all. This leaves almost no-one with any control over

45 Aristotle: Politics. iv/4

their own lives.

The separation of speech and action is fatal to the politcal space.[46] It goes hand in hand with the establishment of a domain in which hollow rhetoric and the demagogy of shame reign supreme. This is the domain in which decisions are made, while the consequences of these decisions are felt within the domain of action. The result is that so-called "political" power is exercised in the most irresponsible way imaginable. It turns into what is called the "political" game, a world on its own, in which a language is spoken that has nothing in common with the language of action. The "political" domain is spoken of in abstractions, in abstract homogenous categories, there where for acting man the only thing of consequence is marginal, relevant units in a concrete, singular context. "Political" discourse is quick to assume that the state-apparatus consists of all-knowing people of perfect integrity, with an unlimited lust for work, and an infinite willingness to attune their own actions to the needs of some abstract ideal. This disconnect between speech and action makes it so that "speakers" may take their desires to be reality, while no "actor" remains able to realize their desires. Speech ends up becoming meaningless and idle prattle, and action loses its specific character of innovating, purposeful behaviour: it degrades into the mere fulfilling of a role.

This separation between speech and action was all but unavoidable in the Greek polis. Splitting the society* into a class of full, "free" citizens and a class of non-citizens corresponded to a separation between the political and the economic, which was deemed to be wholly within the sphere of the household. Economy was, in this original sense, one with the household. It consisted of a head of the family who lead the economy, and could dispose over all the means of the household to do so, including the slaves and any other members of the household. An economy in this sense of the word is characterized by unity of purpose and unity of execution. It is necessarily centrally led and centrally planned. Socialization of the polis

46 One of the symptoms is the reification of "freedom of expression" as an entity decoupled from all ties to action, as is the tendency of some to reason that if freedom of expression is not encroached on, freedom is not in jeopardy. See G.Stigler: The Citizen and the State. Chicago 1975, p.5: “Hardly anyone believes that any basic liberties are seriously infringed today.” Commentary by Thomas Sowell: “Part of the problem…is the arbitrarily restrictive definition of freedom as the particular freedom central to the activities of intellectuals as a social class…The quiescence of intellectuals as long as their freedom to write and to lecture remained safe may be less an indication of the pre-eminence of these particular freedoms than of the insularity of intellectuals.” Knowledge and Decisions. New York 1980, 321.

meant that the principles of the household were applied to the collection of households, which is to say that these households were incorporated into a larger, but still domestic, whole, in which the previous heads lost their independence and became subjected to a higher legal (ed: legislation-giving) authority. As members with a right to vote in the societas thus created, they do still have the right to speak freely, but not the right to act freely. The Greek polis' inability to introduce the political principles of equality in freedom in economic life as well, thus reconstructing the household on a politcal, individualistic or contractual basis, turned out to be its doom. The respect for plurality was not sufficient to stop the socializing tendencies of the household and its hierarchical structure.

The failure of the Greek polis is an interesting historical datum. It should however not blind us to the meaning of the idea of the polis. The essential elements of this idea were: respect for plurality, a unity of speech and action, with open and free dialogue as a paradigm of human interaction, the ideas of equality and freedom and thus the absence of rule. These elements correspond to the application of the fundamental principle of law/ right, showing this principle to be the foundational rule of the political society*, and the basis for the implementation of the ethic of self-actualization of the *zoön politikon*. The fundamental principle of law/right is after all that which determines the criterion for a formally adequate self-conception, and simultaneously also the precondition which must be met for the simultaneous perfection of all co-existing people to be possible. The fundamental principle of law/right acknowledges the ethical, normative priority of the individual and is opposed to any claim made on this priority by any external legislation. The notion of such a legislation is the very core point of the social conception of man as a servant being, which requires a master. We have already seen that the implications of a theory of law/right are directly determined by its social or political character (cf. Locke). The fundamental principle of law/right should thus be understood as being an integral part of a specific conception of man and society*. To reject the fundamental principle that each person is a sovereign subject of law/right, while still proposing the individualist principle of the moral autonomy of each person, is contradictory.

7 Right/Law, Freedom, Equality

> “The demands to divorce the results of economic activity from the processes leading up to them…reflect the un-historical approach of much contemporary discussion of social issues: the amputation of the time dimension from our culture.”
>
> — P.T. Bauer

TWO CONCEPTIONS OF FREEDOM

As a political principle, the fundamental principle of law/right stipulates the precondition for the existence of a free society*, a society* of free people, without masters and slaves. A person is free to the extent that their right to self-determination is respected by others, and unfree to the extent that they do not. This is the political conception of freedom. The fact that everyone has the possibility of exercising their right to determination, of course does not mean that anyone will do so with any degree of competence: to be your own master is not the same as mastering yourself. We've seen that one is but a precondition for the other. One could also make the claim that a person is only free, "truly free", if they do not just enjoy political freedom, but are also able to

silence within themselves all principles alien to themselves and to live only in accordance with the moral code which suits their own individual nature, which would indeed allow them to make the best of their lives that can be made of it. To me, however, it seems misleading and confusing to use the word "freedom" in that way. A person can be free, and yet still be a "slave to their passions", or unfree and still "master of himself". If need be, one could use the terms political freedom and moral freedom, but all things considered I see no reason to introduce the confusing nomination of "moral freedom" while we already have access to words like "intelligence", "self-control", "self-discipline", "integrity", etc. in order to point to this phenomenon or aspects of it. Some people live in an intelligent fashion, and are master over their passions. Others live unintelligently and simply follow their emotions and intuitions. However, as we have established previously, the latter too do this on the grounds of their own choice.

The juxtaposition of "political" and "moral freedom" usually serves no purpose other than the denigration of political freedom: "True freedom is moral freedom, and because it is so much more valuable to us for you to be morally free, we feel justified in curtailing your political freedom. After all, you can only be truly morally free if you live by the correct moral code, and you must allow us to force you to live by that code."

This is a familiar argument, as we have already come across it in both Aristotle and Rousseau. It is an invalid argument, because it misunderstands the role of the moral autonomy of each individual, and it misses the fact that ethical perfection does not consist of zombie-like obedience to some "perfect" moral code, but of the intelligent striving for the most perfect self-actualization. Of course it is true that reason, the reasonable life, is the cause of political freedom in the sense that the more people live in accordance to reasonable fundamental principles, such as the fundamental principle of law/right, the more political freedom there will be. Though, on the other hand, political freedom is a precondition for an ethically full life. For, though being your own master does not imply mastery of yourself, not being your own master does imply not being able to attain mastery of yourself, since those parts of your praxeological body which another has made themselves master over escape your control and jurisdiction. It is clear that those that juxtapose the idea of moral

freedom and political freedom, often are motivated by the desire to drive a wedge between the somatic and extra-somatic means of a person, in order the be able to claim: "As long as we do no touch your body in the narrow sense, do not touch your somatic means, we do not truly limit your freedom. The fact that we confiscate your extra-somatic means leaves your freedom intact." Those who wish to curtail the freedom of another are not likely to have great difficulty in finding some formulation is which the word "freedom" is defined in such a way that even the most repressive of dictatorships would not provide sufficient guarantees to defend this "freedom".

A free society* is one that is based on mutual respect for each-other's right/law. We've previously come to the conclusion that there are in fact only two possible definitions of the fundamental right/law: a) either everyone has the right to do or not do as they wish with what is theirs (and no-one has the right to do anything with the means of another) or b) each person has the right to do or not do as they wish (which would mean that no-one has the right to do anything without the permission of all others). The second alternative is incoherent. Only the fundamental principle of law/right can provide the basis for a coherent definition of freedom. A free society* is characterized by the respect by each for the right of every other to act according to their own insights and convictions, the right to dispose over their own means, to use and apply them towards those goals that they themselves consider to be the most valuable.

To put it differently: a free society* is, as the etymology of the word "freedom" (ed: orig "vrijheid" vrij: free) suggests, a society* based on friendship (ed:"vriendschap" vriend: friend) and peace (orig: vrede).

"Freedom", "friendship" and "peace" (ed: ‘Vrijheid’, ‘vriendschap’ en ‘vrede’) are related words, just like the concepts which they represent are closely related. The common ancestor of the words "free", "friend", "peace", is the Indogermanic root "prijo" which can also be found in the Sanskrit word "priya", meaning "dear" - cmp. to love or to make love with. Freedom, in this sense of friendship and peace, makes a reference to a relationship between equals, more specifically to relationships based on voluntariness and mutual consent; to a spontaneous order, not previously negotiated, nor imposed from above. It makes reference to a society of people, that, though they work together and stand by each-other, still do not see each-other as ambulatory IOU's, and who do not consider themselves to be ambulatory claims on others. You don't "demand" anything from a friend: you respect their individuality and accept

the fact that they live their own lives with attention to their own priorities. Friendship is exactly the relationship in which people find joy in the success of another in realizing their goals, in being fully themselves. Even though you could say that friendship creates moral obligations, in the sense that you owe it to yourself to show yourself to be worthy of the other's friendship, to give the best of yourself, friendship does not create any obligations in right (besides the general respect for the right to self-determination of the other).

Friendships are free. Not free in the sense of unimportant or valueless because nothing is at stake, but rather in the sense that friends consider each-other to be equals and will not attempt to capture one-another in a master-slave relationship, not even out of paternalistic or philanthropic considerations. Friendship presupposes equality in the sense of incommensurability of course, since only in this sense can there be any sort of complementarity and mutual enrichment.

It is not superfluous to our aims to point out this connection between Freedom-friendship-peace. If there is indeed a fundamental contradiction between the social and the political conception of man, it is to be expected that there is an anaologue to political freedom on the social side. This is indeed the case. In many of the European languages, we do not merely have the words "vrijheid", "freedom", "Freiheit", etc. but also words like "liberty", "liberté", "libertà", etc. which are usually considered to be synonymous to the words from the Germanic Group. These words, however, have an entirely different etymological explanation which brings to light a totally different conception. To me it seems essential to make a proper distinction between these two concepts: all too often the confusion around the difference in these concepts is used to threaten freedom and law/right. The contradiction is partly expressed in the discussion surrounding the "positive" and the "negative" conceptions of freedom, which I have alluded to before in another part of the discussions surrounding the relationship between legislation/law (ed:orig "wet") and freedom.

There is a direct and evident line between the words "liberty", "liberté", etc. to the Latin "libertas", and the Greek "eleutheria", which in turn traces to the indogerman root "eleudh", meaning "to come" (compare to the Greek "eleusomai": to come, and "eleusis": coming). In Latin, beside "liber" ("free"), there is also "liberi", "descendants, children (from the point of view of their parents), those born within the tribe". The Dutch

"nakomelingen", as a translation for the Latin term "liberi", represents the foundational etymological meaning very well. (ed: na "after" komen "to come" "-lingen" people who)

Completely in contradiction to the words from the Germanic group, with the foundational meaning of "friendly, peaceful", the fundamental meaning of the words from the other group is "related, connected, ordered". As such there is a clear reference to a determined status within an existing order, with a well-determined distribution of "rights" and "duties". owing to this status or position within the given hierarchy. It is this meaning which shines through in the formulation "Freedom/Liberty under the /legislation/law" (ed: "Vrijheid onder de wet"), which beautifully captures the essence of the social conception of "freedom/liberty" (*libertas*). The Latin "liber" specifically means "a man who is free according to the laws/legislation of the state", and is the opposite of "servus" ("servant, slave"). It is the law/ legislation which determined who is *liber* and who is *servus*, what the "rights" and "duties" of one are, what the "rights" and "duties" of the others are. The formulation "Freedom/Liberty under the law/legislation" is more of a liberal slogan than a well-defined idea: the notion of a law/legislation is very broad. It can relate both to very general, abstractly formulated rules as it can to particular, concrete commands which should properly be understood as "legal", as coming from the legal authorities. It is more a matter of taste than one of logical necessity, where exactly to draw the line between the domain of law/legislation and the domain of random command. The intuitive approach of the most liberal philosophers has never led to very precise boundaries for this freedom under the law.[1]

Freedom-as-kinship (or descent) is clearly of a wholly different nature than freedom-as-friendship. Even though both concepts are borne from the sphere of life within the tribe, they relate to wholly different aspects of it. One refers to a group of equals meeting each-other on the basis of equality, in an essentially free pattern of relations. The other refers to hierarchy, to formal or legal relations in a "given" system in which each individual has a designated place or status, in which every individual is a functionary, a role-filler, a status, in which everyone has a statute and an abstraction is made from individuality to one's own personality. Freedom-as-kinship does not at all suggest the spontaneous order created by the

1 Among others in Adam Smith, Wilhelm von Humboldt, J.S.Mill, also F.A.Hayek. Zie o.a. E.F.Paul: “J.S.Mill and the utilitarian influence in the demise of Laissez Faire” in journal of Libertarian Studies 2, 1979; R.Hamowy: “Hayek’s Concept of Freedom: A Critique”, New Individualist Review 1,1,1962. Rothbard: “A Critique of Hayek’s Concept of Coercion” Ordo 31, 1980

lawful interaction of individuals, but rather a previously given framework, in which the terms of the interaction are given and regulated in advance, independently from the individuality of the momentary functionary.

Among kin, who are bound by the formal relationships of a system in which one is born into a determined position instead of voluntary and free bonds of friendship, there exists the expectation that each will do their "duty". Within the "given" order each person is, because of their status or position, always to some degree the creditor and debtor of all others. The "debts" do not have their origins in some contractual agreement, or an unlawful action, but in the law/legislation (in habit and the decrees of the authorities appointed by habit). In this evidently social conception of freedom it is the case that a person is free to the extent that their "rights" are effectively safeguarded by the community, but what their "rights" are is something which is decided outside of themselves.

The idea of the community as a big family, which you are born into, and in which your status and role are appointed to you by the law/legislation, is consecrated in the idea of hereditary debt: no-one is innocent, no-one is debt-free. Everyone belongs, to greater or lesser extent, to those whose debtor they are (at minimum the state, whom you owe taxes to simply for being). As such, life has a predetermined meaning: to pay your debts, to live in the service of others, the creditors. This is the basic idea of the altruistic or heteronomous morality, which does not so much claim that helping and aiding others is a good, a "good thing", as it claims that helping and aiding others is a duty, that said others have a right to be helped. In this vision, claiming that humans are sinful (ed: orig "zondig") is to state a pleonasm. Our word "sinful" is derived from the Latin "sons", which actually simply means "he who is" (cmp. the Greek "eoon"). The psychological basis of the maintaining of this structure of "rights" and "duties" which determine the social system, can be described as the dominance of feelings of guilt. The most effective technique for exercising social power is exploiting such feelings of guilt, e.g. by suggesting that everyone is responsible for everything, or that every more or less unfortunate circumstance should be explained as being a sign of moral failings in regards to the legislation. This exploitation

of induced feelings of guilt stands in stark contrast to the process of control in a society* based in equality-in-freedom, in which freedom-as-friendship is the characteristic paradigm. There, it is not guilt/debt (ed:shuld) but shame/disgrace (ed:schande) which is the central concept of informal control. Shame is essentially connected to self-respect, not respect for some external legislation, not some "objective" causeless guilt/debt towards others. Shame/disgrace is the loss of reputation and respect resulting from unworthy behaviour. It creates a vacuum around the disgraced person, in the sense that others will turn from them, will no longer associate with them. Once again, this is a stark contrast to the guilty, who become the target of retribution and attempts of their creditors to enforce their "rights".

"Social rights" are, typically, passive rights, given rights, rights to receive, in contrast to "political rights" which are active rights. The fundamental principle of law/right demands for everyone to leave all others the freedom to exercise their own right to self-determination. Every person has the right to live, and every person is free if others respect that right. The social conception of human rights gives rise to an idea of freedom which can only be realized when everyone respects the "passive" rights of the others. In that case one should say that everyone has the right to life, which is to say the right to be kept alive. In which case one must also say that not everyone has the right to dispose over their means by their own insights, but rather that everyone has the right to means, which is to say the the right to be supplied with means. Then one should say, not that everyone has the right to acquire an income by productively applying their own means, but rather that everyone has the right to an income. To claim, from the social conception, that everyone has the right to labour is mere demagogy: of course everyone has the right to labour, but this right implies the right to an employer just as little as the right to marriage implies the right to a spouse (even if no-one is willing to hire said person for the demanded compensation, or if no-one wishes to wed the person). "The right to labour/work" is just a euphemism for the right to an income, the right to the means of existence.

The multiplication of these "social rights" is merely the result of the multiplication of "social duties": everyone has

the duty to ensure that everyone gets all those things they "have a right to". It is only when these "duties" can be enforced that these "social rights" can be guaranteed. In other words, the concept of "social rights" presupposes an agency which has the right to dispose over all people (or all members of a community), and this is not a passive, but rather an active right. It is evident that all the talk about "social rights" is merely meant to draw attention away from the fact that it's really all about "social duties": these have logical priority. Of course, behind these "social duties" is the active right of the agency, the legislator, who has the right to determine the "rights" and "duties" of people. I've previously pointed out that it is only this active right which makes it possible to speak of the lawful validity of these passive "rights". From this follows that the social conception of human rights cannot acknowledge people themselves to be the actual title-holders of their own "rights", and thus that there is no *objective* basis for these "rights". This conclusion is clearly illustrated by the rather heated discussions among proponents of social philosophy about the answer to the question of what it is, precisely, that people have a right to.

Some defenders of the right to life call upon this concept mainly in order to justify the punishing of abortus provocatus; others do so in order to effect transfers of income from those designated by legislation as "rich" to those designated as "poor" by means of the fiscal system. Often enough, the defenders of the one position are vehemently opposed to the other. "The right to life" is a formula which apparently may not be taken literally, and seems to have completely different contents for some than for others. Moreover, it is very remarkable that "the right to life" may not be interpreted as each person's right to their own life. This is very clear when we hear proponents of punishing or criminalizing abortus provocatus make pleas for the punishment or criminalization of suicide (attempts) or euthanasia. If each person has a right to their lives, if everyone has that right, then everyone should have the right to end their own life. Yet, it is precisely this right which is denied. This denial can only mean that no-one has the right to their own life, and that, quite on the contrary, it is the legislator (in the name of God or the Community) who has the right to the lives of people. This, as we've seen, was the position of Locke: people aren't their own property, but

God's. Those who commit suicide "steal" from their Maker, their Master. The same goes for the terminal patient requesting euthanasia, and for the woman who would drive the fruit from her loins. Strictly speaking there is no essential difference between the claim that every fetus has the right to (the sustenance of) life and the claim that every member of society has a right to an income or sustenance. Even those who make the latter claim tend not to see the right to the means of sustenance to be a fundamental right of every person. After all, this would imply that everyone has the right to simply take what they need to fulfil their needs from others. Exercise of such a right would no doubt lead to an all too chaotic process of redistribution of wealth. For this reason, they are forced to claim that it is in fact "the Community" which has the right to dispose over people's means, and that the right to redistribute is not a right of an individual human (and thus not really a "human right"), but a right of a state or some organized community. But of course, claiming that "the community is the actual sovereign subject of law/right" does not mean anything. This leaves no other criteria for determining the "social human rights" than one's own fantasy. It is incredibly difficult to discover which principle could possibly be the basis for the convictions of one who stolidly defends the legalisation of abortion while declaring with equal animus that an employee has a right to their place of labour, and thus may not be fired. Or, of the person who defends euthanasia while maintaining that the government should support companies that make a loss. You'd think that if a woman has the right to drive off the fruit of her loins, an employer would have the right to fire his employees, and that if euthanasia is justifiable then ending an enterprise which accrues losses is certainly justifiable.

Few representatives of social philosophy have the courage to define people as *exclusively* social beings. This sad and dubious honour falls, in our barbaric century, firstly to the fascists, who drew the necessary conclusions from it regarding the absolute nullity and destructibility of the individual. From the English fascist Oswald Mosley comes this quote: "True freedom means a good wage, short hours, job-security, good housing, opportunities for recreation and relaxation with family and friends".[2] This is a typical "social" conception of freedom: a person is free

2 cit. in Z.Sternhell: “Fascist Ideology” in W.Laquer: Fascism. op.cit., p.(ed: Missing in original)

to the extent that others respect their "rights", but in this case this means: to the extent that they are handed or guaranteed all those things they have a "right" to. Mosley came to fascism from the socialist movement, and his definition of freedom has an obvious "left-wing" ring to it. Other fascists had more of a "right-wing" background and put their own emphasis not so much on social control over the means and processes of production in the domain of extra-somatic means, but rather on social control over the physical body of every person (their somatic means), in order the be able to create a "new human". Even though one can find both ideas within fascism, it must be made clear than finally, the whole person with all their means were seen as property of the community, and thus of the state. All things considered, such consistent totalitarianism is a rarity. Most representatives of the social conception cling to a more or less dualistic position, which gives them the opportunity to mask and cover the totalitarians implication of their social philosophy. This dualism, which is aimed at specifying in which ways a person belongs to themselves, and in which ways they belong to the others (the Community, God), usually remains rather vague when described and proves to not to be very well founded when probed.

Political philosophy as introduced above, considers a person as a unit: each person has the right to dispose over all his own means, both somatic as well as extra-somatic, and what his own means are depends on who he is and what he does. It is the reality of each person as an acting moral subject which determines all their rights. The fascist doctrine is also not dualistic: all "rights" of humans are legal creations of the will of the state, the state is the only real moral subject, the only sovereign subject of law/right. Against the state, the individual has no rights. There are of course other coherent social theories of law/right which do not consider the state to be the sovereign subject of law/ right, as fascism does, but rather God, for example, and declare that man has no rights in relation to God. Yet even here we can often find the tendency to formulate at least some rights that protect humans against Divine caprice (which means to say that give expression to the idea of an irreducible *human* dignity), in order to guarantee them at least some inalienable freedom. The root cause for this dualism is probably to be found in the traditional dualistic view

of humans: human = body + soul. Inside of the conceptual framework of social philosophy, this image of man leaves the space both for conservative and for progressive, for socialist as well as liberal conceptions. It all depends on what you're after. Would you rather socialize the soul than the body, or the other way around? As soon as the relationship between a person and their somatic means is conceived to be fundamentally different from the relationship between them and their extra-somatic means, some prima facie plausibility may be given to the idea that the state should not get involved in "the economy", but should occupy itself with the good virtue of its citizens, or the opposite.

So, the slogan "freedom/liberty under the law/legislation" can go any which way. If a person's rights are no more than social constructions, and if the "right" of one implies that all others must work for them - whether they want to or not, as slaves to the law/legislation - then this idea cannot be deemed a conception of freedom.

From the preceding it should be somewhat understandable why the political definition of freedom, and thus the fundamental principle of law/ right, meets such fierce psychic resistance. The fundamental principle of law/right denies by implication that people have a right to life. Total freedom, or right to self-determination, also implies total self-responsibility. No self-respecting person could wish for anything else. But, the temptation remains great, especially in an environment ruined by humanist and altruist propaganda ("Love your fellow man, without first questioning whether they deserve your love, in other words, throw yourself to the others, at the disposal of everyone that has a "need" of your services") to say: "Well, then, let the others take care of me. Let those who speak so fondly of right to life show that this right exists. I am willing to claim my credit". There can be no right to life. Even if we ignore the fact that this right to the means of existence is indeterminate qua contents and thus once again a reason for a power-struggle between different parties, then still such a right seems unacceptable.

The most fundamental reason is, as we've seen in the second chapter above, that passive rights always logically presuppose active rights. Which means that claiming that people have a passive right to life also means that there is some one or some thing which has an active right to the lives of people as their means. If we do not wish to seek flight into the super-natural

or to seek cover under collectivist figments such as the "volonté générale", the "Volksgeist", and such, then we can only mainstain two possible hypotheses: either we say that some people are means of others, and that masters guarantee the right to life of their slaves, or we say that everyone is master and slave to all others. But, as we have previously shown, the latter is a contradiction. The former proposition is also not logically tenable: it has no philosophical foundation, neither in the nature of humans in general, nor in the natures of the various, different, specific persons, for its distinction between a race of masters, and a race of slaves.

Claiming that people have a right to life (and thus to the means of subsistence) is putting the foundation of their right - not the reason for its validity, but the reason for its existence - in the fact that people are living beings, not in the fact that they are living beings of a special kind, namely: moral subjects. A *passive* right can be ascribed to anything at all. Calling the right to life the most fundamental human right is implicitly admitting that all living beings have a right to life - plants and the other animals are just as much living beings as humans are. It would however be absurd to claim that all living beings have the right to be kept alive. This would be a biological absurdity, since all life by its very nature is in competition with other life and many lifeforms (all animals) parasitize other lifeforms (plants and animals).

There is another are in which the concept of right to life leads to difficulties. A and B cause the birth of C - why should C's right to life count as a claim on *all* people (directly, or indirectly by way of some state-apparatus)? Should everyone then make way and provide unlimited space for as many people as others wish to bring into the world, or does the fact that everyone has the duty to keep everyone else alive mean that everyone has the right (maybe even a veto?) to co-decide on the family-plans of everyone else?[3] Opponents of the decriminalization of

3 See the propositions of H.Lafolette: “Licensing Parents” Philosophy and Public Affairs 9,2, p.182–197. Lafolette refers, among others, to the fact that "public control" over the quality of the "parents" is a general rule in the case of adoption. It is typical that he does not even ask the question of whether perhaps the current restrictions in relation to adoption should not be lifted, since they disturb and pervert the entire "baby-market" (on the one end: much demand and little supply of children for adoption, on the other: much neglect of children by parents who would be willing to part with their children, if they were to be paid a reasonable price). What Lafolette's propositions could very well mean in practice is suggested by the recent episode of mass forced sterilization in India under Indira Gandhi.

abortus provocatus seem to call upon the right to life of the unborn child, but what they are actually laying claim to is to be boss of another's womb. This is made all the more clear when they show themselves to be willing to negotiate on the conditions under which abortus provocatus is allowed.[4] The fact that they reserve for themselves the right to seize and punish the woman involved shows not just that they believe the child to have to right to the means of sustenance, but also that they have a right to the child, and thus a right to the woman who carries it. This is the central matter in the debate surrounding abortion, not the question of when a fetus becomes a human being.[5] If this position is accepted however, you might as well say that the community has the right to force a woman to have an abortion, or to forcefully sterilize people. If the community has the right to the life of every unborn child and the womb in which it is located, then the community has the right to decide this question, in either direction.

No matter how we attempt to twist or turn it, the right to life is incompatible with moral autonomy. People have the right to dispose over themselves, over their own lives, and this is precisely why they cannot have a right to life, a right to be kept alive by others. This

4 But few of the proponents of decriminalizing abortion want to make this a legal obligation. This means that the decriminalization of abortion would not have any consequences at all for people who, for religious or social reasons, do not want to commit, or aid in, abortion. This also means that the opponents of abortion have the right to use all of their means to prevent abortion in a rightful/just manner: eg. by contributing to a fund which would pay women not to commit abortion, or one which would mediate between women who do not want their children (any longer) and people who do wish to raise a child. Cf. O'Driscoll: "The Stork Market" Journal of Libertarian Studies, iv, 1980. After all, under the fundamental principle of law/right every person has the right to grant any other (human or animal) a (passive) "right to life(/means of sustenance)" in relation to themselves. Cf. J.Feinberg (ed.): The Problem of Abortion. Belmont, Calif. 1973. B.Brody(ed.): Abortion and the Sanctity of Human Life. Cambridge, Mass. 1975.

5 In fact, it is only when the child shows that it is a rational being that it is capable of behaving like a sovereign subject of law/right; but it is a subject of law/right from conception, just as a person who is asleep or unconscious is a subject of right/law, though they show no sign of rationality at the specific moment. The central matter is though, that the fact that a person is a sovereign subject of law/right gives them the right to do or not do with theirs as they wish, but not the right to do anything to an other's means. The fact that a woman sustains a fetus for x weeks does not give this fetus the right to be kept alive for x+y weeks. In analogy: a person which has been kept alive for x years by some benefactor, does not suddenly get the right to force his benefactor to continue his beneficence after the latter has decided to devote their lives to something else, though they may have become totally dependent on said benefactor by that point. See a.o W.M.Evers: "The Law of Omission and Neglect of Children" Journal of Libertarian Studies 2,1, 1978, 1–10. It is a known anthropological fact that many peoples had an accepted practice of letting small children die (and some still do). See a.o D.Wilkinson: Armoede en Vooruitgang. Utrecht–Antwerpen.

also means that it has no utility to define freedom as the condition a person is in when their right to life is respected, which is to say, while they are being kept alive by others, or while they are capable of forcing others to do so. A coherent definition of freedom presupposes a coherent definition of right/law, and this can only be found in the fundamental principle of law/right.

For a person schooled in social philosophy, the denial of the right to life is likely to be a harsh blow. It would however be advisable to remember that acknowledging such a right would not automatically make the means required to uphold it, to keep everyone alive, come into being. People love illusions, and there is no place where the belief in magic is as great as among "jurists", who are of the opinion that things can simply be forbidden or declared illegal in order to make them disappear, and that making something mandatory will make it suddenly appear. I find it is useful to remember a warning by Isabel Paterson "Poverty can be brought about by law; it cannot be forbidden by law".[6] The only thing that legislation can do is decree the right to life, it cannot guarantee it. If the legislation does so, however, it immediately makes everyone into a slave of everyone, it "socializes" each and every person. It is however not at all the case that a slave-economy, a socialized economy is more productive than a free economy - and this is the question the matter revolves around: it would be better for the right to life not to be acknowledged in a world where everyone has enough than for it to be accepted in a world where there is not enough for everyone. This is especially true if the non-acknowledgment of such a "right" is a necessary precondition for a more adequate system of production, while its acknowledgment would undermine said system of production.[7] Whether a person is materially well-off is not determined by their legal rights, but by the success of their productive activities. The crucial question is: who has it better, a free man or a slave?

Just like there was only one conception of right/law which eventually turned out to be adequate, so there is only one adequate conception of freedom. Namely that a person is free to the extent that other respect their right to self-determination. It is fundamentally wrong to posit some called "positive" conception of freedom in opposition to this "negative" conception, on the grounds of which

6 I.Paterson: The God of the Machine. Caldwell, Idaho 1968, p.96.

7 Thomas Sowell: Markets and Minorities. New York 1981 (“The Economics of Slavery”); Fogel & Engermann: Time on the Cross. Boston 1974.

one should rather claim that a person is only free when they can dispose over not only their own means, but is also guaranteed that means will be made available to them. This conception, as previously shown, is incoherent. It is also fundamentally dishonest to mangle a concept as fundamental as that of freedom to such an extent that one could only claim freedom to exist after a certain level of prosperity has been reached. The expression "poor but free" is not a contradiction, and neither is the expression "a wealthy slave". In purely material terms, some of the black slaves on the tobacco and cotton plantations in the Southern United States in the first half of the nineteenth century were better off than many free farmers and labourers. They were guaranteed a number of "collective facilities from the cradle to the grave" by their owner-slaveholders, to whom they were a very valuable asset. They were fed better, dressed better, had better housing and were guaranteed medical care. But, they were not free, and when slavery was abolished, the vast majority of them preffered a substantial drop in the quality of life (in purely material terms) over a return to the condition of living and labour which were to be found on the plantations. This despite the fact that the owners of the plantation were often willing to pay their ex-slaves double what they did before if only they would agree to continue the old regime of production.

“POSITIVE” FREEDOM

It is undoubtedly true that, *ceteris paribus* it is better to be free and prosperous (wealthy), than to be free and poor, but the idea that freedom only has value to those who are rich does not follow from this truth. This is evidenced by the behaviour of the black slaves I mentioned previously. What is certain is that it is a total non-sequitur to derive the right to dispose over the means of another from one's right to dispose over their own means. Yet this is what the core of the doctrine of so-called positive freedom amounts to. Lawrence Crocker introduces this doctrine as follows:

> "If we take seriously the distinction between freedom and that which gives freedom value, then we must say that freedom has no value absent these conditions. From this seems to follow that any policy which aims at achieving freedom would be irrational if it did not also aim for that which makes freedom valuable. If we call this combination of freedom and that which gives freedom value the "totality of freedom",

> then it would seem that a rational policy must maximise this totality of freedom. Why not... give this totality of freedom the name "freedom"? "[8] (ed: Couldn't access original, retranslation from text)

If mere nomenclature were the issue at hand here, you could say: indeed, why not? It is however the formation of the correct conception which is at issue here, not simply the word "freedom". Crocker seems to suggest that freedom has no value absent the presence of the preconditions which give freedom value. Such a suggestion is unacceptable: as it is better, ceteris paribus, to be free and prosperous or rich than to be free and poor, so too is it better to be poor and free than to be poor and unfree, and better to be rich and free than to be rich and unfree. Even a free person who has nothing is in a better state than an unfree person who has nothing. The former can improve his lot, as soon as the opportunity to do so arises, and without having to ask for anyone's permission. This is a fact that appears to elude Crocker. His remark that every policy which aims at achieving freedom is irrational if it is not also aimed at that which makes freedom valuable is completely beside the question: only a free person can enact their own policies. It would undoubtedly be irrational to fight for your freedom, only to not use it for anything. This does not make it irrational to free someone and then leave them to their fate, which is to say, leave them to use their freedom in the way and towards the ends that they themselves deem best. The fundamental principle of law/right cannot be said to be irrational, because while it does deny to everyone the right to deny others their freedom, it does not impose the duty to supply any others means so that those others would find their freedom worthwhile. Rather, as we have seen, the fundamental principle of law/right assigns to each the right to acquire, within right/law, those means for themselves which seem to them to be the most useful.

Crocker makes reference to a policy without specifying who the policymaker is. It would however be non-sensical to pose that, if A frees B, then A is reasonably expected to also maximize B's totality of freedom. This would mean that A is not merely obligated to ensure that B has means, but also that they use them in such a manner that B's freedom is maximized. If it is irrational of A to free B and not do anything further, then it would also be irrational of A to free B, give them some number of means, and do noting further. However it is not A's,

8 L.Crocker: Positive Liberty: An Essay in Normative Political Philosophy. Den Haag, 1980, p.88.

but B's moral duty to make the best of B's life that can be made of it, and A has no other duty towards B than to acknowledge and respect B's right to self-determination.

In a free society*, it is freedom itself which promotes "the conditions which make freedom valuable", and it does this regardless of the level of wealth one starts from. Only a free person has the occasion to maximally use all the opportunities life offers. It is of course a sad truth that there are people which have physical or mental handicaps so severe that they absolutely require the help of others if they are to have any chance at survival. They are at the mercy of others regardless. But to react to this tragic circumstance by positing that these people have the right to life and thus to all the help they need to survive, is pure sentimentality. Right must have a foundation, and the right to life cannot be provided with one[9]. Those people who come to hold the conviction that it is their duty to care for those in need, can of course take certain measures to ensure that they do so as effectively as possible. The fundamental principle of law/right allows charity, voluntary charity, not forced "charity". This is the only relevant choice: either A uses his means to help B, or A uses his means to force C to help B. Both cases involve charity, but only the first one involves lawful charity. It is pure hypocrisy when A and B try to justify the second method by positing that B has the right to aid and support, or that it is unworthy of a person to have to live of the charity of others.[10]

9 Every person starts as the union of one of many hundred of thousands of sperm-cells and one ovum. That is to say, purely biologically speaking, each person is the negation of many hundreds of thousands of other people, and they only exists because of the "elimination" (under the given circumstances) of all competing sperm-cells save for one. As previously remarked, all animal life is parasitic in relation to other life. As such the right to life cannot be affirmed as a fundamental principle unless you are also willing to claim that most living beings on this planet do not actually have a right to life (since they can only exist by violating "the right to life" of other living beings). Even the claim that humans have such a "right to life", while all the other animals and plants do not, is difficult to take seriously unless the person making it is willing to add that no-one has the right to have less children than is biologically possible. The latter addition is of course nearly totally senseless, considering the sexual nature of human reproduction.

10 Refer a.o to. L.Mises: Human Action. Chicago 1966, hk 25. A.Alchian e.a.: The Economics of Charity, Institute of Economic Affairs. London, 1970. R.B.Mackenzie: “Taxation and Income Redistribution: an unsympathetic critique of practice and theory.” Cato Journal 1, 2, 1981, 339–371, vooral 364–371. A.B.Abram & M.D.Schitz: “The Crowding Out Effect of Governmental Transfers on Private Charitable Donations.” Public Choice 33. 1978, 29–40. That official charity, mostly based on violent expropriation is more a matter of institutionalized interest-groups than of popular consensus. This is illustrated by the rejection by referendum, in June of 1976, of the proposition by the Swiss national government to contribute large sums of money to the International Development Association. The proposition received massive support from the media, the churches, the universities and the government. Precisely those groups who, alongside the political elites in the Third World and international aid-associations, would stand to benefit most from this official government-"support", in financial terms or in terms of power and status. At the very same time Swiss private institutions were donating very large sums of money to victims of an earthquake in Italy, and many non-governmental organisations active in the socalled Third World. Refer also to: C.G.Hanson: “Welfare before the Welfare State” in R.M.Hartwell e.a.: The long debate on poverty. Institute of Economic Affairs. London 1974, 111–140

It is clear that the "positive" conception of freedom only makes sense in the context of an attempt to justify violent charity, which is to say to justify the concentration of political power. A can only succeed in forcing C to help B (if C were not going to do so voluntarily) if A is stronger than C. In either case, B will only be helped if someone decides to voluntarily help them. The fundamental principle of law/right allows for all means and methods towards the organisation of charity, save for violence. This means that the defenders of the doctrine of "positive freedom" (as an alternative to the right to freedom in the sense of the fundamental principle of law/right) can have no other goal than to circumvent precisely this limitation on boundary-violating violence.

It is however obvious that the more means a society* devotes to creating and maintaining an apparatus of aggression, the less means remain for any other aims, including charity. Violence does not add any means to the productive capacity of a society*, on the contrary. What the proponents of the "positive" conception of freedom are actually saying is that violence is a necessary precondition for aid of the needy. That, without violence, there would be no charity, and thus that to reject violence as a means is to reject charity itself. This same argument lends itself to other causes than charity as well. Bastiat wrote the following:

> “Every time we object to a thing being done by government, the socialists conclude that we object to its being done at all. We disapprove of state education. Then the socialists say that we are opposed to any education. We object to a state religion. Then the socialists say that we want no religion at all. We object to a state-enforced equality. Then they say that we are against equality. And so on, and so on. It is as if the socialists were to accuse us of not wanting people to eat

because we do not want the state to raise grain."[11]

This was an excerpt from Bastiat's sharp polemic against "socialists of all parties" (Rousseauists, Saint-Simonists, conservatives, etc.). Against all those who call for a "dictatorship of the good", all those who believe that one can only do good from a position of power. Which is to mean that it comes down to first seizing power, and then making all those laudable things into legal obligations so that they may serve, in their eyes, as an excuse for subjugating their fellow people.

Suppose that most people were unwilling to voluntarily aid their fellow man in need; would it then suffice to create an apparatus of power which is strong enough to force the majority to respect this so-called right to (the means for) life for everyone? If most people don't tend to use *their own means* towards helping their fellows, would they then tend to use their power to that end? Or, on the contrary, would they use those in need as an excuse to more effectively give expression to their supposed selfishness? The argument that "positive" freedom is an alternative political ideal is nonsensical, even when it concerns people that can attach little value to their own freedom due to some handicap. A fortiori it makes no sense when applied to people who are both physically and mentally well, but for other reasons have insufficient means to be free in a prosperous manner.

If not nature, but people themselves, or other people, are the cause of a person's lack of means, or of the opportunity to acquire means, then we are dealing with causes which are within the domain of human action. As such, they could also be removed by human action, and in that case there is no reason to be satisfied with "kurieren am Symptom" (ed: cure the symptom, apparently once used in as a euphemism for end-of-life care). So there is certainly no reason to, as the defenders of "positive" freedom do, want to force others into making their own means available for fighting the symptoms without touching upon the causes. Poverty is not a cause, but a consequence, and helping those in poverty without paying attention to the causes of that poverty is senseless/useless.[12] The only result of the subsidizing

11 Bastiat, F.: La Loi. Paris 1850; cited translation: The Law, Foundation for Economic Education, Irvington-on-Hudson, N.Y., 1974. p.32

12 For a refutation of the vicious "circle of poverty"-doctrine, refer to P.T.Bauer: Dissent on Development. Cambridge, Mass. 1972. Chapter 1

of poverty is that there will be more poor people. It is senseless to subsidize someone who wants to be poor (eg an ascetic); it is senseless to give more means to a person who does not look towards the future and spends their income as they acquire it, in the hopes that this could somehow help them escape the "circle of poverty". On the contrary, it gives said person less of a reason to attempt to be able to take care of themselves, it rewards their wastefulness. Without a doubt it is immoral to force another to contribute to the aggravation of the cause of the poverty of a third party. The fact that people in some circles turn their noses upon hearing the concept of the "deserving poor" (the poor that are worth/deserve to be helped) does not mean that there are no "undeserving poor".[13]

We are however safe in assuming that the most important cause of poverty in the world by far - a cause far greater than natural handicaps, natural disaster, or free, personal lifestyle-choices - is the lack of freedom. Which means to say: the injustice done unto some by the others, and specifically institutionalized injustice (the state).[14] To say that injustice is a cause of poverty is of course not the same as saying that this is the only cause, or that fighting poverty is ipso facto the fighting of injustice. Poverty is fought by the production of goods and services. Injustice is fought by refraining from aggression and by organizing adequate self-defense. There is, of course, a connection: by fighting injustice, you indirectly also fight the poverty of those who suffer said injustice, to the extent that the aggression suffered prevents people from fully actualizing their own possibilities using their own means. And yet, poverty is often used as an excuse by the rulers: "No, we cannot loosen our reigns, there are too many poor people eating from our hand. No, taxes cannot be lowered, because that would render us unable to continue our "social" work, and you would not want that upon you conscience, would you?"

The most popular form of this "argument" (this excuse) is that more

13 Refer to the striking testimony of V.Bukovski: Cette lancinante douleur de la liberté, Paris 1981, p152. The argument over the question of how important the phenomenon of "poverty-culture" is, but its existence cannot be denied. Cf. E.Banfield: The Heavenly City Revisited. Boston 1974, hk 6. Th. Sowell. Ethnic America—A History. New York 1981. V.S.Naipaul. India: A wounded civilization. London 1977.

14 This is certainly the case in the Third World, where governmental control (limitations on freedom) in the economic sphere is near total (beside subsistence level farming) - in the form of taxation, corruption, export-limitations, controls on exchanges etc. This keeps the vast majority of people from having access to the world-market, and in a neo-feudal bond to the local political ruling elites.

freedom would necessarily lead to the poor becoming poorer and the rich even richer. This is in fact no more than an elitist or racist slogan. Indeed, its meaning is simply that there are two kinds of people: those capable of caring for themselves, and those who are unable to, and that the former are the current "rich" and the latter the current "poor". If one makes the claim that any step towards freedom would make the current rich richer and the poor poorer, one is in fact making the claim that the only cause of the fact that the economic inequality between rich and poor is not even greater than it already is, is the current degree of un-freedom. As such, the poor should be glad that they live in an unfree world. The poor are clearly a bunch of lazy ignoramuses, capable of nothing more than parasitizing upon power. Is a greater insult even conceivable, towards all those people who are poor because they are being exploited and oppressed, or the victim of totally irrational laws which eg. create unemployment or curb investment, etc? It is absurd to believe that the current unfreedom of the rich is upheld by the poor, and that only their "political" power keeps the poor from sinking even deeper into misery. Can we really assume that the fact that the poor aren't poorer than they are is a consequence of their ability to (over)rule or oppress the rich? To me the idea that the poor are the great beneficiaries of injustice and that only the rich are the victims of it, is totally unbelievable. Once again: I do not wish to suggest that all poverty is caused by injustice, nor that all wealth flows from it. On the contrary: not everyone who participates in rule is a prince. Every prince needs servants, every leader needs followers. There are poor tax-payers and poor tax-recipients, and there are also rich tax-payer and rich tax-recipients. There are privileges that benefit the poor, and privileges that benefit the rich. There are laws and regulations that mostly affect the poor, and those that mostly affect the rich. The fundamental class-distinction is the one between rulers and ruled, between tax-recipients and tax-payers. All the others, between rich and poor, employers and employees, capitalists and labourers, are nothing but an ideological smoke-screen aimed to obscuring this essential structure of rule, of injustice, of unfreedom. It serves to strengthen rule by giving it a

role as a mediator, reconciler and enforcer of order (as a neutral agency, uplifted above "class-conflict"), or it belittles the effects of rule as being merely an additional factor within the wider class-conflict.

For a refutation of the doctrine of "positive" freedom it suffices to point out that the only thing it adds to the definition given above, is that it is "lawful", in at least some cases, to use violence in order to make yourself the master of an other's possibilities or means. It is evident that there is no objective criterion for identifying these case: who has the right to commit boundary-violating violence? How much violence? Against whom? Who has the right to decide on differences of opinion? Etc. None of these questions finds an answer in that doctrine: you can find opinions in equal number to the people asking themselves the questions. The concept of "positive" freedom introduces a *passive* right as the fundamental human right. This means that the only manner of interpretation remaining is a legalistic one: the oness falls upon the proponents of this doctrine to describe the contents of this presupposed (natural) legislation, and to provide us with its foundation. This, to me, seems like an impossible task.

A somewhat different but related assault on the concept of freedom defined in terms of the fundamental principle of law/right, and thus against the idea of right/law/justice itself, rests on the denial of freedom as the absolutely prioritary political value. In other words, it makes explicit that which is only implicit in the doctrine of "positive" freedom. Namely, the idea that freedom is but one value among a multitude. Freedom, they claim, is a value, but not the only value, and each person faces a choice: either more freedom and less of another value (eg material wealth), or conversely more of another value and less freedom. You cannot have it all! This idea is explained in the following passage from the book by R.E. Goodin *The Politics of Rational Man*. Goodin takes a position in opposition to John Rawls, whose proposes, in his "*Theory of Justice*", two fundamental principles of justice. These are the freedom-principle and the "difference-principle", according to which inequalities in the institutions of a community are justified as long as they benefit those members of that community which are the worst off.(15)[15] The

15 J.Rawls: A Theory of Justice. London 1972, especially chapter 2. My remarks here are not meant as a defense of Rawl's theory, which can, like all "social contract"-theories, easily but without much power of persuasion "prove" that people in the hypothetical "state of nature" or "original position" would consider as reasonable precisely that which the author of the theory, and the majority of his audience (the so-called "establishment") consider to be reasonable.

relation between these two fundamental principles is, according to Rawls, "lexicographic". This is to say that first the realization of the fundamental principle of freedom must be attained, and only afterwards should the realization of the idea of equality (as expressed in the difference-principle) be enacted. Goodin interprets this lexicographic order as being equivalent to the position that freedom has an infinitely large value, so that even an infinitesimal loss of freedom can never be compensated by even a very considerable increase in respect to other values:

> "...freedom is appreciated as one of many fundamental principles that are desirable in terms of the fundamental principles of political morality. (Goodin here refers to the rules "maximize the total amount of means available to the community as a whole" and "wages according to merit")". None of these derivative fundamental principles has priority over the others. On the contrary, they are interchangeable, one for the other, depending on the concrete situation. Since freedom is one good among many, one can say that it should be aimed at if this can be done without compromising one of the other principles. As such, there is an assumption to the benefit of freedom, if there is no good reason to limit it... This assumption works both on an individual as on a social level. Each person will, ceteris paribus, prefer having more freedom. But, even though freedom has this prima facie value to them, it will only be a determining factor if no good arguments can be brought forwards to contradict the assumption to the benefit of freedom.
>
> "...On the social level it seems that, in the process of exchange, where freedom is sacrificed for other principles, some freedoms will be relinquished more easily than others."[16]

This argument clearly makes no sense. It is a mere verbalism, which one could furnish with a very beautiful mathematical form, or decorate with impressive terms like "marginal substitution-relations" and such. But in the end, it means nothing. Freedom is called a "good", and then it is assumed that this good may be traded for another (eg wealth, comfort, security, etc.). Two units of freedom for one unit of comfort, or coffee, or whatever. Here you can witness once more the masking usage of the word "people". Who is trading whose freedom? That is the heart of the matter: is this a voluntary exchange, or a forced one?

16 R.E.Goodin: The Politics of Rational Man. 1976, p.134.

As long as this question is not answered, you cannot even begin to give meaning to this argumentation. There are only two possibilities: either it is a forced exchange, or a free one. If it is a forced one then A "trades" a part of B's freedom for, eg more comfort or security for X (which is to say for A, B or even a C). By what right? If it is a free exchange, then there is no sacrifice of freedom! Then, there is merely the exchange of one good (not the good "freedom") for another. To interpret this voluntary exchange as a loss of freedom is a manifestation of confusion of concepts.

If I am so inclined I may, for example, buy "security" by contacting some insurance-company, and obligating myself to pay them premiums over a certain period of time in exchange for the security (the contractual obligation entered into by the insurer) of having a certain sum available, when some event I fear occurs. It is non-sensical to claim that I am giving up my freedom: I am buying certain goods, which means that I am using my freedom, my right to do or not do with my means as I see fit. To characterize this as a loss of freedom is nothing but bar-talk. It is even worse than saying that someone "gives up his freedom" by entering into a marriage. Worse, because in many countries the legislation around marriage indeed implies a fundamental violation of the right to self-determination. Claiming that taking on *voluntary* contractual obligations implies a loss of freedom, while it is a mere exchange or trade of goods or services, is tantamount to suggesting that only a person without any obligation can be free. Some who lives totally isolated, or else limits his contact with others to those that can be dealt with on the basis of immediate delivery on both sides. Someone without debt, who is not a member of any organizations, who is not working in some collective connection aimed at realizing some long-term goal, etc. If this is what is to be understood as "freedom", then freedom would indeed be but one of a multitude of values. But to draw from this the conclusion that, because it can be rational to work with others on the basis of set agreements, it is also rational to give up your right to self-determination, and to subject yourself to force/compulsion, is a blatant non-sequitur.

Regardless of how reasonable, which is to say moderate, it may sound to claim that "freedom" is but one value among many other values, and that thus it may be assumed that some people are sometimes willing to give up their "freedom"

(by marrying, raising children, commiting to write a book or build a house), we cannot allow this to entice us into the position that the "negative" conception of freedom should be given up for being too absolute. The negative conception of freedom does not rest upon the claim that "freedom" has an infinite subjective value, which no-one wants to trade away for any other value. Rather it rests on the fundamental principle that every person has the right to do or not do with themselves as they see fit, which is an objective right "hors commerce" (ed: untradeable): I do not have the right to trade your "freedom" for my comfort. You have the right to engage certain obligations aiming at ensuring your own comfort (or that of a beneficiary of your choosing); and so do I, so does everyone.

The initial plausibility of the aforementioned assault on the conception of freedom disappears as soon as we realize that the freedom which each person has a right to is indeed, a right and not a good, not a value among many others. Even though each person must determine for themselves how much their freedom is worth to them, which is to say how much they will spend on defense and deterrence in a hostile world, the fact itself that they live in a hostile world, the fact that their freedom is threatened by those who would make themselves master over their somatic or extra-somatic means, is beyond their control. So, I *cannot* trade my freedom for an other good: whether I will be free, whether my rights will be respected or not, is not finally dependent on me. It is only when I am under assault that I must choose between defending myself or submitting. It is not true that submitting means that I am trading my freedom: the fact that I am forced into this choice by the others is sufficient proof that *they* are the one robbing me of my freedom, and that it is they who have judged my freedom to not be worth the bother of respecting for them.

Goodins argument can therefore not be taken seriously. Even though he discusses principles of political morality, he ignores the very basis of political thought itself: the irreducible multitude and individuality of all people. His "trade off" precisely presupposes this misrecognition of the "difference between people" which Rawls explicitly mentions as being the fundamental mistake of utilitarianism. Goodins principles of "political" morality identify *goals*, but they do not indicate how, using what means, under which conditions, etc. these may be worked

towards. They imply a legislation that all should obey and this is the most explicit negation of the essence of political morality. My ends justify the use I make of my means, not the use I make of your means. This difference, which is not all that deep or subtle, is the difference between a finite and an infinite conception of a person, and is all too easily overlooked.

EQUALITY AND EGALITARIANISM

Those that propose the doctrine of "positive" freedom as a political fundamental principle, and that maintain that people do not just have the *active* right to do or not do with their means as they see fit, but also the *passive* right to means, will of course deny that they are motivated principally but a hunger for power and rulership. They are quite likely to call upon the idea of justice, and specifically on the idea of equality, to defend their programmes. One of the seemingly inexhaustable sources of differences of opinion in the philosophy of law/right and related domains, is exactly the "problem of the relationship between equality and freedom". This problem is however, mostly a mirage. This is made apparent when we place it in the context of concrete human action. There is no reason to believe that the idea of equality provides a basis for an assault on the fundamental principle of law/ right and the conception of freedom it is the foundation for.

We needn't dwell overlong on the difference between "equality in right" and "equality in material circumstances". The fundamental principle of law/right posits that each person has an absolute, and thus necessarily equal for all, right to self-determination. It does not make the claim that everyone has the right to "the same amount of/equal" means (what/which?), to "equal" opportunities (to do what?). These "rights" do not have a scrap of fundamental meaning: the fundamental principle of law/right encompasses all people, without distinction, and ascribes to them a right that they can all have, without any contradiction. But, what could the meaning possibly be of a fundamental principle which claims that our ancestors four thousand years ago have a right to equal means or opportunities as we do? Even if we were to make the naive error of understanding "all people" to mean only all people currently alive, it remains totally meaningless to claim that everyone has a right to "an equal amount" as every other. Yet still, this *egalitarianism*, which should be distinguished from the equality-in-freedom

of the fundamental principle of law/right, is often invoked as a motive for constraining people's freedom and violently redistributing means (or opportunities). We've already encountered the fundamental premise above, namely that freedom and economic equality are incompatible, and thus that more freedom must inevitably lead to more inequality. The elitist-racist tone of this argument, I have also already pointed out. However, there is more afoot.

Freedom is the state/condition in which each respects the right to self-determination of all others. Consequently freedom is compatible with every possible degree of equality or inequality in the distribution of any sort of material means. There can therefore be no inherent conflict between freedom and equality (in the sense of economic equality). To pose the problem in such terms is therefore besides the question. In essence, the question is of a totally different nature. Namely: is freedom a *precondition* for the coming about of a more egalitarian society* as some claim, or is it rather as the others claim, that equality of material circumstances is a *precondition* for a more libertarian society*. To the first group (the libertarians) freedom is the path to equality. To the others, (the egalitarians) equality is the path to freedom. We must not be intimidated by those egalitarians who would make it seem that all those who make the plea for more freedom are proponents of more inequality, that they wish to "keep the workers in their place". The essential difference of opinion between libertarians and egalitarians rests on their radically different conceptions of what is cause and what is effect. This difference of opinion relates to the question of how we can transform the current situation into a better one. Everyone agrees that such an improvement is possible, at least in principle. We are indeed not in a perfect world (in which no improvement would be possible), but in a world in which we must choose a political strategy. Libertarianism and egalitarianism are such strategies. One considers liberation/freedom to be the political priority, the other considers egalitarian redistribution to be. Both are reactions to existing unfreedoms and inequalities.

The libertarian does not deny that a more equal distribution of prosperity is desirable, but points out that those inequalities, which so offend the egalitarian, are often the effects of a lack of freedom.[17]

17 Cf. T.Machan: “Equality’s Dependence on Liberty” in G.Dorsey (ed.): Equality and Freedom. New York–Leiden, 1977, 663–670.

The egalitarian does not usually deny that some inequalities are the result of existing unfreedom, but fears that if people are freed while there is not yet general equality, inequality will grow even further. The egalitarian is obviously within the camp of social philosophy, the libertarian in the camp of political philosophy. One is of the opinion that violence is only acceptable in defence of the right to self-determination. The other claims that it is also, and maybe even primarily, acceptable in order to guarantee the right of each to "as much/the equal" as the others. The position of the libertarian contra the egalitarian is that egalitarianism is an incoherent doctrine. That forced equalization will not only not lead to more freedom ex post, but that it will most likely not even lead to more equality. The essential difference between the libertarian and the egalitarian is indeed that the libertarian advocates an immediate deconstruction of the structures of power which they believe to be artificially maintaining many inequalities, while the egalitarian makes a plea for a meaningful increase in the concentrations of power, to make inequalities disappear, both the artificial and the spontaneous one, and is only willing to give people their freedom when all inequality has disappeared.

A libertarian may attempt to minimize differences in material circumstances in some peaceful manner, eg by starting or contributing to charity, educational programmes, information-centres, self-help groups, etc. or by organizing public information campaigns, or primary or secondary boycotts and such. They may try to use their own means, in cooperation with other, like-minded people, to promote those "equalities" which seem to them to be the most essential. Such an attitude is perfectly compatible with respect for the right of others to strive for different aims, possibly even attempting to promote other "equalities". But, above all, the libertarian will point out that if anyone feels themselves to be the victim of some inequality, in a free society* they are allowed to exert as much effort in getting rid of this inequality as they themselves see fit. In a free society*, undesirable inequalities tend to disappear, while other differences, which are not undesirable or even appreciated, will continue to exist. This is the ultimate touch-stone for libertarian politics: everyone has the right to devote their own means towards removing those inequalities which bother them, whether it is they themselves which are caught up in said situation of inequality or not. The exercise of this right

will of course never result in a complete equalization, but it must result in a condition in which all inequalities are contingent and ephemeral.[18]

The egalitarian on the other hand, is convinced that there is one specific "equality" which everyone has a "right" to. Thus, everyone has the duty of promoting the removal of certain differences, even people that do not feel strongly one way or the other. Every egalitarian is convinced that there is one correct scheme of redistribution, but from this, it does not follow that there is one scheme of redistribution which all egalitarians will believe is correct. This consensus among egalitarians is a typical mirage. It can only exist until the egalitarians are questioned about their opinions on very concrete measures of redistribution, or even the question of what they think the apparatus of redistribution should look like. Egalitarianism is not a well-defined doctrine, neither in relation to specific goals (which "equality"?) nor in relation to specific means (taxes-subsidies, interventionism, socialism, etc.), it is a whole host of doctrines.

It is clear that the libertarian can make a coherent argument that, if

18 To speak of improvement in social conditions is to speak of/over generations. Studies of the successive waves of immigration to the USA unambiguously show the great influence of personal culture (in terms of which someone will judge themselves and others as being "better off" or "worse off"), above that of so-called "objectively measurable material conditions". It has been shown that the majority of some groups start a steep social climb after just one generation, while other groups which were "equally poor" take far longer. The descendants of the Jewish, Japanese, Chinese, Polish and German immigrants (which were a substantial part of the "poor" in the USA in the period of the turn to the 19th century) now constitute the richest ethnic minorities, boasting a higher average income than the so-called WASPs, and this despite a long period of official and social discrimination and even persecution. The same sorts of evolutions are still taking place, as comparisons across age-groups show: “Age-cohort comparisons of ethnic groups can present both a different picture and a truer picture of current ethnic progress. For example, blacks over 45 years of age earn less than 60% of the income of their age-peers in the general population, while blacks aged 18–24 earn 83% of the income of their age-peers. The percentages are virtually the same for American Indians. Puerto-Ricans aged 18–24 earn 3% more than their age-peers, but Puerto-Ricans aged 65 and older earn 35% less.” Thomas Sowell: Markets and Minorities. New York 1981, p.12. In a racially homogeneous society these evolutions are difficult to statistically identify, but social mobility not being a fiction is shown not just by daily experience, but even by authors whose ideologies would be better served by a confirmation of the hypothesis of insurmountable class-barriers. Cf. D.V.Glass: Social Mobility in Britain. London 1954: J.Westergaard & H.Resler: Class in Capitalist Society. London 1975. Large social mobility in a diversified society* of course does not exclude the existence of a relatively stable highest class, some "power elite", well-connected to those circles which exercise or control political power, either directly or indirectly (as in a democracy for example). In this relation, little is truly knows, so that the existence of such a class as some sort of more or less closed, solidary unity, cannot be simply posited. Even the concept itself is unclear.

everyone's freedom is maximally respected in a society*, a spontaneous tendency will emerge to remove all unwanted inequalities, and that it is incompatible with the principle of right/law to force people to aid in the removal of inequalities they do not wish to remove. The egalitarian on the other hand has to make a plea for the largest possible concentration of power into their own handz, since they are convinced that, given greater freedom, people would spontaneously act in such a way that greater inequality will result. This explains the well-known connection between egalitarianism and imperialism, which I will discuss in more detail further below. Of course, a logical discussion of the phenomenon of egalitarianism should not be blinded by that little word "equal". The essential element is the existence of a *well-determined* redistribution which must be realized.[19] The problems of egalitarianism are not so much determined by the specific characteristics of one redistribution or another, but rather by the fact that a centralized apparatus is required in order to, *manu militari* if need be, create the desired distribution. However, before taking a closer look at this link between egalitarianism and imperialism, we should ask ourselves a number of questions about the intelligibility of egalitarianism.

One essential aspect of any egalitarianism is the necessity of measuring "inequalities". This probably goes some way towards explaining why egalitarianism tends to focus on visible, measurable differences, or in any case why they tend to interpret measurements which show differences as indications of substantial *inequalities*. The circumstance that money exists, and that most things that interest the egalitarians have a money-price (which is to say are exchangeable for money) seems to lend egalitarianism the opportunity to give their ideal of equality a mathematical precision independent on arbitrary judgments of value. Even though all like to admit that "money isn't everything", still the usual or even exclusive tool used is statistical data from the money-economy. Still, "inequality" often is believed to be best interpreted as inequality in income or wealth, which is to say economic inequality. This mathematical precision is

19 To equalize is always relative in relation to a specific norm. If this norm is realized, then the degree of inequality in respect to that norm is zero, regardless of the fact that, eg a fifty-year old earns 3 times what a twenty year old does, or that an urbanite will find a visit to a movie theatre to be cheaper than a rural person. Without mentioning the norm, the concept of "equality" is meaningless. There is however no logical reason to say that Bismarck's "Sozialpolitik" was not an egalitarian political system, no matter how much it differs from what some contemporary egalitarians conceive of under the term equality.

of course a mere illusion, which rests on a deep misunderstanding of the true, real nature of the money-economy, and of the economic meaning of prices. It may seem obviously true that it is possible to create more equality by taking from A, who has 5000 u(nits of money), a sum of 2000 u, and giving it to B, who only has 1000 u. But the mathematical proposition 5000 - 2000 = 1000 + 2000 is totally irrelevant to a discussion regarding the economic ideal of equality.

The evident irrelevance of the usual "measurements" of inequality can be easily illustrated. To do this, we can imagine a perfectly egalitarian society, make a computer-model of it, and then, given the results of this model, "measure" the amount of inequality by subjecting the data to the same operations that are used to measure inequalities in the real world. For example, one can calculate what the inequality-coefficient is if we divide the share of income (in relation to total "national income") of the top 20 percent of earners by the share of the lower 20 percent of earners. It is easy to understand that even in a perfectly egalitarian society the coefficient of inequality will never have the absolute minimum value of 1, not even if we explicitly state that we are dealing with a society in which everyone has the exact same run of life in all regards. (Everyone dies at the same age, starts making money at the same age, retires at the same age, everyone earns the same amount per day of labour, works the same number of days, spends the same proportion of their incomes on consumer-goods, everyone saves the same amount at the same rate of interest,...) The reason why a significant degree of inequality can still be measured, is that at any one time some are just starting to earn money, while others have already worked and earned for their entire lives. The longer people are active in such a perfectly egalitarian society, and the higher the interest rate, the higher the measured "inequality". A computer-simulation of such a perfectly egalitarian society which was reported on in *The Economist*, in which everyone lived to be 84 years old, and everyone could invest their savings at 10 percent, gave as a result that the richest 10 percent of inhabitants (who were of course the oldest) had control of about 74 percent of all the wealth in the hands of the citizenry.[20]

Plausible models of this nature have "measured" inequalities of the same

20 The Economist, London, 26 May 1978, 16–18

of the same order as those measured in reality, and sometimes they are markedly higher than the numbers we measure in reality, for example in a number of West-European countries. If we are to take these measurements seriously, we must say that Europe is more than perfectly egalitarian. This is of course not the case. In the simulated egalitarians societies everyone makes the same throughout their lives as any other. That is of course the only relevant basis for comparison, but it behooves to account for the fact that, in a growing economy, the younger people will make more throughout their lives than the older people (and vice-versa for an economy with "negative growth"). The important point, however, is that those who want to statistically prove how unequal society is, do so using numbers and data which are totally irrelevant, as they reflect inequality at one specific time.

How much of this "measured inequality" is due to aforementioned statistical illusion?[21] How much of it is due to the effect of a long average lifespan, and an interest rate which is high due to inflation? How much is due to irregularities in the demographic pyramid? How much is due to the simple fact that people differ, not just physically and intellectually, but also in economic characteristics like thrift, work ethic, risk-aversion, physical and mental care/hygiene, which is all to say to the fact that there are different ways of life, and that not every person takes equally well to the every lifestyle? Even more importantly, money does not play an equal part in all countries. Can we really take these "measured inequalities", measured on the basis of monetary data, seriously when we know that in, say the USA, money-income is a far larger part of a person's total purchasing-power than in say the Soviet Union, where money-income is a negligible part of said purchasing power compared to the possession of power, influence, or a key position in some administrative or managerial agency? Both components, money and power, matter in every country, but in some one is markedly more important than the other. It should also be clear that "money-traffic" is a process of a *totally* different nature than the exercise of power and influence. Money is by definition a universal, non-discriminating means of exchange, power and influence are very strongly tied to the individual person, and have more value the more exclusive they are.

21 Refer, besides the works by Thomas Sowell and P.T.Bauer. already cited, to, a.o . L.Gallaway: “The Folklore of Unemployment and Poverty” in S.Pejovich: Governmental Controls and the Free Market. College Station 1976, 41–71.

The above considerations should make it clear that it may not be so easy to determine what "inequality" actually is. In fact, inequalities are naught but unwanted differences. This determination raises a question.... Unwanted by whom? Also: what means and methods are allowable in order to remove said unwanted differences, or their unwanted consequences? Which ultimately leads us to the question: who has the right to answer these questions? This automatically brings us back to the fundamental principle of law/right, and its alternatives. The egalitarian, who is of the opinion that the freedom of their fellow people may and should be limited in order to press their own ideal of equality, is necessarily an imperialist. However, an imperialist is not a proponent of more equality, since they must insist on a strong apparatus of power in order to realize their plans or ideals, and such an apparatus presupposes a large inequality in power. The egalitarian want more economic equality by increasing "political" inequality. This is why they are so interested in subverting power, in matters of policy and legislation, and in administrative issues. This paradox is reinforced when we consider that the egalitarian is not capable of guaranteeing that the apparatus of power they propose (which can only truly be efficient if it is all-powerful, and thus very "unequal" in relation to people and their voluntary associations) will only be used towards egalitarians ends. The basic premise of the egalitarian, that if people were to be let free, inequalities would increase incredibly and excessively, leaves them no choice but to go all-in on the hand of power. They, of course, babble on endlessly about democratic control, and constitutional guarantees, and of the dangers of bureaucratization and how they will counter them. However a) we should not let such talk deceive us, b) the fact remains that the more power is decentralized, the larger the space becomes in which inequalities may develop and c) the more power is centralized, and thus the risk for unwanted differences reduced, on paper that is, the greater the risk becomes that power falls into the hands of wily politicians who will turn it to ends other than those that power was envisioned to serve. In the end, the only option left for the egalitarians is to claim that we should all just trust them, have faith.

The libertarian poses the question of why these economic inequalities are the only ones that seem to offend the egalitarian. They also do not simply settle

for all that prattle of democracy: to vote is to exercise power, it is comminting boundary-violating violence indirectly. Voting for candidate X is basically giving them a blanc cheque: "You have my permission to, within legal and constitutional requirements of form, do or not do as you see fit, not just with me, but with all my fellow citizens". That is what voting is, and this is why no-one has the right to vote in organisations in which not all members are voluntary participants. That is an immediate consequence of the fundamental principle of law/right. To a libertarian, it is precisely that inequality of power, of rule, that is fundamentally wrong. After all, it rests on violence rather than the ever-changing, largely unpredictable evolutions in technical knowledge, tastes and preferences, saving-habits, etc, which, in a free society*, are at the basis of unstable, ever-changing economic inequalities. Is the libertarian naive when they posit that concentrated "political" power is much more likely to be used to ensure that the powerful stay powerful and the powerless powerless, or that all but the powerful are "equalized", than it is to be used in order to realize, in word or spirit, the ideas about distributive justice of some scribbler?

The egalitarian simply assumes that more freedom brings more economic inequality, which means that inequality in right is a necessary precondition for establishing more economic equality. This inequality in right must of course be understood as the negation of the fundamental principle of law/right. Many egalitarians implicitly accept the alternative fundamental principle that each person is master and slave to all others, which when superficially considered can also seem to be equality in right, but which must in fact result in unequal power of decision-making (making one more of a master, and the other more of a slave). An egalitarian is likely to respond to this by claiming that unequal economical positions have a similar effect, because they imply that one "stronger" party has a much better position to negotiate from than another, "weaker" party, and that the former is hence able to force the latter to consent to the conditions they desire.[22] Indeed, we have already discussed

22 In some cases, the position of negotiation of the "economically weaker people" is indeed weaker than that of the "economically strong", but this is far from always the case. For instance, the "strong" are often under a lot of pressure of a moral, conscientious, or social nature in their contacts with the so-called "less fortunate". The latter are also often much tougher negotiators than richer people, because they can much more credibly claim "This is my final offer, I cannot go higher/lower.". Cf. Thomas Schelling: “The Strategy of Conflict” Cambridge, Mass. 1960 This is certainly the case in those cooperative endeavours that have the character of the production of a so-called public good. Cf. M.Olson Jr.: The Logic of Collective Action. Cambridge, Mass. 1965: en M.Olson Jr. & R.Zeckhauser: “An Economic Theory of Alliances” Review of Economics and Statistics 48, 1966, 266–279. At a macro-economic level, the economic power of the non-rich is of course much much greater than that of the rich, at least in modern Western societies*. This is shown by mass-production for mass-consumption, while production of luxury-goods for the rich or "super-rich" as they are often called today, is a rather marginal and insignificant phenomenon. It is no more than a truism to claim that one rich person can lay claim to more scarce factors of production than one poor person, but this does not imply that the rich as a group are able to lay claim to more scarce factors of production than the poor as a group. Refer also to M.N.Rothbard: Power and Market. Kansas City, 1977, p.229. who rightly remarks, in the context of 2-person situations: “Economic power is simply the right under freedom to refuse to make an exchange”— which makes it clear that equalizing economic power per se is nothing but instituting a form of slavery. (In this context see above note with page 347).

the need of making a distinction between lawful compulsion, which does not imply any violation of a persons right to self-determination, and unlawful compulsion, which does. We've even seen that lawful compulsion is an essential element in any society* in which people try to influence the behaviour of others (eg in child-rearing, or to discourage lawful yet immoral actions). No-one will deny that this ability to exercise lawful compulsion too can be abused, in the sense that a person can choose to apply their means to ends which are disapproved of by others. The question that poses itself here, is whether the egalitarian is able to find refuge in the argument that "economic" power is as or even more dangerous than "political" power, and that it would be duplicitous to speak of freedom if not all parties to any contractual relation are in "equally strong positions".

Many egalitarians are undoubtedly willing to admit that, if there is economic equality, there is no reason to constrain people's freedom. Indeed, we may note that in many cases, egalitarian arguments appear in disguise as it were. Which is to say they are produced not to plea for direct redistribution of means, but rather for the "protection of the weaker party". This protection then takes the form of the creation of various legal privileges for the "weak", by limiting contractual freedom. One form of egalitarianism proposes intervention by the legislator (or the state's courts) in order to forbid certain contractual agreements, nullify or weaken others, while making yet others mandatory. It speaks for itself that even this "moderate" egalitarianism is wholly incompatible with the fundamental principle of law/right, which implies

that no-one has a right to life, and thus a fortiori no right to be "protected" by others when it is not their life itself but some of their economic interests which are at stake. But, aside from these general remarks, there is also the fact that this legal protection cannot in any sense be adequate. To put it differently: limitations of the principle of contractual freedom can, despite any and all good intentions, not lead to the protection of the weak.

While discussing contract in chapter 3 above, I have previously remarked that any contract brings with it transaction-costs, and that it can be perfectly rational to try to save on these transation-costs in order to be able to achieve other ends as well. This means that, in any case, we must be very careful when facing the arguments of paternalists and egalitarians, who want to protect people against themselves (against their so called lack of insight, care and intelligence, etc.) or against the economic power of heartless others.[23] In many cases a contract which turns out, ex post, to be detrimental to the so-called weaker party, entailed an ex ante risk they consciously, and calculatingly took. In those cases, the weaker party can be forced to not save on transaction-costs (make longer negotiation, collecting more information, or the acquiring of expert opinions mandatory) but this is not what the protectors of the weak usually do. They usually prefer to legally transfer the risks on to the stronger party, thus creating the impression that the weak must bear none and the strong all of the extra costs associated with a limitation in freedom of contract. This is of course another manifest illusion. The only effect is that everyone will benefit from thinking twice before entering into contract with someone who, as a "weaker person", possesses certain privileges and immunities. Consequently, such measures create a tendency to make entry onto the market (contractual traffic) more difficult for the weaker, which may even lead, in some cases, to the formation of a sort of ghetto, with an invisible wall of reluctance on the part of potential contractual partners. In such cases, not even the weakers willingness to take more risks will allow them to take part in the benefits of normal economic traffic.[24] This "protection of the weak" will then in

23 It is not superfluous to emphasize that this expression is, at most, meant to signify the intention of some people, not the effect of their interference. Refer to a.o I.Paterson: The God of the Machine. Caldwell, Idaho 1968. hk 20 (“The Humanitarian with the Guillotine”).

24 A.T.Kronman: “Contract Law and Distributive Justice”, Yale Law Journal 89, 1980, 472–511,argues that limiting freedom of contract is a legitimate alternative to the system of taxation/subsidy of social redistribution. He does so partly on grounds of the claim that the principle of freedom of contract presupposes that all existing inequalities between the parties are justified. This is an incorrect representation, as the principle makes no claims beyond that every group of people has the right to distribute their means among themselves in the manner that they agree to do so. It is clearly unjust to force a fellow contractor of a person who has been the victim of an injustice in the past, that has not yet been righted, to compensate the other for said injustice inflicted by an unknown third party. Kronman loses sight of the fact that judges have neither the right nor the ability to formulate a just or principled norm of redistribution, and apply and enforce it. See a.o I.Jenkins: Social Order and the Limits of Law: A theoretical Essay. Princeton 1980. Any attempt along those lines is fruitless if the judges are not able to directly take control of the administrative bureaucracy and even the legislative institutions. Which is to say if it does not itself take control over the system of taxation/subsidy. But, if they were to do so it would be clear that their actions were not at all an alternative to the system of taxation and subsidy. For more about the impact of this system on the formation of ghetto's, refer, a.o, to E.C.Banfield: The Unheavenly City Revisited. Boston 1974, en J.Jacobs: The Death and Life of Great American Cities. New York 1961.

many cases need to be supplemented with measures to legally force those others to contract with the weaker. Usually this will happen indirectly, by creating "social provisions" (paid for by the tax-payers, and thus partly by the weaker themselves). This places the weaker into a completely different economic circuit and makes them totally *dependant* on others: they are encouraged to stay outside of the usual traffic of exchange.

That fiddling around with freedom of contract cannot be productive as a method for protecting the weak in the long term, is a well-founded conclusion of praxeological analysis. The principle is easily illustrated by considering the effect of freezing prices regarding rental contracts.[25] As an example, we will use a form of rent-control which only effects the monetary part of the price, even though the service that the owner expects of the renter also entails the provision of certain maintenance-services, besides the payment of a sum of money.

Blocking the monetary price of rental contract is often proposed on the grounds of the claim that the renter is the "weaker" part. This is certainly not always the case, but we will humour the presupposition in our example. An obvious reaction of the owner to rent-controls is to decrease the amount of services they render, or to increase the amount of services expected of the renter. The owner will attempt to compensate a low rental-price by altering the non-monetary components of the rental contract. Such

25 Walker (ed.): Rent-Control—A Popular Paradox. Frazer Institute, Vancouver 1975. C.W.Baird: Rent-Control: The Perennial Folly. Cato Institute, San Francisco 1980. W.E.Block & E.Olson: Rent-Control: Myths & Realities—International Evidence of Rent Control in Six Countries. Frazer Institute, Vancouver 1981.

such compensations are almost always possible. They limit the freedom of choice of both the landlord as well as the renter. The latter will have to accept a decrease in quality or an increase in work (and thus decrease in leisure time) compared to what otherwise would have been the case. If the renter is for some reason not able to perform the required services themselves, they will have to turn to the market in order to be able to employ someone to do the work for them. That which they saved because of the rent-control, is partly or completely lost by the changes in the area of non-monetary price-elements (quality). It is of course impossible to determine how large those effects will turn out to be. It is likely to vary on a case by case basis.

These effects will continue to manifest as long as the blocked price is below the market-price. It is rather unlikely for the market-price to spontaneously fall below said blocked price. This is simply because price-controls tend to inhibit the supply of residential space for rent. Without a drastic fall in population (by some epidemic, or the explosion of a neutron bomb, etc.) causing the demand for but not the supply of residential spaces to drop, a price-control will almost certainly result in an increase in demand and a decrease in supply, and thus in a growing imbalance in the housing-market.

Demand will tend to increase, influenced by a number of factors. Many people will find that, given the controlled price, they can afford more living-space than before. They will tend to want to live "larger", potentially being on the look-out for a vacation home or second home. They are also likely to want to start living apart sooner (children will look for their own homes or appartments earlier). Some owners will find that is will be cheaper to rent rather than to keep maintaining their own houses, which may have become too large. Potential owners may put off plans to buy or build, or give them up entirely, and start to rent.

This is accompanied by a decrease in supply. After WWII, Sweden attempted to fight an imaginary housing-crisis using "temporary" rent-controls (which were only completely lifted in 1975). In the early 60s, they formed a commission tasked with investigating "the mystery of the disappearing houses"![26] As soon as the rent-controls are seen as

26 See Sven Rydenfelt: “The Rise and Fall of Swedish Rent-Control” in Walker, op.cit. p.175. Consider also the famous quote by A.Lindbeck: “In many cases rent-control appears to be the most efficient technique presently known to destroy a city—except for bombing.” (The Political Economy of the New Left. New York 1972)

a lasting measure, relatively few people will be willing to invest in residential spaces for rent. Both the construction of new buildings as well as the maintenance of existing ones will decrease, or even stop.

Many landlords will use the first opportunity to convert their no-longer profitable housing into means with a different designation which is not under price-controls (stores, warehouses, bars, parking space, etc.) or to sell them to someone that wants to inhabit it themselves. Yet others are likely to leave their properties derelict as said properties no longer generate sufficient revenues to pay for repairs and maintenance. If rental-arrangements are also divorced from the system of freedom of contract in the non-monetary domain, then many buildings are likely to remain vacant, despite a large need for housing. For example, if it is no longer allowed to have the renter vacate the premises at short notice, or if it is not allowed to make the renter carry the costs for urgent repairs, or if the owner cannot pass off liability for damages. Such situations give rise to the "squatter problem" - which is a completely anomalous situation once you consider that in a free market renting out an existing residential property which does not have any immediate alternative designation is completely cost-less. On a free housing-market no owner has any interest or benefit in leaving a property vacant.

Another factor that depresses supply is the fact that those who are currently renting will not tend to move domiciles. This low rate of mobility of course means that renters remain in the same property for much longer than would otherwise be the case. This leaves candidate-renters who are looking for housing in a specific, densely-populate area (usually an area with good employment opportunities), unable to find such housing even while many houses are being occupied by pensioners, students, and many others who have no direct benefit from living in the area, and who would often be more than happy to move if they were not convinced that it would be impossible to find housing elsewhere. People who would like to live larger, and are willing to pay for it, stay put, and it is usually the least wealthy who cannot even find a hovel to shelter in: everything is already occupied. The absence of vacant housing inhibits mobility and in so doing contributes to various side-effects, such as unemployment: there's no work where people live,

and there where work is available for them, housing is not. Part of the renters "gains" must be spent on commuting to and from work (eg acquiring your own car), and as such the "employment-costs" increase, making work less attractive to many people. This dwindling supply of new housing may be partially compensated for by increasing the population-density in existing domiciles, but there are limits to the number of people that can live in one house or apartment, as well as to the willingness of renters, who already believe they are living cheaply, to sublet. Yet another side-effect is that, when people are unable to use their money to buy things they truly need, said money loses its value.

All these effects, and many other besides, occur everywhere rent-controls are enacted. The major victims are of course those so called "weaker" people who such measures purport to want to protect. But why is this shameful measure still applied, time and time again? Ignorance undoubtedly plays a role, both in the public as well as in the policy-makers, who are usually not required to provide any proof of knowledge or competence, and who are thus not subject to any impulse towards acquiring said properties. But the most important cause by far, in my estimation, is the inherent dynamics of the "political" game of leaders and followers, the game of counting electoral loss or gains. Measures such as rent controls can be easily understood when viewed from the latter perspective. Such measures are very well suited for the purposes of gaining a large audience of voters. This audience is not "the renters" but "the *current* renters"; the beneficiaries of rent controls are not renters in general, but those who are renting at the time the measure is enacted (or that will rent before the most other people have had time or opportunity to adjust to the situation created by the measure). These current renters (and current candidate-renters) are of course the only ones who consider themselves "renters". They (and the politicians involved) are the netbenificiaries of such an operation. They are also the only renters participating in the current elections. The *future* renters are the major victims in this operation (together with the *current* owners of residential rental properties). The entire thing is what is called a *negative sum game*, because even though at first glance there would appear to only be a transfer from current owners to current renters, one

should account for the totality of effects in the long term.

These long-term effects will present themselves, of course, in the form of "social problems" (eg: a housing crisis) which are then seized as opportunities for the political professionals as being ever so much proof that "despite the many measures already taken, the need persists for much greater, much more drastic government intervention for the protection of the weak in society". The praxeological insight that the current social problems are often the result of "measures previously enacted" is usually nowhere to be found. The passivity bred by social philosophy on the other hand makes it very easy to discredit those who would propose freedom as the cure for social ails. "They wish to do nothing, they want to leave people to their fates!" In this way, the person who recommends letting people do as they wish is painted in the light of a propagandist for inaction, while the one who recommends taking people's freedom of action away from them is purported to be the propagandist of "action".

The analysis I proffered above is valid, *mutatis mutandis*, not merely for rental contracts, but rather all contracts. The game which is played with "the renters" in the previous example, can also be played with "the worker". This is made amply clear by the praxeological analysis of the consequences of of minimum-wages, various labour-regulations and so called "social" provisions (cf. above reference to "equal pay for equal work" policies). Here too future workers are victimized in order to benefit *current* workers and their political and syndicalist leaders. The game can also be played with "the entrepreneur", and with "the capitalists": it is a grave error to believe that most interventionist institutions, legislation and regulation has come into being under the pressure of the proverbial left or labour-movements.[27]

27 Cf. G.Kolko: The Triumph of Conservatism. New York 1963. A.E.Ekirch Jr.: Progressivism in America. New York 1963. W.E.Grinder & J.Hagel: “Toward a Theory of State Capitalism: Ultimate Decision-making and Class-Structure.” Journal of Libertarian Studies. I, 1, 1977, 59–79. R.A.Childs: “Big Business and the Rise of American Statism” in T.R.Machan: The Libertarian Alternative. Chi-cago 1974, 208–223. J.Weinstein: The Corporate Ideal in the Liberal State, 1900–1918. Boston 1968. R.Radosh & M.N.Rothbard: A New History of Leviathan. New York 1972. S.A.Lakoff & D.Rich (eds.): Private Government: Introductory Readings. Glenview, Ill. 1973. R.Hamowy:”The Early Development of Medical Licensing Laws in the U.S., 1875–1900”, Journal of Libertarian Studies 3,1,1979, 73–119. D.Armentano: Antritrust and Monopoly: Anatomy of a Policy Failure. New York 1982. J.L.Castrovinci: “Prelude to Welfare Capitalism” in Compassion and Responsibility: Readings in the History of Social Welfare Policy. Chicago 1980, 265–289. J.Schumpeter: “The Sociology of Imperialism” in B.Hoselitz (ed.): Two Essays by Joseph Schumpeter. New York 1955. Also older works such as P.T.Moon: Imperialism and World Politics. New York 1927; en R.Hilferding: Finance Capital: A Study of the Latest Phase of Capitalist Development. Published by Tom Bottomore. London 1981.

Nothing could be further from the truth. *Current* entrepreneurs don't balk at making access to the market more difficult for *future* entrepreneurs.

The same goes for the *current* practitioners of the so-called free professions. In cases involving these, "the need to protect the weak: the consumers, patients, children" is very often weaponized.

It speaks for itself that there is no counterargument against the desire to help others, a fortiori not against the desire to help the "weak". It is not the goal, but rather the means and methods which must be questioned. Add to this the historical context of the whole egalitarian rigamorole against freedom of contract. Once you take a look at said context, it should become evident that the historical background of egalitarianisms critique of the fundamental principle of law/right is not one in which said principle was rigidly applied, but rather a context of a *class-state*, in which a monopolistic structure of power encompassed both legislation and jurisprudence. The existence of such a state, with its jurisprudence and legislation based on unlawful violence, is of course incompatible with the fundamental principle of law/right. In such a state, by definition, the right to self-defense is limited in such a manner as to put everyone at the mercy of the willingness of the government/authority to defend them. There is no doubt that the willingness of, say, the vast majority of judges, to defend the members of certain groups or classes, was not the same at all times. Nor can it be doubted that a strict application of, for instance, the principle of contract, in a certain *legal* context, can easily provide an excuse for defending certain national or class-interests. But judges (legislators) in a monopolistic system of jurisprudence, are themselves guilty of implicit theft whenever they use their positions of power in order to express their "sense of social justice", by forcing some party to provide not previously agreed to benefits to another party. Such a judge (legislator) makes use of the means of another without permission, in order to realize their own goals or values. In any rational order of right, the exploited party would be able to sue said judge. In an order based on violence and monopoly of "the protection of right", that of the state, this is nigh-on impossible. The disadvantaged party has no choice but to turn to the same organisation that the first judge was a part of.

In a rational order of right/law there is neither a monopoly on legislation nor on jurisprudence. In such an order, scholars of right/law devise typical or standard contracts, which are acceptable to as large an audience as possible, as well as systems of procedures they attempt to market to as many courts as possible. For their income, courts must rely on their own reputations of impartiality, as in a free society* no-one can be forced to appear before any *particular* judge if they are willing to peacefully resolve the conflict they find themselves in. This means the parties involved must choose their judge by mutual accord. Thus, implicitly, they must mutually agree on the rules of procedure and interpretation, and the rules of supplementary right/law in general, on the basis of which their conflict will be settled. Judges with a reputation of partiality, carelessness, lethargy, etc. will regularly be rejected, and will have to content themselves with trivial cases, or resign. The massive inefficiency of the monopolistic system are thus impossible, as here too, competitive pressure will do its selective work.

A final point I wish to raise in this discussion of egalitarianism is the matter of *pauperism*. This matter beautifully illuminates the contradictory nature of egalitarianism. Here, I use the word "pauper", not as a synonym for the "poor person", but in its older meaning the *Oxford English Dictionary* describes as "(since 1775) some who lives off alms, off public welfare" (which is of course not meant to signify the officials that administrate the system of public welfare). Pauperism is often a consequence of various egalitarian policies/measures, such as those mentioned above, having led to a rapid waxing of the class of paupers, which is to say of people who derive the majority of their incomes from the state and its forced "charity" (whatever the particular name or term that is used). Poverty and pauperism are two wholly different things: some paupers are pretty well-off, and many of those in poverty are not paupers. In a country such as the USA, where, starting in 1964, a "war on poverty" was "fought" for many years by means of a massive transfer of income, the percentage of people below the poverty-line was reduced from a large 13% to 3%, but pauperism increased hand over fist.[28] Similar evolutions took places in West-Europe. Specific to pauperism is that paupers

28 See M.N.Anderson: Welfare. The Political Economy of Welfare Reform. Stanford Calif. 1981, p.24.

get stuck in a sort of social-economic ghetto, in which they lose their independence and become unable to do anything but parasitize the rest of the economy. The paupers are the victims, primarily of all sorts of economical pressure-groups, but also of social bureaucracy, which benefits from making sure that there are enough paupers, and which is in any case little inclined to encouraging self-sufficiency in their clientele (their own raison d'être). Pressure-groups marginalize many people (*future* would-be-renters, *future* workers, in the examples above), who then later become a new politically profitable target demographic "to be helped" with various interventions (fiscal or otherwise) in the economy of the other citizens.

The essential problem of pauperism is that paupers are in fact living as recipients of taxes, making them part of the class of tax-receivers. As such, it is nearly impossible for them to lose their status as a pauper without stepping into the class of tax-payers, which means that they lose their "right" to benefits and support. The result is that paupers face effective marginal tax rates that defy all imagination. Practically speaking it means that whoever is caught in the trap of pauperism, will find it very difficult to get back out without making very large sacrifices.

In order to clarify the problem, we can take the following example. (Ed: the original example used, sadly defunct, franks... I refuse to substitute.) Let's say a certain pauper enjoys a benefit payment of x fr. and that he finds work which would make him 20.000 fr per month. This puts him above the upper limit of income, and would lose him at least a part y of his benefits. Let us say that, at the end of each month, he would be left with x + 4400 fr as net available income. So, x + 4400 = (x-y) + 20000 and y = 15600. This is not an unrealistic example. The loss of benefits to the tune of 15600 fr per month has the same final effect on the net available income as a tax, and it can be expressed as a percentage of additive income from work (20000 fr in this case), so as a marginal tax-rate in relation to the income from work.[29] The pauper in this example is facing a marginal tax-rate of 78% - a rate which would leave even multimillionaires in many countries dazed and stupefied: in Belgium in 1976, the marginal rate on the highest slice of incomes (basic rate, increased rate and community-taxes) totalled to 75.6%

29 M.Anderson op.cit., Chapter 2

(tax-rate on the part of income exceeding 4 million frank).

Considering the complex structures of the wellfare-system and the various schemes for reducing benefits in moneys or goods, or subsidies, it is no doubt possible to arrive at various different numbers. 78% is not a maximum, not even 100% is. It is probable that in such circumstances, more than a protestant work-ethic is required in order to get the pauper from our example to consider regular, legal work, which will keep him away from home for at least 8 to 10 hours a day, five days a week (including transportation) for an increase in income of 4400 frank (in the presupposition that there are no additional costs associated with the work, such as clothing, transportation etc.) to be worthwhile. Neither is it a very daring undertaking to speculate as to the motivation, discipline and loyalty of such a potential worker.

On the contrary: it requires an extraordinary degree of thought for the future, of optimism, self-confidence, and self-appreciation, for someone in those circumstances to decide to make those sacrifices imposed upon them, hoping to make a career and thus get out of the trap of pauperism.[30] These are not exactly the characteristics that define the majority of paupers. Thus it is very unlikely that people with such an attitude ever end up in the situation of a pauper, or stay there long enough to acquire the psychological characteristics of a pauper. The fact that a higher than normal degree of drive for the future is needed to escape the trap of pauperism, does mean that those who have reached a certain age, are likely to correctly asses the hopeless nature of their situation, and thus accept it.

30 Cf. Banfield: op.cit. bij p.415, 52–76; Banfield: “Present-Orientedness and Crime” in Barnett & Hagel (eds.): Assessing the Criminal. Cambridge, Mass. 1977, 133–142. A special aspect which deserves mention is that fact that the person who is "socially insured" in a system of "social security" does not acquire a property-right to the capital they save up, and as such they cannot leave it to their children (or anyone else). They only have a right to the benefits as long as they live (potentially with adaptations for a non-remarried widow(er) or children not of age). This is all in stark contrast to the workings of a system of private insurance, and is potentially of great importance in explaining certain rigidities in the phenomenon of social mobility. Such an organisation of the system of social security discourages the adoption of a horizon of time which encompasses not just one's own life, but also the life of one's children. It also has a negative impact on familial solidarity. These tendencies are additionally amplified by many other social measures which reward "short-sightedness". The greatest victims of minimum wage laws, those that are priced out of the market, the "marginal employees", are not very motivated to escape the system if they have almost immediate access to a relatively high replacement income through unemployment benefits.

the wall of taxation surrounding and trapping the paupers is inherent to the system of social security, and to any egalitarian programme which makes use of this system. If you are unwilling to keep paying the benefits regardless of the income of the beneficiary, then the only option is to start reducing said benefits in some way at some point. The only "solutions" are purely theoretical: either you can reduce benefits such that what one loses by working is in any case insignificant; or you can reduce the marginal "social" tax-rates by slowing the reduction of benefits as income from work increases. The first option compromises the whole concept of an assured minimum towards existence; the second implies a phenomenal increase of the burdens of taxation (either through fiscal means or by inflationary means). Since not just the chosen poor layers of society will have to be maintained from public funds, but an even greater number of people will have to be given some benefit-payments. It would be difficult to accept a situation in which A makes 20000 frank per month, while getting no benefits, while his colleague B makes 20000 frank per month and additionally receives a benefit payment of 2000 frank, simply because B was at some time a receiver of benefits and A was not.

The trap of poverty of pauperism is hard to escape, but easy to fall into. It has, as it were, a suction-effect, which can be very strong, especially in times of economic recession. We should also consider that the long-term effect of such a global system of benefits is very depressive in an economic sense. It is in fact a positive feedback loop, bringing more and more people into a parasitical relationship to the rest of society*, while the latter become less and less willing and able to bear that burden. If some can receive 20000 fr per month from public welfare (in whatever form or under whatever name), how much sense does it make to work for 20000 fr per month? Or for 21000 fr per month, or even 25000 fr or more (especially when accounting for the ease of earning some extra money through the "black" labour-market if you have the time, and also and even more so the amount of domestic production "for own use" where a full-time employee must turn to the market or sacrifice nearly all of their free time).

As the difference between "receiving" and "earning" gets smaller,

the value of income from work in relation to the value of free time relinquished by working, decreases. It does however, make no sense at all to try to maintain a large difference between these two by creating laws on minimum wages which have no other effect than to price "marginal" workers (especially young people, women, unschooled people, etc.) out of the market, leaving them no option but pauperization. They can still "receive" but they can no longer "earn". Few among them have the praxeological insight to appreciate the long-term effects of such a policy, so that the greatest victims of such policies are often also its greatest supporters. For someone with a short time-horizon, it is completely rational to demand both high minimum wages as well as high unemployment benefits. But, the first creates unemployment, which is to say it reduces the number of "actives", while the second increased tax-burdens on that dropping number of actives. If however, one wishes to motivate paupers to leave the system, the difference between "receiving" and "earning" must be greatly increased, but this is a policy that goes against not just egalitarian philosophy, but also very concretely against the interests of the "social bureaucracy" that manages and subsists of the system. The costs of said social bureaucracy are phenomenal. In 1965 the American government (national, federal and local governments combined) were spending 77 billion dollar a year on various "social" goals. In 1975, it was 286 billion dollars, which is about an increase of 210 billion. Officially about 12 percent of the US population (+/-26 million) is below the poverty-line. This would mean that a direct redistribution in cash of aforementioned 210 billion dollars among all the "poor", would net each poor person a stipend of over 8000 dollars, an amount which far exceeded even the most "liberal" poverty-line. This would leave about 3000 dollars left over per "official" poor person, which could be used for administrative costs. This amounts to 36 percent of the poor person's stipend, which ought to be enough to pay the officials involved.

Of course 278 billion in 1975 was more than enough to turn every poor person into a relatively well-off citizen, while also maintaining an adequate social bureaucracy. The money was not applied toward this social goal, however. Poverty was, of course, virtually eradicated (less than 3 percent of Americans is below the poverty-line at present, according to some researchers), but not in what could be called an efficient way: large parts of this amount are spent on bureaucracy and given to people who

are anything but needy (not all of the renters, widows, orphans, handicapped, etc. are "economically weak"). Furthermore, the entire system is set up in a way that encourages pauperisation. It is also remarkable that while scientific research (based on all sources of income) estimates the number of people below the poverty-line to be between 6 and 12 million, while official statistics (based on reported income) consistently report numbers close to the magical 12%, which is to say that they create the impression that, despite the massive transfers, the number of "poor" is not decreasing, and may even be increasing. Such an impression of course fits perfectly into the strategy of a bureaucracy that wants to expand its budget. As so often happens, the means has become an end on its own, the focus of a powerful interest-group with, for a power-base, the growing mass of paupers, and which finds in the "acquired rights" of the inherently fraudulent "system of social security" the links from which they may forge the chains of the next generations.[31]

31 W.Shore: Social Security: The Fraud in Your Future. New York 1975. P.J.Ferrara: Social Security: The Inherent Contradiction. Cato Institute. San Francisco 1980. In the usual terms of economics or insurance, nearly all social security systems are bankrupt. The certainty they offer is neither economic nor social, but rather non-existent. After all, the only way the current payers of "social contributions" will get what they paid for is if future governments are able to take enough from future taxpayers to compensate the current taxpayers for the fact that they could not productively invest their savings through conventional (private) insurance. The Repartition-system of social security means that the current contributions are not applied toward increasing the future standard of living (which is, after all, the very substance of social security as a goal/ end), but towards the increasing of current consumption ("buy now, after all, your future is assured"), thus implying a decrease in future production (as only that which is not immediately consumed can be invested). Calling speculations about the relationships between future governments and future taxpayers "security/certainty" is a treacherous thing, especially when it concerns a system which has a negative influence on the size of the future taxable mass. Refer in this regard to several studies done by M.Feldstein, especially “Social Security Wealth”, cited in Ferrara, pp.75–112, passim. It is true that the introduction of the system of repartition has been very beneficial to the generation which did the introducing since they could, in one fell swoop, dispose over not just an interest-generating fund created by their own contributions, but also over "social contributions" of the next generation. It is however evident that this benefit is a one-time thing. For every subsequent generation will no longer have their own fund (as their contributions were consumed by the previous generation), and as such they can only dispose over the current contributions of a system which no longer generates interests. The introduction of repartition was however a requirement to be able to demonstrate the so-called superiority of the system of social security at paying out sensational "benefits". Economically speaking, it was of course a totally irresponsible and even criminal act. Such actions can however not be deemed unexpected in a system for which eventually, no-one is responsible. Neither the administration nor the ministers in subsequent governments bear any economic or financial responsibility for their policy/ management. This responsibility is totally and completely pushed unto the taxpayers, who are of course forced to comply.

Martin Anderson summarizes the state of affairs like this[32]:

> "In the frenzied attempts to help the poor, we have created a situation in which the poor in America are subject to a markedly higher tax-rate than the non-poor... The proliferation of social programmes has created a very high marginal tax rate for those who are least well off. There is a veritable "wall of poverty", that effectively eliminates any financial stimulus towards labour, for millions of Americans. Though these people are able to fulfil their fundamental needs, they are very much dependent on the state, and there is nigh on no hope for them to ever vanquish their dependence. They constitute a new caste, of Dependent Americans."

It is hard to form a clearer image of the inherent contradiction of egalitarianism as a strategy for creating "freedom through economic equality". Yet many observers seem to not have been able to become conscious of this. Misled by the marxist Utopian vision of a society* in which "society regulates general production, and people are free to do what they want", they plead for a generalization of the system of social security, where any and all control and selectivity has been abandoned, giving every person an unlimited claim to means. In so doing they believe that the current system of clientele, with its inherent favoritism and paternalism, can be sanitized. The moral consequences of such an unrealistic vision are clear indeed. Many people are taught that they have an inalienable right to parasitize on the production of others, and that true progress consists of generalizing and "democratizing" the parasitical lifestyle that was once the privilege of a small ruling class of feudal landowners. Evidently, such conceptions are logically absurd, and any attempts to realize them are doomed to failure. That which is logically impossible is also sociologically impossible.

Realizing that there is a distinction between poverty and pauperism is fundamental for properly understanding the necessary failure of egalitarianism. Poverty is eradicated through production and exchange, pauperism can be fought by having a greater respect for each person's right to self-determination. This realization is of course not a novel one. The dangers of pauperization was already explicitly pointed out in the classic report of the Royal Commission which was tasked with researching the economic and social consequences of the system of care for the poor in the United Kingdom

32 M.Anderson: op.cit. bij p.421, p.50, 43.

(1832) The well-known *Speenhamland* plan, which was introduced in the last decade of the 18th century, made an attempt to provide every person with an income "according to need". In order to do so, a married man was assigned a higher income than an unmarried man, and a household with many children was assigned more than one with few children. This of course encouraged to breeding of children (since each child constituted a claim on the rest of society*), led to widespread and large-scale child neglect, and created massive tensions in a society* which was already in the throes of a massive evolution, during the so-called industrial revolution. These systems were plagued by shocking abuses, both from the paupers ("They cheat us on all hands", came the testimony of an administrator of the district of Saint Giles, Cripplegate, London, to the commission) as well as from the employers, who got the opportunity, or were even encouraged, to push part of their labour-costs unto the taxpayer. This made the formation of a free, competitive labour-market nigh on impossible (so that, according to the marxist definition, we cannot speak of a capitalist economy in England in 1834), and drove a massive part of the population into the trap of pauperism. As the historian Karl Polanyi wrote in *The Great Transformation*[33]: "The 'right to life', as espoused in Speenhamland, turned out to be a hopeless trap". However:

> "No policy was ever more popular. Parents were relieved of the care for their children, and children became independent from their parents. Employers could keep wages arbitrarily low while the labourers were protected from hunger regardless of their willingness to work. Altruists applauded the system for, though it was not a picture of justice, it was still an expression of sympathy, while others found solace in the idea that compassion could not be translated into unbridled prodigality. Even the taxpayers started, slowly, to realize what the consequences are of a system that assigns everyone "the right to life". The consequences were terrible... Gradually, the entire rural population was pauperized."

The Speenhamland system was in fact one of the implications of the mercantilist concept of the managed economy of the Ancien Régime. It was an attempt to compensate for social-economic evolutions by means of fiscal and bureaucratic manipulations. The relative speed with which the Speenhamland system was unmasked and dismantled was a result of its total

33 K.Polanyi: The Great Transformation. op.cit. bij p.264, p.79

failure. Eventually the system lost the support even of the land-owners who were its main beneficiaries (as the stipends immobilised the rural population and thus maintained a large reservoir of cheap labour). How can we explain the fact that this lesson, from that first truly large-scale social experiment, was forgotten so quickly? In my opinion, the answer lies in the lasting attraction of social philosophy, which in fact leaves no room for a coherent individualism. Among those who resisted the burgeoning system of the modern welfare-state, there arose a gradual schism between the "left-wing" and "right-wing" critics. The latter mainly criticized the inefficient and forcible redistribution of wealth, as well as the undermining of the traditional values embodied in familial, communal and religious solidarity. The former focused their assaults more and more on the insufficiency of the system, on the demoralizing pauperizing effect of public welfare, on the detrimental effects of long-term dependence on the self-respect of the clients of this system. The former started to plead for more controls, stricter conditions, greater selectivity and for a more paternalistic approach in general. The latter advocated for less paternalism, for an unconditional "right to support", and for more money in general[34]. Even though both groups of critics voiced valid objections which are not in contradiction with eachother, they still lost sight of the totality because of their partial approach. Thus they got embroiled in discussion about the relative weights of these issues, rather than focusing on the fundamental causes of poverty itself, namely the lack of freedom which prevented many people from developing their capabilities.

34 An echo of this idea in Charles A.Reich: “The New Property” Yale Law Journal 73, 1964, who argues that in a society of welfare-recipients, “individual freedom” can only be guaranteed if the government does not impose any conditions for this support. In this context, also consider the of-touted criticism of the so-called "state of need" that implies that the person that lays claim to public support extensively prove their neediness. Resistance against this so-called humiliating infraction of the "privacy" of the would-be welfare-recipient is, strangely enough, almost never extended to a resistance against the infraction of the "privacy" of the tax-payer who is expected to prove, in minute detail, that they are not needy.

EGALITARIANISM AND IMPERIALISM

The fundamental contradiction of egalitarianism is that it is willing to accept a large measure of inequality in the "political" sphere, which means to say a strong state, in order to guarantee economic equality. Sometimes they even speak of a "compensation-principle": "political" power should be distributed in such a way that it compensates for the relative lack of "economic" power. It is evident, however, that there is no spontaneously functioning mechanism which can achieve this trade-off. Both reason and experience teach us that societies* in which large concentrations of political power are possible, economic and political inequalities tend to coincide. Political power can and will be used to protect the interests of more economically powerful groups, by "political" means. This means to say: by means of control over the legislative and executive branches of the authorities in the state. What should we think of those who wish to subject "economic powers" to oversight by the state, so as to prevent the state from becoming subjected to the oversight of economic powers?

The relationship between egalitarianism and imperialism can be best understood if we understand the concept of "egalitarianism" in its broad sense, as reffering to any doctrine which posits that the power of the state should be applied to the end of maintaining a certain distribution of wealth. Bismarck's *Sozialpolitik* was certainly not aiming for an "equal" distribution of wealth, but it was still egalitarian in a more dynamic sense: the intent was to maintain certain ratios/proportions, despite any evolutions in the markets, and in so doing, maintain the economic basis for the extant social hierarchy of the soziale Königtum der Hohenzollern. The legitimacy of such a broad interpretation of the concept "egalitarianism" is certainly defensible. This is especially so when considering that, if the power of the state is sufficient to distribute equally, it is equally capable of distributing unequally. Furthermore many egalitarians, striving in the long term for an equal distribution, want to enforce an unequal distribution of tactical and other reasons.

Characteristic of this egalitarianism in the broad sense, is the idea that "equality" is something which must be brought into existence in some artificial manner, through the violence of the state. We can find this idea both in a person like Plato, but just as well in a thinker of a wholly different nature like Rousseau. Both see the state for what it truly is, an imperial, military structure - not in order to condemn it as such, but in order to underscore its essential virtue.

Plato's republic is fundamentally a soldier's republic - the "guardians" form the backbone, and the shield, and the basis of it. It is from their ranks the ruler (the philosopher king) is chosen. The person who "careful examination shows to have acted all his life, with the greatest fervour, to what they consider to be beneficial to the state", the person who considers the interests of the state to be identical to their own. The ruler must be able to state, without reticence and with true conviction "L'état cést moi" (red: I am the state). The ambiguity of this formulation is clearly the same ambiguity as that of egalitarianism itself (more generally: the ambiguity of the attempt to connect the abstract principle of rule with the person of the ruler, or of the organisation in which this principle in embodied in a certain way).[35]

The upbringing of the guardians is the most important task in the state. In his later work, "The Laws", Plato remains loyal to this idea. In the famous chapter about military duties, in which Plato seemingly is only talking about the armed forces, time and time again we can see that the military is made the norm for civilian life:

> "Now for expeditions of war much consideration and many laws are required; the great principle of all is that no one of either sex should be with-out a commander; nor should the mind of any one be accustomed to do anything, either in jest or earnest, of his own motion, but in war and in peace he should look to and follow his leader, even in the least things being under his guidance;... and in a word, not teach the soul or accustom her to know or understand how to do anything apart from others. Of all soldiers the life should be always and in all things as far as possible in common and together; there neither is nor ever will be a higher, or better, or more scientific principle than this for the attainment of salvation and victory in war. And we ought in time of peace from youth upwards to practise this habit of commanding others, and of being commanded by others; anarchy should have no place in the life of man or of the beasts who are subject to man."[36]

This passage greatly impressed Rousseau, who also claimed Plato's remarks on the education of the guardians to be "the greatest extant treatise on education". In his Considérations sur le gouvernement de la Pologne, as well as other writings, Rousseau is full of praise towards this same subjugation of the individual to the societal hierarchy of

35 Plato: The Republic III/412d-e
36 Plato: The Law XII

goals. He prefers taxation "in natura", which mandates that a citizen occupy themselves with certain tasks, and in so doing imposes the condition that each person should identify themselves by the task which has been imposed on them. This required permanent, unceasing social pressure:

> "Every citizen will feel the eyes of his fellow man upon him, every moment of every day... Everyone will be so wholly dependent on the publics appreciation that no-one will be able to do, acquire or achieve anything unless it carries the approval of all. The resulting competition will induce a gestation which in turn will elicit a patriotic motivation which will lead people to rise above themselves, like nothing else could. "

The totalitarian implications are clear enough and would lead later authors like Alexis de Tocqueville and John Stuart Mill to argue for protection of the individual from "the tyranny of the majority, of the ruling sentiments and opinions", so as to safeguard personal initiative and individual self-development.[37]

The obsession with control is manifest both in Plato as well as in Rousseau. The lives of the citizens of a well-led state hold no surprises. The ideal citizen is an abstraction, a person bereft of everything that makes them into an individual. To Rousseau, as well as to Plato, the Legislator is the great educator. This Legislator manages to, as Rousseau put it in his Du Contrat Social, "transform each individual, which in and of itself is a perfect and solitary unit, into a part of a larger whole from which that individual receives, in a certain sense, their life and their being".

The legislator must "deny man its own powers, and replace these with abilities that are alien to them, and of which they can make no use without the help of others". Any who would resist this, are guilty of incivism.

The state is contra naturam: it is absurd to want to cut down the state to the measure of man. Those who hold the state as a value must be willing to cut down man to the measure of the state. The order of the state is the norm for the reconstitution of people as citizens. That which is human must be equalized with that which is of the state. The essence of the state is the self-alienation of each and every person. The state formalizes and transforms the economic interdependence of all people into the dependence of all citizens on the state - the

37 Rousseau: Considérations sur le gouvernement de la Pologne (1771)—J.S.Mill: On Liberty (1859)—A. De Tocqueville: De la Démocratie en Amérique. Vol.1 (1835)

citizen, as an abstraction, is a being without its own "I", devoid of any identity. Thus, the citizen in and of itself is a non-entity, to whom dependence is not a relationship, but a characteristic property. This self-alienation is the precondition for the existence of the good society from which legislation derives their normative meaning. As long as people are still themselves (possessing a "physical", but not yet a "legal-persona"), state-compulsion is de facto legitimized: for the citizen as a citizen, this compulsion is superfluous, since the citizen as a citizen is defined by legislation, and legislation forms the principle for their actions. This presentation of the individual person as a deviation from the norm, which obviously presupposes that there is a norm/measure valid for all people, is the foundation of the egalitarian endeavour to make people fit into some scheme/framework, as well as the desire for a power whose main goal is the realization of this scheme. The specifics of this scheme are not truly salient to the matter. What is important however, is the desire to artificially bring said scheme into being, manu military if need be. The demand for equality implies, to the egalitarian, the demand for power. Christopher Jencks wrote the following:

"If we want a substantial redistribution, we will have to not only politicize the matter of income-inequality, but we must also change the fundamental presuppositions in terms of which people define their mutual responsibility for each-others well being…

As long as we as egalitarians assume that public policy cannot directly contribute to economic equality, but we rather constrain ourselves to working indirectly by ingenious manipulations of marginal institutions like schools, our progress will be trivial. If we wish to leave this tradition by the wayside, we will have to gain political control over those economic institutions which shape our society*."[38]

But, what does this mean, other than that the egalitarian is not satisfied with political power, but wants economic power to boot? The egalitarian is not satisfied with controlling already politicized institutions, they wish to additionally control not-yet-politicized institutions. For, as long as there are domains that escape their control, the egalitarians will come to the conclusion that those domains give expression to important inequalities. Consequently, they will claim that only mere "trivial" progress has

38 Christopher Jencks e.a.: Inequality: A Reassessment of the Effect of the Family and Schooling in America. New York 1972. cited in K.S.Templeton Jr. (ed.): The Politicization of Society. Indianapolis 1979, p.188

been made. But this control itself cannot be controlled and equalized. This is what creates the dilemma: political equality or social equality. Either we hold political equality constant and let social and economic competition take its course, accepting all resultant temporary and changing inequalities. Or, we hold social and economic equality constant, letting all the forces, tendencies and trends which produce inequality express themselves in the political struggle for power. But, if we choose the second alternative, how could we guarantee social and economic equality? The only (purely "theoretical") way out of this dilemma available to the egalitarian, is imperialism: the position that competition cannot be allowed in either economic nor political respects.[39]

The original meaning of the term "imperialism" is "a centralized, bureaucratic state" (referring to the Latin imperium). It is only in the second part of the 19th century that "imperialism" became associated with the exercising of direct control by some strong national state over areas which are outside of their borders (colonies or vassal-states). In his classical study, The Diplomacy of Imperialism (1935), William Langer still uses the original meaning, referring to dictatorship, centralization, administration, Caesarism and Bonapartism, even though he limits his research to the phenomenon of international imperialism. But even this international imperialism cannot be detached from the egalitarian trends which were finding expression in those days, in the agitation for what we now call the wellfare-state. After passionate pleas by free

39 Refer to the remarkable study by W.Marina: “The ‘E’ Factors in History: Equality, Envy, Egalita-rianism and Empire”. Modern Age. 18,2,1974. (Ook in Templeton, op.cit., 129–165). A.Flew: “The Procrustean Ideal: Libertarians vs. Egalitarians” Encounter, 50, 1978, 70–79. also the conclusion of A. De Tocqueville: De la Démocratie en Amérique. Vol.2, iv/3, cited from the translation by H.Reeve-Francis Bowen-Phillips Bradley: “Thus by two separate paths I have reached the same conclusion. I have shown that the principle of equality suggests to men the notion of a sole, uniform, and strong government; I have now shown that the principle of equality imparts to them a taste for it.” Also Vol.2, Iv/6: “Above this race of men stands an immense and tutelary power, which takes upon itself alone to secure their gratifications and to watch over their fate. That power is absolute, minute, regular, provident, and mild. It would be like the authority of a parent if, like that authority, its object was to prepare men for manhood; but it seeks, on the contrary, to keep them in perpetual childhood: it is well content that the people should rejoice, provided they think of nothing but rejoi-cing. For their happiness such a government willingly labors, but it choses to be the sole agent and the only arbiter of that happiness; it provides for their security, foresees and supplies their necessities, facilitates their pleasures, manages their principal concerns, directs their industry, regulates the descent of property, and subdivides their inheritances: what remains but to spare them all the care of thinking and all the trouble of living? Thus it every day renders the exercise of the free agency of man less useful and less frequent; it circumscribes the will within a narrower range and gradually robs a man of all the uses of himself. The principle of equality has prepared men for these things; it has predisposed men to endure them and often to look upon them as benefits.”

traders such as Ricardo, Cobden and Bright, Bastiat, and others against any excuse for centralism, economic interventionism and colonial imperialism, the imperialists had their say with the exact opposite message: national unity and prosperity for all are only possible within the framework of an aggressive foreign policy. This was the main theme in the imperialism of egalitarians like Chamberlain and Bülow. The colonial expansionism of the 19e century was essentially "politically" instead of "economically" motivated. It was extremely nationalistic and militaristic. The hobby horse of "naval officers and politicians rather than... businessmen" (Ch. Beard)[40] International imperialism was the logical consequence of imperialism as a general phenomenon of the expansion of state power: state power, being the formalization of exploitation and oppression in a regular fiscal system, creates lasting class-contradictions which, Chamberlain and Bülow sensed, could not be sustainably resolved unless all the classes could be united in an attempt at exporting the exploitation and oppression, so that the citizens themselves could somewhat share in the proceeds of the fiscal procedure.

In the introduction to this book I have drawn attention to Saint-Simonism. It is necessary to do so again. Saint-Simonism - like most early socialist and egalitarian movements in the 19th century, may be considered a typical imperialist movement. Saint-Simons concept of a scientifically planned society fully conforms to the classical definition of imperialism. It is a well known fact that Saint-Simon and Enfantin were favourable towards Bonapartist politics. There was in fact no dearth of authors who, more or less following in Rousseau's steps, praised the latter's theory of the good legislator as a reformer of human nature as a practical scheme for a top-down revolution. Usually this was done in order to achieve a clearly egalitarian program. No matter how fascinating this age of intellectual reaction may have been - and it would prove to be a reaction capable of turning a five century old trend in the mental life of Europe - it is not my intention to deeply consider the relationship between egalitarianism and imperialism in this historical context. On the contrary, I want to draw attention to what came before, namely the scientific study of humans and communities towards the end of the 18th century,

40 Ch.Beard: A Foreign Policy for America. New York, 1930, p.72.

so as to give a perspective on the scope of the intellectual regression in this area. The state of knowledge in that time was, I aim to content, sufficiently far advanced to clearly lay bare the aforementioned internal contradiction of egalitarianism, and to remove any grounds to the belief in the possibility of an omnipotent, all-good, and all-knowing state.

What these days is called "new political economy", the idea that the normal economic postulates of behaviour should also be applied to politicians and bureaucrats, to the leaders of various pressure-groups, and not just to producers and consumers in the private sector, is in fact as old as methodological individualism itself.[41] It was an implicit premise of those politial thinkers who, reacting to the absolutism and its accompanying versions of egalitarianism (e.g. mercantilism), looked for institutional guarantees to control power, thus bringing into being the idea of a free community/society based on the right to development. Politicians and bureaucrats are people too, they reasoned, and if a government is needed to keep people in check and to control them (as was the position of traditional philosophy of man and society*, then it is also necessary to limit and control the kings, politicians and officials. The problem is as old as the state itself: Quis custodiet ipsos custodes? Who watches the watchmen? The question is rather if the true breadth of the problem could be appreciated before Machiavelli's revolutionary interpretation of "the art of rule" had been expressed. Machiavelli equated the art of rule with the art or skill of the ruler at manipulating the people in his domain, at "using" them for the good of the ruler himself. Power for its own sake was the motto of a machiavellian policy, and Machiavelli was able to make this sound plausible by holding to the old presupposition: that power is "necessary" for human co-habitation, that a strong state eventually benefits everyone, both the rulers and the ruled over. Thus, to Machiavelli the first responsibility of the ruler was to guarantee and strengthen the power of the authorities in the state, without allowing himself to be distracted by considerations of morality or natural law.

It is evident that Machiavelli, in taking this position, definitively undermined any attempt at legitimizing power in a normative way.

41 A good overview may be found in in H.Lepage: Demain le capitalisme. Paris 1978, en Lepage: Demain le libéralisme. Paris 1980. Also R.B.Mackenzie’s often used handbook The New World of Economics is a good introduction.

For, if the relation of the ruler towards his subjects is characterized by a farreaching amoralism, the same is true of the relation of the ruled towards the master. In other words, Machiavelli destroyed any possibility of providing a foundation for a political duty of obedience. His demystification of rule paved the way for a "scientific" study of rule, but also for a total change in the attitude of the subjects towards the ruler. The ruler is no longer a superior being, so the attitude of the subjects towards the ruler has to be determined by the judgment of those subjects about the ruler's utility to their interests. Spinoza wrote:

> "Moreover, Machiavelli perhaps wished to show how cautious a free multitude should be of entrusting its welfare absolutely to one man, who, unless in his vanity he thinks he can please everybody, must be in daily fear of plots, and so is forced to look chiefly after his own interest, and, as for the multitude, rather to plot against it than consult its good. And I am the more led to this opinion concerning that most farseeing man, because it is known that he was favourable to liberty, for the maintenance of which he has besides given the most wholesome advice."[42]

The ruler uses his subjects, but the reverse is just as true. Rulers and subjects play a game with eachother: the former want to rule, the others want to escape rule. In the best case scenario, claims Spinoza, there is a balance between these two tendencies. This balance requires both parties to play wisely however: a ruler who wants too much power will be brought low, the people that want to much freedom will lose all their freedom. The lust for power and the urge to rule are facts that should be taken into account, but they are no more than simple facts. Spinoza pointed out that the application of the basic rule of a technological conception of science - that one must obey nature if one wishes to control it - in the domain of rule, does not only mean that the ruler who wishes to gain the maximum possible from their rule must take into account human nature. It also means that those who judge freedom highly and wish to safeguard it must do the same.

> "But if human nature were so constituted, that men most desired what is most useful,

42 Spinoza: Tractatus Politicus. v/7

no art would be needed to produce unity and confidence. But, as it is admittedly far otherwise with human nature, a dominion must of necessity be so ordered, that all, governing and governed alike, whether they will or no, shall do what makes for the general welfare; that is, that all, whether of their own impulse, or by force or necessity, shall be compelled to live according to the dictate of reason. And this is the case, if the affairs of the dominion be so managed, that nothing which affects the general welfare is entirely entrusted to the good faith of any one. For no man is so watchful, that he never falls asleep; and no man ever had a character so vigorous and honest, but he sometimes, and that just when strength of character was most wanted, was diverted from his purpose and let himself be overcome. And it is surely folly to require of another what one can never obtain from one’s self; I mean, that he should be more watchful for another’s interest than his own, that he should be free from avarice, envy, and ambition, and so on; especially when he is one, who is subject daily to the strongest temptations of every passion."[43]

A demystification of rule just as explicit is expressed in the following well-known passage from one of David Hume's essays, On the Independence of Parliament:

"Political writers have established it as a maxim, that, in contriving any system of government, and fixing the several checks and controls of the constitution, every man ought to be supposed a knave, and to have no other end, in all his actions, than private interest. By this interest we must govern him, and, by means of it, make him, notwithstanding his insatiable avarice and ambition, co-operate to public good. Without this, say they, we shall in vain boast of the advantages of any constitution, and shall find, in the end, that we have no security for our liberties or possessions, except the good-will of our rulers; that is, we shall have no security at all."

"It is, therefore, a just political maxim, that every man must be supposed a knave: Though at the same time, it appears somewhat strange, that a maxim should be true in politics, which is false in fact."[44]

43 Spinoza: op.cit. VI/3

44 D.Hume: ‘On the Independence of Parliament’ Essays Moral, Political, Literary (1749)

This premise, that the rulers, the ones in power, are also but human, and thus should be considered as such in the context of the philosophy of man and society*, automatically led to an increasing attention to the institutional context of human action. It attained its full relevance in the work of Adam Smith, The Wealth of Nations. Smith's fundamental insight was that if people have the occassion to dispose over the means of another, they will tend, as much as they can, to use said means towards the achievement of their own goals, whatever these may be. While doing so they will additionally attempt to dump risks and negative consequences on others, while making themselves the benificiaries of any positive consequences. Smiths argumentation for a "system of natural liberty" was founded on this insight: the system of individual property-rights had the benefit of making everyone bear the consequences of their own actions, through the juridical protection of the property-rights of all others, thereby providing a motive for responsible behaviour. Smith's criticism of the mercan-tilist system (of a directed or mixed economy), with its imperialist and egalitarian tendencies, was that it provided too many people the opportunity of making others bear the consequences of their actions, causing there to be a lack of a negative feedback loop to pressure the rulers and their bureaucrats into refraining from failing to appreciate (orig: miskennen, misknowing) others possibilities and accomplishments.[45]

The mercantilist system, which was in full swing again a hardly a hundred years after the death of Smith, is dangerous and irrational. Dangerous because so much depends on the competence and moral characters of the few in protected and privileged key-positions capable of intervening in the lives of many others. Irrational because even competent and morally forthright functionaries are put into a position in which it is impossible for them to feel, in the flesh, what the consequences of their decisions are. One can learn by doing, but only if you aren't shielded from necessary feedback generated by the consequences of what one is doing. This shielding is however very present in the mercantilist system, in which decisions are made

45 Cf. Chris R.Tame: “Against the New Mercantilism: The Relevance of Adam Smith” Il Politico 43,4,1978, 766–775. G.G.Johnson: “The Relevance of the Wealth of Nations to Contemporary Economic Policy” Literature of Liberty 1,1,1978, 120. Zie ook E.G.West: Adam Smith—The Man and his Works. Indianapolis, 1977.

within the governmental sector, but consequences are borne in the private sector. The governmental sector is shielded from the consequences of the decisions it made because its income does not depend on the valuation of the "services" they render to the private sector by said private sector. Its income rather depends on its ability to, directly or indirectly, disown people in the private sector (by taxation, currency-debasement, or inflation).

Smith emphasized the fact that even competent, morally upstanding fuctionaries and politicians did not guarantee good policy. "Conservative" critics of the privileged and monopolized governmental sector, see its failure mostly as a failure in choice of personnel and of "mentality", which could be alleviated with a better selection and "education" of "public managers". In contrast to them, Smith took a position which would later be associated mainly to marxist insights: that one should account for the specific institutional context of human action. "I do not wish to disparage the character of the people in the East India Company, much less upon the characters of specific persons. It is the administrative context, the situation in which they find themselves, that I wish to criticize, not the characters of those who work within it. They are acting like you would expect people to act in such a situation, and the people who rant and rave at them would likely have done no better."[46] Many have wondered why Adam Smith, after having given such importance to the human capacity for sympathy and empathy, and other altruistic feelings, in his Theory of Moral Sentiments, limited the impact of human motivation almost completely to the striving for one's own material interest, in the Wealth of Nations. This is so much the case that many even got the impression that the entirety of the science of economics is founded on the fiction of the Homo Oeconomicus. This question can be answered in part by pointing out that in Smith's proposed system of natural freedom, even a purely selfish person would be forced to contribute to the well-being of others if they themselves wish to attain their own goals. This is the essence of Smiths theory of "the invisible hand" that rules this system of natural freedom based on respect for the right to self-determination of each. Smith contrasted this with

46 A.Smith: The Wealth of Nations. op.cit. with p.324, iv/7, pt.3 (Cannan, p.605 and following)

the mercantilist system, in which even the best of intentions are not enough to encourage general welfare. Even in the worst case scenario, in which people think only of themselves, the free market society* is superior to even the best possible scenario for the mercantilist system (which would be a scenario in which the motives and insights of the politicians, bureaucrats and their economic agents are above any suspicion of selfishness).

The rulers are human, just like the ruled. There is no a priori reason to presuppose that they are necessarily "better" or "worse" or fundamentally different than the ruled (or, to put it in economic terms: than the people in the private sector). Their situations, however, are different. Thus, so are all the factors limiting and influencing their decisions. Their entire epistemic context is different. They must, according to the theory of good governance, decide for others, and do so while thinking first and primarily of the general interest. But, of course, they must eventually make the decisions themselves, based on their own, possibly mistaken, hypotheses of what that general interest is. They must decide on the basis of their own values, their own information, their own expectations and preferences. In all this one should not forget that their status, their position, their income, is no so much, or not at all, dependent on the degree to which they succeed in doing that which the theory of good governance says they should do. Rather, it is determined by the degree to which they manage to make a positive impression on their bureaucratic and political superiors in the state-apparatus, or on the representatives and leaders of powerful interest-groups. It is these latter who truly decide over the former's fate and status. And these latter, too, are not directly subject to any form of true feedback starting from the rest of society*, since they aim to achieve their goals through use of the state-apparatus, which is to say through mediation by the privileged sector.

Even if there is feedback, this is usually delivered in some categorical fashion - through eg election-results or opinion-polls - rather than in marginal terms.[47] It may be possible to get some idea of how many people are "for" and how many are "against" a certain policy. But it is impossible to gain any insight in the real question of which price various people

47 Cf R.Mckean: “Property Rights within Government, and devices to Increase Governmental Efficiency” Southern Economics Journal 39, 1972, 177–186. Thomas Sowell: Knowledge and Decisions. op.cit. 137–144 (“Categorical versus Incremental Decisions”)

are willing to pay for the product or service delivered. There is a big difference between the question "Are you pro or against X?" and the question "How much are you willing to pay for an additional unit of X?". Even more so between the decision between showing yourself to be a pro- or opponent of X in the eyes of others, and the decision to pay a certain price at a certain time for a certain quantity and quality of X. What people are willing to say that they will do in barely specified, or non-specified, hypothetical circumstances is usually not what they are actually willing to do in actual circumstances in which they are confronted with real alternatives and real costs. Bureaucratic decision-making in the governmental sector almost always needs to do without relevant information about marginal quantities, with predictable results for the quality of this decision-making.

Add to the above the fact that the remuneration of the officials and decision-makers is not determined by the willingness to buy of the consumers for whom, according to the theory of good governance, said bureaucractic output is after all intended. This means that there is no available method for determining whether production is "efficient" or not. That is to say, efficient from the perspective of the public, not the bureaucrats themselves. Such organisa-tions can permanently operate "at a loss", and as such they will always be capable of generating a larger demand for their output than there would be if the consumers would have to pay the full price. This artificially inflated demand can then be used as an excuse for the bureaucrats to demand more means, in so doing driving up the losses per unit of output. In the competition among administrative departments for the control over the process of allocation of budgets, inefficiency in production is an important factor in power. That which would be deemed inefficient from the perspective of a non-embodied theory of good governance, is very efficient indeed from the perspective of real bureaucrats.

However, as Martin Ricketts correctly noted, The Wealth of Nations is very much more a criticism of the mercantilist system than a purely abstract approach to economic problems. Certainly, Smiths defense of capitalism was far from an apologia for "capitalsists" (about whom Smith has not a single positive word to spare in his entire book).[48] This systemic approach and criticism undermined the belief in the possibility of organizing the power of decision

48 M.Ricketts: “Adam Smith on Politics and Bureaucracy” in J.Buchanan e.a.: The Economics of Politics. Institute of Economic Affairs 1978.

making as a true keeper of the common interest. It is naive to believe the bureaucratic decision-makers would not make use of opportunities for maximizing their own goals, especially if they do not in fact posses effective information about the public they are supposed to serve, and what said public wants from them. Additionally, this public (unlike organized interest-groups) cannot know what is happening inside of the bureaucracies, nor can they form a judgment about the desirability and wisdom of particular decisions.[49]

Smith's analysis of the institutions relied implicitly on the principle of the right to individual self-determination of any person: the wealth of a nation cannot be ascertained by merely gauging the welfare of the elite or the governmental class. All people equally qualify for judging the economic system. Smith's conception of the right to self-determination was however neither explicit nor was it a potential anarchic basis, but rather a presumption in favour of the ruled against the ruler. In this sense, Smith was a true liberal indeed: a proponent of freedom under the law/legislation. He was also willing to ascribe a rather wide and broad role to the state. Not merely as a legislator, judge and policeman, but also as entrepreneur for public works. His defense of the individual right to self-determination was undermined by strong utilitarian tendency. This formed the basis for the idea that, concretely, in reality and under various circumstances, one should determine whether one should let "the market" run its course or whether the government should intervene. This idea of course raises the obvious question of who it should be, that makes this determination, whose judgment in this matter is decisive and why. This question was of course resolved to the benefit of the governing authority. Utilitarianism and idealism would, especially in England, largely repress the implicit individualism on which Smith's analysis

49 L.Mises: Bureaucracy. New Rochelle, N.Y. 1969 M.Weidenbaum & L.Rockwood: “Corporate Planning vs. Government Planning” The Public Interest. 4, 1977, 59–72 . Thomas Borcherding: Budgets and Bureaucrats: The Origins of Government Growth. Durham 1977. A.Downs: Inside Bureaucracy. Boston 1967. W.Niskanen: Bureaucracy and Representative Government. Chicago 1971. G.Tullock: The Politics of Bureaucracy. Washington D.C. 1965. E.Furubotn & S.Pejovich (eds.): The Economics of Property Rights. Cambridge, Mass. 1974, especially part 3. An essential insight is the fact that the "costs" which influence decisions are purely subjective: J.M.Buchanan: Cost and Choice. Chicago 1969. J.M.Buchanan & G.Thirlby: L.S.E. Essays on Cost. New York 1981. F.A.Hayek: “Economics and Knowledge”, Individualism and Economic Order. op.cit. bij p.12. J.Wiseman: “Cost and Decision” in Currie & Peters (eds.): Contemporary Economic Analysis. Vol.2, London 1980, 473–490. K.I.Vaughn: “Does It Matter That Costs Are Subjective?” Southern Economics Journal 1980, 702–715.

and criticism of mercantilism rested. Both schools of thought are very collectivist in their implications. Utilitarianism, with its slogan "the greatest happiness for the greatest number", very quickly came to mean that it is justified to make one person suffer in order to make another happy. This means that the boundaries that separate the one from the other have no moral relevance. The British idealism of Bradley, Green and Bosanquet even developed an ethical theory in which all individual differences were denied any and all moral significance.[50] It is evident that the ethical concerns against egalitarianism were thus forgotten.

Smith's institutional analysis of the state was sidetracked rather quickly as well, especially in France. There, despite the efforts of the Idéologues and their followers at demystifying the state, the reactionary imaginations of Saint-Simon and other "social reformers" would start to reign supreme. There, institutions and legislations were re-analyzed in terms of intentions and ideals instead of in terms of the specific contexts of choices they create. The political was once again wholly subsumed in the sphere of the mystical. The state was no longer an object of scientific research into the conditions and consequences of human actions and decisions. Instead it became an object of worship and idolatry, in the Saint-Simonist system even the instrument of science itself. Even before the final demise of the Ancien Régime, the absolutism of the new regime started in full swing. The tradition of imperialism was continued practically without interruption, both in theory as well as in practice, strengthened by egalitarian goals to boot. The idea of a neutral state as a passive instrument for the achievement of said goals won out over the idea of the state as a specific method which people employ in order to realize their aims at the expense of others.

Whatever the fundamental causes of this formidable revival of the myth of the state may be, it is certain that the democratic idea in its Rousseauisist form played a major part. The collectivist tendency of thought conceptualized the political problem as a struggle between "the majority" ("the people"), and "the minority" ("the aristocracy"), and saw in democracy no less than the transition between the rule of the minority over the people into the state in which the people rule themselves.

50 See the criticism by D.Norton: op.cit. with p.265, Chapter 3

This all means that the democratic state could not but be absolutist, and this in the name of freedom, no less. If the people rule over themselves, then constraining the power of the state is to rob the people of their freedom, to deny the people the right to dispose over themselves:

"Because the doctrine of natural rights was abused in the time of the French Revolution, do not ignore the fundamental right which every man holds in common for a chance of decent existence, but try rather to give it the sanction of law and authority, for it has the eternal foundations of justice and equity. Because State Socialism may cover very injurious and very unwise theories, that is no reason at all why we should refuse to recognise the fact that Government is only the organisation of the whole people for the benefit of all its members, and that the community may — ay, and ought to — provide for all its members benefits which it is impossible for individuals to provide by their solitary and separate efforts. I venture to say that it is only the community acting as a whole that can possibly deal with evils so deep-seated as those to which I have referred. When Government represented only the authority of the Crown or the views of a particular class, I can understand that it was the first duty of men who valued their freedom to restrict its authority and to limit its expenditure. But all that is changed. Now Government is the organised expression of the wishes and the wants of the people, and under these circumstances let us cease to regard it with suspicion."(51)[51]

This was Joseph Chamberlain's way of saying "Quit mistrusting me and my political friends: you would do better to mistrust yourself". Here, the democratic idea, coupled with egalitarian sentiments, is clearly used in order to foster acceptance of an imperialist policy. This vulgar, demagogic opposition between the individual and the community, between the government as the organization of the entire people for the welfare of each of its members, and the individuals with their solitary and separate efforts, gives one insight into the extent to which collectivist dogmas had successfully blinded people to reality. The society* Chamberlain spoke of was rife with voluntary, commercial, mutualist and charitable associations.

51 J.Chamberlain: “Speech at the ‘eighty Club’, London, April 28, 1885” in Charles E.Boyd (ed.): Mr. Chamberlain’s Speeches. London 1914, 164. A similar idea can be found in J.De Grandvilliers: Essai sur le libéralisme allemand. Paris 1925.

Furthermore, these associations were not at all shown to be inadequate in facing the conditions Chamberlain spoke of, considering the phenomenal transformation of society* by the introduction of industrial production, urbani-sation, an explosion in population defying the imagination, and the resistance of governments in certain social matters.

The democratic ideal was initially conceived as a weapon against the concentration of political power, and the monopolies and privileges that follow from said concentration. However, it soon became an excuse for an far greater concentration of power than Europe had ever known before. Meanwhile, the "social question" was exploited in order to mobilize the masses for the expansion of state power. From 1870 forwards, more and more domains of public life disappeared, at an ever increasing rate, into the statist-bureaucratic treadmills, and became the private hunting grounds of various "experts". The emancipation of the state, which was concluded in the period before 1914, would swiftly produce the results the individualists predicted: a lasting destabilization and dislocation of public and especially international traffic, the accumulation of political and economic tension, and the release of said tensions in a cycle of world-encompassing wars and world-encompassing economic depressions. The cumulative effect of more and more government interventions, over the pre-existing government interventions, inevitably leads to greater and greater maladjustment of all coordinative interactions in the market and in social traffic, and manifests itself in a situation of general uncertainty and frustration.

Modern totalitarian states, whether in their bourgeouis, proletarian or militaristic forms, are doomed to either go from one crisis into another, or to stagnate in a permanent state of crisis. The analysis of human action in the institutional context of bureaucratic decision-making, with its very poor epistemic structure and its purely conventional connections to the reality their decisions influence, shows why this is inevitable. This analysis also shows why the egalitarian attempt at producing economic equality by means of an imperial power-structure (centralization of the power of decision) is fundamentally unbelievable. After all, the state is not a being with its own finality, but rather a means by which some individuals aim at achieving their goals with the means of

others. The goal of the egalitarian implies that the state should have access to the means of everyone. As such, it also implies a radical abolition of each person's right to self-determination, a radical centralization of mountains of information and powers to decide over all members of society*.

When one realizes that the connection between egalitarianism and imperialism is by no means contingent, one can also see why egalitarian politics/policies are doomed to failure. Even if we were to judge political inequality to be an acceptable price for the realization of an egalitarian policy, still we would have to admit that such a policy could only be successful if people were different than what they in reality are.[52] Even when power (or the key positions in the political apparatus) is in the hands of true egalitarians, still there would be no reason to presuppose that there will not be disagreement among the egalitarians of different strains, or with differing priorities or opinions on the most appropriate methods of achieving certain goals. That the possibility for deeply rooted differences of opinion among egalitarians is not far-fetched, is a claim which is not so much inspired by familiarity with egalitarian literature, or even with the historical practices of regimes with an egalitarian ideology, We have, after all, previously concluded that the only truly relevant measure for measuring equality is the entire life of each person. However, for very many people the egalitarian will have to intervene at a time when the largest part of their lives are still ahead of them. That is to say, they will have to intervene at a time when, even under the best conditions, we cannot know how "unequal" people are. Theoretically, only totalitarian control is capable of resolving these problems. Practically, totalitarian control as an instrument is either incredibly crude or incredibly expensive, and more often than not it is both. In any case, this faces us with problems to which no provably uniquely correct solution can be found. In fact, it is safe to assume that the number of proposed solutions is as great as the number of parties involved. These parties will have to vie over the right to render final judgment over said proposed solutions. This vying will necessarily take the form of an attempt at

52 See, a.o. Frank Parkin: Class Inequality and Political order. New York 1971. “Egalitarianism seems to require a political system in which the state is able to hold in check those social and occupational groups which, by virtue of their skills or education or personal attributes might otherwise attempt to stake claim to a disproportionate share of society’s rewards The most effective way of holding such groups in check is by way denying them the right to organize politically, or, in other ways, to undermine social equality. This presumably is reasoning underlying the Marxist Leninist case for ‘the dictatorship of the proletariat’.” (181–182).

acquiring control over the greatest possible amount of means (money, information, authority, weaponry, etc.). There is no reason at all to assume that it is possible to have egalitarian principles prevail in such a conflict. In conflicts of that sort, quite unlike in market competition, the rule is "the winner takes it all". The weaker party is completely excluded from access to the points of control (for instance, a government will never represent all parties, and usually only one party can hold the top-position in any particular administration or service - and this usually means a certain faction within this party to boot). It is quite likely that the caprices of such a struggle would result in a series of ad hoc compromises, removing any chance of pursuing a coherent, coordinated policy. From the perspective of each of the parties involved (ex hypothesi all of egalitarian conviction) these compromises mean nothing less than the institutionalization of inequalities! In a free society* (with a free market-economy) each person can improve their lot, by using their means towards the production of their own most valued ends. The possibility of free trade guarantees that there will be no hindrances which will stop means from ending up where they are most appreciated. But, since "equal" actually references a state of society* as a whole, it is impossible for everyone to succeed in gaining more "equality". After all, more "equality" means more of a certain conception of equality, and thus less of another conception of equality (even if these conceptions differ in no other way than the time-scale in which they operate).

Even the most convinced egalitarians will not be able to help but experience the poverty of the epistemic context in the main decision-making bodies of a society*. As such they will be constantly thwarted by their subordinates and even by those who they wish to protect and privilege. Their measures and interventions, based on retrospective, fragmented, extensively edited and thus warped, n-th hand knowledge, simplistic because of conformity with specifically worded, cannot possibly take into account the particular, concrete and singular circumstances of all people who will have to directly or indirectly deal with the consequences of said decisions, and in which everyone will try to make of their personal situation the best that can be made of it

under the given circumstances (as they see those circumstance, and not how the experts or political and administrative decision-makers see them).[53] This will be these case even if those people in abstracto agree completely with the desirability of the egalitarian goals towards which aforementioned measures were taken. The egalitarian cannot do without an exceptionally expensive system of information-gathering, and a loyal policing apparatus. This does not mean, however, that they will be able to succeed even if they do have those things at their disposal. That they cannot do without, simply follows from their categorical rejection of freedom as the path to equality. That they cannot do it, even if they don't suffer a lack of these, follows from the simple fact that the information which they would need to posses to solve their problems is simply not available (since it pertains to concrete future situations).

An expensive information-gathering system and a loyal policing-apparatus absorb quite a lot of means, which makes these means unavailable for the achievement of other ends. This means that, at the very least, some relative weights must be assigned to the importance of "equality" versus the importance of a host of other matters, so as to be able to decide how many means will be made available to the achievement of one end, and how many for all others. But, since this decision must necessarily be a collective decision (unlike an individual decision, in a free society* or order of law/right, to decide how much should be spent on self-defense and how much on other goals) here we encounter the problem that everyone is likely to

53 Thomas Sowell: Knowledge and Decisions. New York 1980 214 e.v.; F.A.Hayek: “The uses of Knowledge in Society” Individualism and Economic Order, op.cit. A.Alchian & H.Demsetz: “Production, Information Costs, and Economic Organization” in Furubotn & Pejovich: The Economics of Property Rights. op.cit. bij p.443. Sowell: op.cit., 334–5: “…articulation is crucial to the intellectual process, however limited (and sometimes confusing) it may be in the social decision making process. Articulation, indeed, readily loses information, as noted…in discussions of price control and central planning. The definition or articulation of product characteristics by third parties seldom covers as many dimensions as are unconsciously coordinated in unarticulated market processes”; Hayek, op. cit., p.80: “Today it is almost heresy to suggest that scientific knowledge is not the sum of all knowledge. But a little reflection will show that there is beyond question a body of very important but unorganized knowledge which cannot possibly be called scientific in the sense of knowledge of general rules: the knowledge of particular circumstances of time and place. It is with respect to this that practically every individual has some advantage over all others because he possesses unique information of which beneficial use might be made, but of which use can be made only if the decisions depending on it are left to him or are made with his active cooperation.” On the failures of attempts at controlling complex systems on the basis of articulated, expert, "rational" prescriptions, see, a.o S.Pejovich: Life in the Soviet Union. A Report Card on Socialism. Fisher Institute, Dallas 1979. B.R.Shenoy: “A Report on Ten Years of Economic Planning in India.” New Individualist Review 3,2,1964, 13–21. G.Warren Nutter: “How Soviet Planning Works” New Individualist Review 4, 1, 1965, 20–26.

have very different conceptions regarding this *trade off*. This means to say that, whatever decision ends up being made, many people will not be motivated to enact it spontaneously. Either because they are of the opinion that the egalitarian policy is already within the domain of negative marginal gains, or because they are of the opinion that it is not worth it to work themselves to the bone towards the enactment of a policy which, in their eyes, will not produce any significant equalization. These arguments are of course also valid for those people employed within the policing and information gathering systems.

The control required to execute an egalitarian policy does not solely entail an "economic" cost, in that sense that opportunities to improve one's own position through production and trade cannot be utilized. It also does not only entail a "political" cost, which is to say that there will definitely be less "freedom". No, the main cost incurred is "moral" in nature. It is the suppression of the very human tendency to conduct mutually beneficial trade and agreements that pushes these activities into illegality, but it does not make them disappear. Under such circumstances hypocrisy, deceitfulness and corruption can flourish (cfr Prohibition in the USA, the so called "drug-problem", prostitution and illegal gambling dens). Additionally this faces people that are aware of these activities (such as family members, friends, acquaintances, collaborators) with a choice: either to betray someone who they very pertinently know not to be harming anyone else, merely because they are breaking some rule. Or, to make themselves complicit in the committing or concealing of an illegal action. The demoralizing effect of such a choice is clear as day. This is especially clear when one considers the difficulties one might have when trying to explain to someone why they may not do this or that because this might endanger social equality, which are insurmountable. Not only is it very likely to show that the people involved have totally different conceptions of what social equality is, but the target of such an explanation is probably going to disagree even with the idea that there is any significant connection between any particular act and some vague, abstract condition of the entire society* which some person or another, for some reason, has decided to designate as "social equality".

Furthermore, it is incredibly naive to believe that the apparatus of control will forever remain in the hands of egalitarians of the strongest conviction.[54] If

54 F.A.Hayek: The road to Serfdom. Chicago 1976, hk 10 (“Why the Worst Get on Top”)

equality is not an absolute value, then there will always be some point at which it will be possible to form a politically effective coalition of members who are of the opinion that it is time to turn the apparatus of control, and the means it contains, to the achievement of other ends. Such a coalition, which may of course be made up of people from within the apparatus of control itself, can simply continue the process of "equalizing" the rest of society*, for instance by taxing other "by ability" to the benefit of the members of the coalition themselves. In all this, one certainly shouldn't lose track of the fact that there will be a significant difference between the attitudes and values of those that work towards the establishing of equalizing, redistributive institutions, and the attitudes and values of those who will later want to work within those institutions. Even if we were to naively presuppose that only true egalitarians would be proponents of the establishment of such institutions, taking our naivety to the level of further assuming that only true egalitarians will be attracted to the administrative and bureaucratic routine which comprise the daily runnings of such an institution, would truly be a bridge too far. The mere fact that these institutions are intended to facilitate access to anothers means already gives us a hint to the answer to the question of who might be interested in controlling (even partially) such an institution.

In this discussion, it also makes little sense to reference the "democratic control" these institutions should be placed under. There is no reason at all to presume that "the people", or even just the majority of citizens, will assign a high value to equality. Nor is there any reason to assume that there will only be one single conception of equality, shared among the people. If this were the case, there would be no need for any egalitarian policy, since the people would be self-motivated to, step by step and through trade and gifts, concretize this conception. If this is not the case however, we can also not claim that "democratic control" will keep the redistributive apparatus on the narrow path of egalitarian virtue. Furthermore, to attempt to control what is happening in bureaucratic and administrative services is always a very difficult and very expensive undertaking. The absence of any direct control over the production-process by the consumer in the free market is adequately compensated for by the possibility of testing the end-product in practice, and judging whether it was worth the price paid.

If their judgment is negative, the consumer can look to another producer in the future, or come to the conclusion that considering the current technological and organisational knowledge, there is no price/quality ratio available which is acceptable to them for the given product. Such judgments are communicated to the producers by the investment-decisions of consumers, via the system of relative pricing. This happens in such a way that producers who do not wish to take these into account are either pushed out of the market, or are forced to make peace with a marginal existence. In any case said producer's impact on the economic system would be greatly diminished. This would make his chances of further claiming scarce factors of production for the production of goods that nobody wants to reimburse them for very small indeed. This is how, in a free market, wastefulness is mercilessly punished (this of course presumes a free market: the state's monopoly on currency, with it's inherently inflationary tendencies, is probably the most important violation of the principles of the free market, and the most important source of wastefulness in the current Western democracies).[55]

The control the consumers have over the market is furthermore not monolithic and periodical, but rather selective and continuous. As a consumer, people provide feedback to the producers of those goods and services which are involved in that consumer's investment-decisions. The consumer makes these decisions based on experiences with the products of specific producers, and this more or less independent from experiences of other consumers. It is not at all the case that the judgments of individual consumers must first be collected and aggregated in some collective judgment that then must be fictitiously ascribed to some fictional being which could be called "the Consumer". Nor is it the case that the consumers render judgement over one, homogenous, indivisible good we could call "the Output", but rather a mass of individual products.

Such a cheap, effective, specialized and continuous

55 Mises: Human Action. op.cit. 434–444, Mises: The Theory of Money and Credit. Foundation for Economic Education, Inc., Irvington-on-Hudson, N.Y. 1971, vooral het derde deel. Zie ook R.E.Wagner & J.M.Buchanan: Democracy in Deficit: The Legacy of Lord Keynes. New York 1977. R.E.Wagner & R.D.Tollison: Balanced Budgets. Fiscal responsibility and the Constitution. Cato Institute. San Francisco 1980. R.E. Wagner: “Boom and Bust: The Political Economy of Economic Disorder” Journal of Libertarian Studies 4.1.1980. 1–37. W.Rees-Mogg: The Reigning Error: The Crisis of World Inflation. London 1974.

manner of control is wholly outside of the reach of consumers of output of a monopolistically organized, bureaucratic institution. There is no effective feedback from the consumers (sic) of the good "equality" to the producers of it. How could anyone test, or judge such a product? How could anyone effectively relay their judgments when it is the producer of the good itself who decides what and how much the consumer must part with for the product to even exist? Why would anyone ever try when "equality" is by definition a good which can only be produced by one producer in one uniform fashion, identical to all consumers? This last fact is why there then would be no hope at all for marginal adjustments to suit the need and judgments of any individual consumer. The latter does not even have the option to, on their own dime, make adjustments to the product. In the absence of competition, how could a consumer figure out if the "equality" furnished by the current administration is indeed the best which could be furnished under current circumstances? Most citizens have neither the time nor the inclination to familiarize themselves with all the various elements that play a role in the decision-making and achievements of bureaucracy. This makes it easy indeed for the administration to silence their critics, by pointing out that said critics are not at all familiar with the relevant factors and data. Who could contradict them? Who could refute the claims of the administration if it maintains that their current policies fit in the framework of a long-term policy, and that it would be unreasonable to expect results right away, from some programme that just started? In the end, it will be the administration itself who will decide the criteria for their performance. It is clear how this makes it facile to (by a series of changes to the plan of action, in accordance with "new data") choose the criteria so that the results achieved can be deemed a success (under those criteria).

The proposition of egalitarians which is most probably the most vulnerable is their belief that production is an automatic process. This leads to the idea that there will always be a certain amount of services and goods, which can be redistributed at will, and that the manner of redistribution will have no impact worth mentioning on the production itself, that is to say on the goods to be redistributed in the next period. The marxists believe that the development of the capabilities of production during capitalism can be disconnected from the specific institutions of capitalism.

In the same vein, egalitarians believe that production and distribution are independent processes, following J.S. Mill. He wrote, in his Political Economy:

> "The laws and conditions of the Production of Wealth partake of the character of physical truths. There is nothing optional or arbitrary in them. It is not so with the Distribution of Wealth. That is a matter of human institution solely. The things once there, mankind, individually or collectively, can do with them as they like. They can place them at the disposal of whomsoever they please, and on whatever terms."[56]

Hayek's answer to this passage is very instructive:

> "Yes, once. But never a second time, for the problem of production cannot be separated from the problem of distribution. Goods are only produced if the producers expect said production to pay off. It is the mechanism of pricing which informs the producers in this regard. The mechanism of pricing regulates not just distribution, but also production. Without this mechanism, the goods that the politicians and officials plan to redistribute, will never be fabricated. I am perhaps willing to admit that we should redistribute the goods in society by certain criteria, if we were free to redistribute those goods as we saw fit. But we will never have that freedom, and with this disappears any basis for government policy in the domain of wealth-redistribution."[57]

People have expectations: if the producers expect the income of their production to be redistributed by others (stolen, confiscated), they will account for this in their plans of production. This means they may desist from further production (or that they

56 J.S.Mill: Principles of Political Economy. iii/1. pp. 199–200 in uitgave Augustus Kelley. New York 1969.

57 F.A.Hayek: De weg naar moderne slavernij. Brussel 1980. voorwoord. p.11. Cf. K.Marx: Grundrisse. (Ed.D.Mclellan). New York 1971. p.151: “The means of distribution are the relations of production themselves, but sub specie distributionis. Thus it is quite absurd to say, as J.S.Mill does…, that: ‘The laws and conditions of the production of wealth partake of the character of physical truths…It is not so with the distribution of wealth. This is a matter of human institutions solely’…(Once machines become the property of associated workers) an altered means of distribution will derive from a new altered basis of production emerging from the historical process.” This passage alone is actually sufficient is demonstrating how much Marx is absent in "leftist" politics, and how much the left wing is indebted to redistributionists such as J.S.Mill. Even though Marx acknowledged the identity of production and distribution, in a constructive sense this insight remained sterile. He did not realize that the subjective and (primarily) the objective preconditions for the existence of an efficiently managed communist society* are of a nature that excludes their realization. For an early criticism, read: E.S.Robertson: “The Impracticability of Socialism” in Thomas Mackay: A Plea for Liberty: An Argument Against Socialism and Socialistic Legislation. New York 1891; reprint: Liberty Classics. Indianapolis 1981.

may attempt to hide it, eg working off the books). Furthermore, they will quickly realize that it would pay better to become party to those distributing the production of others, rather than toil at production, run financial risks, etc. Those who sow, expect to reap, and the reason they are sowing is because they expect to reap. Those who expect others to reap what they are sowing, would rather eat the seed. Mills presupposition that production is not influenced by expectations is absurd. The paradox is that Mill was one of the most competent at explaining Say's Law, and was even an enthusiastic exponent of it.[58] His position regarding the separation of production and distribution was, however, a manifest denial of the validity of that law.

Mills authority as the author of the most read handbook on political economy in the second half of the 19th century lent sufficient influence to redistributionists and egalitarians to allow them to completely cast aside Say's Law (and the praxeological insights it rests upon) without fear of massive backlash. They transformed political economy from a critical-analytical science into a theorettical vehicle for various "social reforms". So doing, the insight that production was a goal-oriented activity drifted into the background in economical discussion.

Say's Law gives expression to the idea that people produce in order to consume. In other words, that supply creates its own demand: those who produce and offer a thing are also demanding. They are either producing something they demand themselves (autistic trade), or they are producing something they consider to be sufficiently appreciated by others to motivate those others into giving him something he does want, and this to such a degree that he would be willing to trade his product for the thing offered. Production, not in the technical but in the economic sense, is a goal-oriented activity which causes means which are not immediately available for consumption by the eventual consumer to become available for said consumption. The producer only produces because they want to consume (achieve their goals, whatever it may be). As such, they will often produce for the market, because they believe that they will be better able to achieve their goals by participating in the traffic of trade, rather than

58 See “Of the Influence of Consumption on Production” in J.S.Mill: Essays on Some Unsettled Questions of Political Economy. London 1844. Say’s law. see J.B.Say: Traité d’économie poli-tique. Paris 1803. 5°uitg. 1826. hk 15. (also in H.Hazlitt: The Critics of Keynesian Economics. New Rochelle. N.Y. 1977). The paradox of Mill's lack of understanding of Say's Law in Political economy is explained in his Autobiography, Boston 1969. p.138–149, where he mentions the influence of his wife Harriet Taylor and her socialist sympathies, on his positions

by limiting themselves to autistic trade. After all, those who participate in trade can radically transform and reconstitute their means: eg replace rocks with bread, etc.

To deny Say's Law is to deny yourself any opportunity of understanding economic reality. The production-distribution dichotomy is an expression of this lack of understanding. Production is guided by expectations regarding the "distribution" of the product. Production is not some automatic process of physical transformation of resources into usable means. Rather it is the outward expression of the human quest for ways of more adequately satisfying needs and wants. This means to say that, from a perspective of scientific economical analysis, it is a mistake to make this physical transformation of resources (situated in a certain location) into usable means (in some other location) into the formal object of study. The technical and geographical transformation of "land" (in the form of cattle and veins of ore) into shoes on the consumer's feet - the production of shoes - is not a formal object of economical analysis. Quite on the contrary, what we should be focusing on is the people who enable this process, and who keep it going. If we do so, then we will see that they are not motivated by the desire to make shoes, nor by the demands of shoe-production itself. Rather, they are motivated by their wish to satisfy the need for and desire for a thousand and one different things, to the best of their abilities. The production of shoes is only assured as long as there are people who believe the production of shoes to be their best chance at survival. In other words, the production of shoes is not an immutable given, but rather an ephemeral and brittle phenomenon, no matter the solidity of the machines and buildings, and even the end-product, whose essence is effectively a certain configuration of expectations. Some people devote themselves to the production of shoes because they believe that others are willing to pay them (these shoe-producers) enough to allow them to best satisfy their own needs and desires. Shoes will only be produced as long as these expectations are confirmed. To word it yet differently: the true employers of the shoe-industry are the consumers. They make it so that shoes are made. The entrepreneurs, labourers, designers, clerks, farmers etc. who are involved in the production of shoes, do not do so because they want to make shoes. They do so because they want to acquire for themselves a steady supply of a highly

tradeable good (money). To them, all the particulars of the production of shoes as a technical process lose their relevance from the moment they receive their compensation (wages, interests, etc). This compensation is their product, and this product is to them nothing but a means for achieving their aims. This product is the result of a certain phase of production in their own personal process of production, a process which is guided by their personal opinions on what is worth consuming, and on which methods are the most suited to optimally realize the consumption of said goals.

The people that are involved in the making of shoes are little concerned with what happens to the products (the shoes produced), they are not likely to care who ends up wearing the shoes. But, this does not mean that production and distribution are disconnected in the economic sense. The indifference of the producers in relation to the eventual destination of their product is conditioned by the fact that they will integrally receive their compensation. However, this last fact is precisely the fact that distributionists and egalitarians take umbrage to! They are not planning on using their own means to buy all the shoes which are produced in order to distribute them "equally" or "proportional to status in a certain hierarchy". They mean rather to confiscate the reimbursement of the producers (that for which the producers produce) in order to finance the execution of their schemes. In other words, they plan to intervene directly in the economical production process. They do not realize that production, like any praxeological concept, relates to a phenomenon that can only be studied and analyzed prospectively, teleologically. They also do not recognize that the problems of production, which appear superfically to be merely of a technical nature, are determined by a mass of "givens" that can only remain "given" if the institutional context of production remains unaltered.

It would serve us to take a moment to reflect on Say's Law. It can shed some light on the manner in which an egalitarian policy of intervention dislocates the production and distribution of wealth/prosperity. The fundamental insight this law rests on is, as mentioned previously, that people produce in order to be able to consume. That is the reason why "production creates demand". To produce or offer is to demand. Say's Law is not an empirical hypothesis, but a logical identity, and any economic theory that does not acknowledge this identity is contradictory merely because of that fact. Reflection on

the meaning of this Law makes it clear that the economic problem of a society* is a problem of coordination.[59] People produce for the market if and only if they hope that in so doing they will be better able to provide for their own needs than to try to do so in another manner. What people produce is of course determined by their own means or possibilities, but also by hypotheses on the future needs of others. When producing for the market, it is important to correctly anticipate the future demands of others. This applies to everyone: in this sense, the processes of the market are the attempts of many people to coordinate their actions with eachother, as well as they can considering the information, knowledge and means that they posses. The economic problem is a problem of coordination, and its main characteristic feature is the fact that, as Hayek remarked, the information required for the mathematically correct solution is not a "given" for anyone, but is rather spread out over the entire society*.

As such it is incredibly naive to posit that a "rational" solution to this problem of coordination requires all parties involved to gather and make a unified plan of production after considering and thouroughly researching all relevant data about the available means, knowledge, preferences and goals. Such an approach

59 Cf. F.A. Hayek:" The Uses of Knowledge in Society" in F.A.Hayek: Individualism and Economic Order. London 1976. p.77. This classic passage is deserving of being quoted in its entirety: "What is the problem we wish to solve when we try to construct a rational economic order? On certain familiar assumptions the answer is simple enough. If we possess all the relevant information, if we can start out from a given system of preferences, and if we command complete knowledge of available means, the problem which remains is purely one of logic. That is, the answer to the question of what is the best use of the available means is implicit in our assumptions. The conditions which the solution of this optimum problem must satisfy have been fully worked out and can be stated best in mathematical form: put at their briefest, they are that the marginal rates of substitution between any two commodities or factors must be the same in all their different uses. This, however, is emphatically not the economic problem which society faces. And the economic calculus which we have developed to solve this logical problem, though an important step toward the solution of the economic problem of society, does not yet provide an answer to it. The reason for this is that the "data" from which the economic calculus starts are never "given" to a single mind which could work out the implications, and can never be so given. The peculiar character of the problem of a rational economic order is determined precisely by the fact that the knowledge of the circumstances of which we must make use never exists in concentrated or integrated form but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess. The economic problem of society is thus not merely a problem of how to allocate "given" resources—if "given" is taken to mean given to a single mind which deliberately solves the problem set by those "data". It is rather a problem of how to secure the best use of resources known to any of the members of the society, for ends whose relative importance only these individuals know. Or, to put it briefly, it is a problem of the utilization of knowledge which is not given to anyone in its totality." See also G.P.O'Driscoll: Economics as a Coordination Problem: The Contribution of F.A.Hayek. Kansas City 1977.

is not just time-consuming and impractical. It is logically impossible. Not only is it logically impossible to guarantee a coherent "social scale of preferences" (as Arrow has shown), and not only is it impossible to make rational choices in relation to various production-techniques to minimize waste absent a market for the means of production (as Mises has shown), it is also impossible to construct such a system with any guarantee of the decision being taken being independent of the person of the decision-maker at any certain time in this all-encompassing production-process (as Buchanan showed).[60]

The only other solution to the problem of coordination, is radical decentralization and coordination which is not ex ante but ex post, through the "mechanism of pricing".[61] This mechanism of pricing is of course not a mechanism in the literal sense of the word, but rather a vast system of information from which producers can determine which things (goods and services) are not sufficiently provided, and the consumers can determine which things are demanded in excess, and even on where there is more and where there is less supply or demand. Producers and consumers are of course often the same person in different roles. Producers are people that attempt to, ceteris paribus, maximize their money-income precisely because they want to be able to realize their aims to the maximum extent. Because this is their aim, they must, ceteris paribus, try to make their productive activities as profitable or gainful as possible. This they can only do through the market (that is to say without the use of boundary-violating violence) if they produce those things that are most appreciated by their potential customers. "Production for profit" is "production for use". The system of relative prices continuously registers, minute by minute, any alteration in the relevant data which make some participant in the market-process alter their plans of production or consumption. Those who find those alterations, communicated through the system of pricing, to be relevant can, if they so please, also alter their plans of production and consumption. This reaction is then, in turn, communicated through the system of prices

60 K.J.Arrow: Social Choice and Individual Values. New Haven, 1964. Mises: Human Action. Chicago 1966, part 5 (“Social Cooperation without a Market”). Buchanan: Cost and Choice. Chicago 1969.

61 See Hayek: op.cit. with p.458, and Hayek: “Der Wettbewerb als Entdeckungsverfahren” in Hayek: Freiburger Studien. Tübingen 1969.

to others, who then also have the opportunity to evaluate this change, and change their plans if they deem it worthwhile. It can be proven that the market-process tends, at any time, towards a state of equilibrium in which everyone can realize all their plans. Of course, it cannot be proven that this equilibrium will be reached. Any change at all in the fundamental market-data - the goals preferences, knowledge, state if health, etc, of the various participants in the market process, discoveries, inventions, climatological and other natural changes - implies a change in the state of equilibrium. It is not at any moment possible to say what the state of equilibrium determined by the currently extant objective situation will look like, since no person at that time knows, or can know, what the currently extant objective situation is. The reality of those changes motivates people to be ever vigilant, but of course everyone remains free to not be vigilant, or to ignore certain evolutions in order to be able to focus on the fulfilment of their plans: not every change is relevant to everyone.

The essential point is that while ex ante coordination is impossible in principle, ex post coordination by means of the system of pricing is possible. Well, these prices are nothing but amounts of money, transferred from one person to another. They only come into existence because at any and all times there are people to be found who value certain goods and services more than a certain amount of money, as well as people who have the exact opposite relative valuation for said goods and sums of money. It is immediately plain to see that equalisation of the money-income amounts to an intervention in the system of relative prices, and consequently in the central mechanism that makes the ex post coordination of the plans of the various participants of the marketprocess possible. Egalitarian propositions based on the presupposition that production and distribution are mutually independent processes, assumes that the producers are only concerned with their income before the redistribution (before taxation). In other words, they expect the producers to make decisions as if they do not know that part of their income from production will be taken from them. This is obviously absurd. Of course, reactions to certain measures will take time to take shape, since many people will have to start looking for alternatives, and do some arithmetic and evaluation. In any case, many people will tend to

alter their plans, and young people will anticipate the effects of said measure, and alter their plans accordingly, from the get-go.

So, egalitarian policy intervenes directly in the domain of production-decisions, and makes production for the market relatively less valuable compared to other activities. Some producers will then find that other producers are much less inclined to produce that which they are demanding (that for which they are actually producing for). Others will experience that their incomes are dependent to a much smaller degree on the extent to which they correctly anticipate the demands of their fellow men. The former will be less inclined to produce those things demanded by others (this causes the value of money to drop for these people as well, as the things their money can buy are less and less aligned with their most urgent needs and desires). Nor will the latter likely be very motivated to anticipate the needs of others.

Eventually everyone attempts to do only what pleases them, without worrying about the production of the means this requires: these, they simply try to win in the process of redistribution. This stage is very well represented in the behaviour of many environmentalists, social workers, consumer-protectors, developmental aid workers, adult education teachers, physical education teachers, academics, politicians, etc. who all find it perfectly normal that other supply the means for their "meaningful work".

Egalitarianism atomizes society*. It undermines the market-process in which every participant knows that the best way of realizing their goals is contributing to the realization of the goals of others, and it also encourages autistic trade. Those that find that that for which they work will not become available to them by means of the market, and those who find that there are ways of acquiring income without braving the uncertainties of the market, will not refrain from drawing their conclusions from those findings.

It is evident that, as the processes of redistribution gain in importance, it also becomes more interesting to invest in the acquisition of power and influence in the organs of redistribution themselves. It will also be necessary, in order to keep production going, to create stimuli in the form of benefits and privileges connected to certain positions and activities. As possession of money becomes less important as a factor of

inequality, the importance of the factor of power and influence increases. It is clear that inequality of money-income is of a totally different nature to inequality in power and influence. If A has an income that is ten times higher than that of B, and B gains an income that is ten times higher than that of A tomorrow, then the inequality in the group (A+B) remains high at any moment, but over the entirety of the period there is no inequality. The occurrence of such shifts is much more important and likely in market interaction than in the political-bureaucratic process of the transfer-society. Power and influence are connected to position or access to positions in a rather formal and inflexible system of more or less adequately delineated spheres of authority. In other words, they are connected to politically maintained monopolies and privileges, to exclusive procedures and such. This is all exacerbated by the tradition of internal succession. What is abundantly clear however, is that this political-bureaucratic complex has no equivalent to the entry to the market. The fact that A is a baker does not exclude B from also establishing himself as a baker. But, the fact that C is the director for the department of international trade does exclude D from establishing himself as the director of a department of international trade of an independent ministry of economic affairs. Whatever the specific cases may be regarding the money-incomes of these departments, it is obvious that such monopolies and privileges must pay handsomely in interests/rents for those involved. It is also obvious that many people would be willing to pay quite a price to enter into the good graces of said individuals. Estimates in some countries would have us believe that it is not exceptional for up to 25% of the national income to be spent on "rent-seeking activities" (corruption in its myriad forms, the gaining of the good-will of various departments, etc).[62] When inequality is mainly expressed in power and influence, which is to say in the fact that people find themselves at various different "distances" of the centres of power, then this inequality is formalized and institutionalized. Such inequalities cannot be resolved. One can try to gain for oneself a position in the closed hierarchy of power, but this does not create more equality. The only result is that now a different person reaps the benefits.

62 R.B.Mackenzie: Bound to be Free. Stanford 1982. S.Andreski: Parasitism and Subversion: The Case of Latin America. London 1966.

If the role money plays in the coordination of the actions of many millions or billions of people is removed, something else must take its place. Coordination without inequality is impossible: at any time it is necessary for one party to be motivated to stay their course while another must be motivated to change their ways. If coordination by means of the mechanism of pricing is rejected, a different method must be applied. Said different method is characterized by its own inequalities, while it does not offer any guarantee of equality of money-incomes. Those with the power to keep money-incomes equal also have the power to keep them unequal. It is not wild speculation, but a plain fact that many economic inequalities are at least partially the result of differences in political power.

CONCLUSION

Many of the people that claim to be "for more equality" (economic equality), seem to believe that all those that reject their egalitarian propositions are ipso fact "for more inequality". This is nonsense. A libertarian is not "for more inequality". A libertarian rejects the idea that the egalitarian's proposed limitations of the individual's right to self-determination are sufficient, required or even useful for achieving more equality. The difference of opinion does not relate to the goal, more equality, but to the means for achieving that goal, to the paths to this goal. To the libertarian equality in right (ed: orig rechtsgelijkheid), freedom, is the correct path to more equality.

The libertarian does not let himself be blinded by equality as an esthetic ideal. He does not look forward to a society* in which statistical or other observation would project an image of equal prosperity, but that does not mean that equality is not a value to him. The libertarian is furthermore not concerned with the inequalities that manifest themselves in a free society*, since these are necessarily ephemeral and passing if they do not rest upon political oppression. All economic inequalities tend to disappear under competitive pressure, and even though this tendency is continually suppressed by the occurrence of changes in the underlying fundamental market-data, which is accounted for more rapidly by one than

by some other, this does not mean that the tendency does not exist.

For the libertarian, it is not so much the measured inequalities as such that matter, but the institutional context in which they occur. Does this context provide people the opportunity to give the best of themselves, or not? That is the relevant question. The distinction mentioned previously between commensurable and incommensurable equality is relevant here. To the libertarian, it is of greater importance that everyone have the opportunity to develop themselves fully as a finite being, so that each person can rise above all others in that dimension that is uniquely theirs, rather than that everyone be forced, in an atmosphere of jealousy and envy, to have their lives guided by the mediocrity of every person.

If we project the opposition between egalitarians and libertarians onto the level of policy in a state, we have to say that if the government does not succeed in guaranteeing the freedom of each person equally, they a fortiori are not capable of treating their citizens equally in any other domain. If the government were to try to do something else than this, it must commit aggression against one party to the benefit of another. At that point it automatically becomes the prize in the struggle for power of one against others, whose outcome is unpredictable. Conversely: if the political control of the citizens is not capable of ensuring that the government limits itself to protecting everyone's freedom, then they are a fortiori not capable of adequately ensuring the proper fulfilment of any task by the government. After all, any mandate broader than said protection transforms the state into an instrument with which one group of citizens can exploit another group.

In the end, nothing is left of egalitarianism but the vague sentiment that more equality is better than more inequality. This, few will disagree with. But in no way, shape or form can it be claimed that the egalitarians have an argument for sacrificing freedom, as defined in the fundamental principle of law/right, for more equality. In order to even start the construction of such an argument they would have to succeed in showing that each person has the right to life, and thus the right to the means to sustain their lives (rather than just the right to their own means). No-one has ever succeeded in deriving such a right from arguments that do not apply to plants and animals. So, there is not a single reason to bow to egalitarian pressure and cast out the individual's right to self-determination, which can be supported and is fully determinable, for

what amounts to no more than a slogan. Once again: the fundamental principle of law/right only forbids the use of boundary-violating violence, even in an attempt to create a more pleasant and just society. It does not require us to sacrifice equality for anything, it only asks of us that we respect each-others' individuality.

If egalitarians are of the opinion that inequality per se is an excuse for the use of boundary-crossing violence, then I believe that we can say that they belong to the same category as those who have taken various other excuses (the stability of the regime, economic growth, the one true religion, the correct morality, etc) to force their visions and interests on others, which is to say to destroy others as moral subjects. Just as happiness is unattainable for those that violently wish to be happy, equality is unattainable for those that violently wish to equalize everyone.

8 Right/Law and State

> “The point to remember is that what the government gives it must first take away.”
>
> J.S. Coleman

INTRODUCTION

One of the greatest mysteries the 19th century has left us, is that of the power of all these collectivist conceptions (the Nation, the State, Class, Race, the Volk, etc.) which we able to almost wholly undo all the progress the 18th century had brought in the domain of the humanities and political philosophy.

It is significant that these mystifications allowed the myth of the state to make such a strong comeback. Yet, the classical liberal conception of the state was not dead. According to this vision, there is no contradiction between the individual and the state or the community. Rather there is a contradiction between lawful behaviour and unlawful behaviour, between voluntary cooperation and cooperation based on master-slave relations. The classical liberal theory of the state was the so-called theory of conquest, namely that the origin of the state

is to be found in subjugation and exploitation. According to this theory, the state was naught but an organization though which some individuals attempted to exploit and oppress other individuals. This theory was succinctly worded by Franz Oppenheimer:

> "What, then, is the State as a sociological concept? The State, completely in its genesis, essentially and almost completely during the first stages of its existence, is a social institution, forced by a victorious group of men on a defeated group, with the sole purpose of regulating the dominion of the victorious group over the vanquished, and securing itself against revolt from within and attacks from abroad. Teleologically, this dominion had no other purpose than the economic exploitation of the vanquished by the victors."

Reasoning wholly within the praxeological tradition of classical liberalism, Oppenheimer came to the conclusion that there is no use in identifying the state in the category of aims, which means to say through an indentification of the specific goals the state would aim at.

> "There are two fundamentally opposed means whereby man, requiring sustenance, is impelled to obtain the necessary means for satisfying his desires. These are work and robbery, one's own labor and the forcible appropriation of the labor of others. ... I propose in the following discussion to call one's own labor and the equivalent exchange of one's own labor for the labor of others, the "economic means" for the satisfaction of needs, while the unrequited appropriation of the labor of others will be called the "political means.""[1]

Aside from the use of the term "politics" in a sense from which any and all reference to the *polis*, as the place where no-one rules, was removed, this distinction is strictly equivalent to the contradiction between the lawful and the unlawful methods I have introduced above, in chapter 2. Using the terminology of this essay, the state, in its true sociological nature, is the organisation of injustice/unlawfulness.

This approach makes it possible to analyze the state in human terms, which is to say to demystify it without making the mistake of so many collectivists. Specifically, they tend to deal with their vague suspicions of the unlawful character of the state by additionally positing, beside "the state", the existence of "the community". This community to them is the true master whose will the individual owes obedience to and to whom the individuals' love should be directed. The demystification of the state - and of the community - is a sufficient condition for dissolving the absurd oppositions

1 F.Oppenheimer: The State. (translated by J.M.Gitterman) New York 1975, p.8,12

between the "abstract" individual and the "concrete" state or the concrete community, which are at the base of so many of the modern assaults upon the individuals right to self-determination. We need not deny the existence of states and communities in order to deny that states or communities are moral subjects, or ultimate subjects of law/right. To question why there are people is nonsensical, while wondering why there are states and communities does have uses, which is to say, to ask why people maintain states and why they shape their interactions in the way we have in mind when we use the word community. Asking whether people/humans are lawful or not makes no sense, but asking this question of states and other forms of collective action, or actions in a communal context does.

The opposition between individual and state has no fundamental meaning. It can only be usefully applied in pointing out the fact that the state, more than any other human organization, blinds the individual participants in state-action to the true meaning of the actions they help to plan and execute, and that those who are subject to state-action are seldom able to determine the precise origin of it, or to determine the people responsible. Rule in the modern state is everywhere and nowhere. Emancipation no longer seems possible. Even regicide is useless in the collective, bureaucratic and anonymous structures of decision-making of the modern state. We do not, however, have to be content with this so very pervasive sense of intellectual and physical powerlessness that the state in its current form elicits in people. We can rationally judge its actions if we take ourselves as we are, and not as the legislator defines us. This means to say that we must judge in terms of lawful/just and unlawful/unjust, not in terms of legality and illegality. To judge in terms of legality and illegality is to judge from the perspective of the state, and that is, literally, *no-one's* perspective. To understand the state, we must describe it in terms of human plans, goals and means. This is what methodological individualism is about. In order to judge the state we must understand it as one of the methods people use to realize their aims.

THE FISCAL RELATIONSHIP

The strength and resilience of the myth of the state becomes apparent when considering the willingness with which so-called political philosophers attempt to answer the question of what the state is meant to do precisely, of what is the actual proper domain of state-action, which is to say which goals the state should aim at. The questioning of the right of existence of the state is not just a relatively recent phenomenon, it is also often very easily and lightly cast aside. We have previously seen however, that the question "What should I do?" only makes sense when it is interpreted as "What should I do with my means?".

The idea of private, individual property is a praxeologically necessary presupposition of any moral theory which accepts a multitude of moral subjects - not the idea of some thing that itself requires justification. Those people that define normative political philosophy as the attempt to answer what the state (or community) should do immediately presupposes that the state possesses its *own means*. But, how could one possibly say anything sensible about the state if one only considers the way said state spends "its" means, and not the way in which it acquires these means? No-one can claim that the way a thief uses their loot could ever be of a nature that gives them the right to steal . Their reasons may be touching and moving enough to pardon, or forgive them, but this does not at all constitute the recognition of a right.

Now, it is clear as day that no-one will call an organisation a state if that organisation exclusively gains its means through lawful means, by voluntary contribution by its members and by exchange of the means thus acquired. The state is the organisation of "the political method" of the acquisition of means: it confiscates the means *of others* - and that is not at all an operation based on mutual accord between the taxpayer and the tax-collector. If anyone doubts this proposition, they may test it by returning their tax-forms to sender with the added missive that they decline to further cooperate with the tax-office, and wish to be taken off the mailing list. Whatever the state may do with its confiscated means, the fact remains that the state has no right to these means. We may be happy that the state spends part of its loot on caring for the handicapped, and urban renewal, rather than spending it all on guns and the maintenance of diplomatic staff, but that has nothing to do with law/right/justice at all.

A critical study of the state must not be distracted from its goal by the myriad of conventional juridical concepts and constructions which describe the state in terms of the results *hoped for* (eg "the common interest", "impartial jurisprudence", etc), rather than in term of *real interaction-processes* (such as the confiscation of the means of an other). Confiscation, and thus redistribution, is the praxeological essence of the state.

It could hardly be more evident that taxation is wealth-redistribution.[2] What would be the use in levying taxes if it were not to enrich one and impoverish others, to give the means of one party to others, and allowing those others to achieve their goals at the expense of the former?

A universal, non-redistributive tax is senseless: it would have to take, from each person, precisely as much as they are paid back through government expenses. Such a system would also plainly be impossible, because taxation and government expenses are real operations, which require expenses of their own (unless we are to presume that the government is made up of people that "play state" for the sheer enjoyment of it, using their own means; though even then there would be redistribution, simply because they are seizing others as objects for the practice of their hobby). A universal proportional tax, which would tax each proportional to the benefit payments they receive, would also be pointless. Imagine a state or community with two members, A and B. Assume A pays 100 kg of grain in tax, and B pay 50 kg of grain, and assume that this tax is proportional to the benefit payments A and B receive from the state's coffers. If the full 150 kg were to be redistributed, A would get 100 kg and B 50 kg of grain. This is the case mentioned above: the tax is useless and actually even impossible. Now, if only 120 kg of grain would be redistributed, A would get 80 kg and B 40 kg, with 30 kg having gone up in smoke. Such a system of taxation would be even more absurd: no-one gains anything and everybody loses!

If, however, we assume that the community in question has three members, A, B and C, and that C receives the 30 kg which remain, then we can consider the situation to have some utility, but we can no longer say that everyone is taxed proportionally: C gets 30 kg of grain and pays nothing. The tax is indeed proportional to what each *taxpayer* receives, but not everyone is a taxpayer. This makes the tax redistributive even though it is not redistributive within the class of

2 M.N.Rothbard: “The Myth of Neutral Taxation” in Cato Journal 1,2,1981, 519–564.

taxpayers. A tax redistributes from taxpayers to *tax-receivers*. Only when this condition is met, does anyone stand to gain from the system of taxation, and only then could someone be willing to maintain the system. It is clear that the taxpayers will never get back the total of what they collectively paid in taxes. A part of the fiscal loot will have to be used in order to pay for the process of taxation itself (costs for receiving, administration, and such, which of course constitute income to the fiscal agents and their suppliers). The idea which is often used to defend this system, rests on the claim that the services the government provides, which it finances using fiscal income, create a climate from which everyone, including the taxpayers, will eventually derive benefits, as compared to a situation in which the government would not provide said services. This argument, however, is dealt a fatal blow by the plain determination that there is no reason why such welfare-productive services would not be produced if the state does not produce them, and even less of a reason to explain why you would need to force people to enjoy services that improve their situations. This is not the place to bring up the theory of so-called "public" goods - that theory has been so thoroughly discredited that there is not need to interrupt this argumentation to discuss it.[3]

The fundamental propositions of the theory of the fiscal relationship imply a confirmation of the position that the state is an organization for the application of the "political method". Any system of taxation divides society* into two classes: the class of tax-payers, who pay more than they receive in any form whatsoever from the state's coffers, and the class of tax-receivers, who get more from the state than they pay. The core of the class of tax-receivers are the fiscal agents of the state itself. They do not pay taxes to anybody. It is true that various fictions of a juridical, and accounting, nature are used to conceal this rather evident fact,

3 See o.a. J.P. Kalt: “Public Goods and the Theory of Government” Cato Journal 1,2,1981, 565–584; M.Olson jr.: The Logic of Collective Action: Public Goods and the Theory of Groups. Cambridge, Mass. 1965 is still the basic reference work for the argument that some goods will not be produced if those who want said goods are not able to make other individuals by means of "private" (which means personalizeable) positive or negative stimuli (reward or punishment). Olson's argument is not that those cases justify the use of violence/force (which would mean that in those cases the intervention of the state would be legitimated by its necessity) Also F.van Dun: “Collective Action, Human Nature and the Possibility of Anarchy”. in L.Apostel & F.van Dun (eds.): Collective Action in Science and Society. in Philosophica 21, 1978,59–97. En F.van Dun: “Marktfaling, Marktproces en Institutionele Context” Tijdschrift voor Sociale Weten-schappen 23, 3, 1978, 237–277.

but it is not very difficult to realize that if the state pays some gross wage to a fiscal agent (their employee) of 1 million franks, and "taxes" it to the amount of 300000 franks, the state's coffers are not increased by this operation. The fiscal agent remains a tax-receiver. It would not cost the state a frank if they were to pay their employee not 1 million franks, but 2 million, if it were to immediately "tax" it by 1.3 million franks. To relationships in the private sector, however, it most definitely matters whether an employer (in the final analysis: the consumer) has to pay 1 million, of which 700 thousand goes to their employee and 300 thousand to the state, or 2 million, 700 thousand to their employee and 1.3 million to the state. The state too, will find that it matters whether they receive 300 thousand or 1.3 million from the private sector. The private sector is the tax-paying (rather than receiving) sector. The public sector is the tax-receiving sector. The distinction between the two is fundamentally determined by the fiscal relationship, not by various juridical fictions.

In actual fact, not a single state agent pays taxes, But, while many other state agents provide services which the free market would also demand, the fiscal agents provide a "service" which, in the order of law/right, would be punishable. They are taking from one party in order to give the loot to another, and that is incompatible with the fundamental principle of law/right. A person who wants to provide educational services cannot help the fact that is made completely impossible, in an education-market twisted by state-subsidies and rules, to start a school which would work in perfect accordance with law/right. A person who wishes to make a living as a judge cannot help that the state monopolizes jurisprudence, etc. On the free market, there is a completely lawful and allowable demand for education and jurisprudence, for lighthouses and ports, for services of security and protection (police, fire departments, etc.). There is no allowable demand for fiscal agents. It is possible, but of course not certain, that judges and teachers and others that provide or could provide useful services, make less money in the service of the state than they could on the free market.

If this is the case, then they - the judges, teachers, police officers, etc. - can claim that, though they are not paying taxes, they are still experiencing financial damages from the fact that their profession has been nationalized. This is a claim the fiscal agents (as fiscal agents) cannot make. It is not just state personell who do not pay taxes. There is an untold number of subsidized people in the class of tax-recipients. These clients of the system of taxation can be subsidized in cash or in kind. They may be economically privileged by the fact that the state makes legal violence available to them, in order to protect their privileges or monopolies (eg anti-competitive measures, or anti-trust measures which allow to to eliminate competitors which are too succesful), or by guaranteeing the sales of their products or services (agricultural subsidies, lowering of educational standards, etc.). It is not always simple to determine who does and who does not belong to the class of tax-recipients, but the fact that these classes must exist follows from the existence of the fiscal relationship itself. The relationship between these classes must necessarily be antagonistic, since it is founded on one party exercising compulsion towards another.

Any state is by necessity a class-state: a classless society is a contradictio in terminis. Any state, any societas is organized around a system of taxation, and thus creates a redistributive process which pits tax-payers and tax-receivers against eachother in the perverse spiral of a *negative sum game*. The antagonistic structure of the class-relations which stem from fiscality is quite clear to see, and this makes the collecting of taxes quite complicated. The stability of the system is, however, significantly improved by the so-called "political entrepeneurs" (politicians) which attempt to mobilize groups on the basis of other criteria - specifically criteria which encompass both tax-payers as well as tax-recipients.[4] This is made possible by the fact that, in all contracts, the parties involved are in a - limited - antagonistic position towards eachother. Namely, when it comes time to determine a price, within the margin determined by the price below which the seller will not sell and the price above which the buyer will not buy. If A is willing to pay 100 franks for a book that B is willing to sell for 80 fr., then

4 Cf. Mises: The Clash of Group Interests and Other Essays. Center for Libertarian Studies, New York, N.Y. 1978. J.Schumpeter: Capitalism, Socialism, and Democracy. London 1944. A.Downs: An Economic Theory of Democracy. New York 1957.

both A and B would benefit from the sale of the book, but A has an interest in limiting the price to 80 fr, while B has an interest in driving the price up to 100 fr. What the price will end up being can only be determined by a real process of negotiation, which will be determined exclusively by the talents at negotiation of both parties, since both parties stand to gain from the contract, wherever the price may fall between 80 fr and 100 fr.

To the "political entrepreneur" or demagogue, it is a simple matter indeed to exploit this residual form of antagonism between contracting parties. For example, by making a promise to renters to enact legislation which limits the freedom of negotiation of landlords, or by promising employers to limit the options in negotiations of employees. It speaks for itself that, if one demagogue find themselves able to mobilise one group, say renters or employers, in such a manner, it will not be long before another demagogue will start to mobilise landlords or employees. Initially in order to protect the rights of the latter, to later go on the offensive, and acquire new rights at the expense of the other group. In actuality, control over the dominant position in the fiscal system is still at the heart of the matter, though the shape it appears in is no longer that of the struggle between taxpayers and tax-recipients.

Evidently, in an order of right/law, there can be no contradiction between the interests of renters and landlords, or employees and employers. The mere fact that there is coordination of their interests by contractual means proves their interests to be complementary. It is plain to see that renters have an interest in a large supply, and landlords have an interest in a large demand, for rental property. In relation to any specific offering, all renters are competitors, and in relation to any given demand all landlords are competitors. The same, mutatis mutandis, applies to the relations between employer and employee. In a free market, all renters benefit if renting out property is an attractive proposition. Equally, all landlords benefit from renting being an attractive proposition. Employers benefit from labour being more attractive than sitting around doing nothing, or from domestic production for own consumption, and employees benefit when

entrepreneurship being attractive. Which is to say they have an interest in there being a large number of people that are willing to identify as many desires of the consumer as they can, and to try to satisfy them by means of efficient production-processes. But, even though the interests of renters and landlords, employers and employees, are complementary, in any concrete case there is always a residual antagonism between a particular renter/employer and their particular landlord/employee in relation to the specific terms of their specific contract. This is sufficient for the demagogue, unconcerned with the relation between renter and landlord, but rather with the relationship between current renters and landlords. They will identify/conflate the interests of, say current renters with the interests of renters in general. In so doing they create the appearance that aforementioned residual antagonism, which can only be discovered after the fact that both parties have an interest in the closing of the contract at any price within the margin of negotiation, is characteristic for the totality of those parties' mutual relations. What they are doing in actual fact is sacrificing the interests of future renters for the benefit of current renters, using the argument "in the long run we are all dead". Which is to say "after us, the flood".

In this way, it is possible to push the opposition between taxpayers and tax-receivers to the background. For instance, by drawing attention to the residual antagonisms which results from the fact that room for negotiation remains in existence in most contractual situations, allowing space for "tough" negotiators to focus on getting the most out of dealings for their clients. Among both the groups of taxpayer and tax-receivers we can find renters and landlords, employers and employees, men and women, etc. The possibilities for playing groups against eachother are practically endless, once the insight of the fundamental nature of the fiscal relationship has been lost. That relation does remain fundamental, of course. The heart of the matter involves legislation, which means to say the way in which state power is applied to taking means and possibilities from one group and giving them to another. However, to the extent that demagogues or other "political entrepreneurs" succeed in mobilizing groups in order to strive for a dominant position in relation to this fiscal relationship, and to the degree that these groups lose consciousness of the role of

this relation, they can break through the solidarity between the taxpayers, playing one taxpayer against another. In so doing, they can hollow out the original definition of democracy, turning democratic institutions into something which conforms to Bastiat's definition of the modern state: "The state is that grand fiction by means of which each aims to live at the expense of all others".[5] The majority of contemporary political activity indeed consists of attempts of various interest-groups at turning the fiscal relationship to their own advantage.

In order to correctly understand the original idea of democracy, one must keep the fiscal relationship in the forefront of one's thought. The democratic idea in its modern form was originally a rendering of the desire to curtail the tax-agencies: "No taxation without representation". The aim was to bring the government and authorities in general, under the control of the taxpayers, so that the state-apparatus might no longer be used solely by a small ruling elite of tax-recipients. The logic of this idea demands a central position of the praxeological or economic distinction between taxpayers and tax-recipients. This central position may not be compromised by fictional juridical definitions of these concepts. A taxpayer is not someone who completes various forms and meets various administrative requirements, but a person who acquires their income by means of the market and is forced to relinquish part of said income to an authority. The personnel of this authority, the clients of the system of subsidization, and people supplying the authority, are, in those capacities, tax-recipients. The basic idea of democracy is violated when tax-recipients get a say and a vote in the level of taxes, the structure of taxation, and the structure of government expenditures. This is made clear when, as is the case in many Western "democracies", tax-recipients form the majority of the electorate. In practice, a numerical majority is often not required for the tax-recipients, as they are in a position from which they may easily attempt to form coalitions with various groups of taxpayers, enticing them with the opportunity to get a slice of the state-pie. The phenomenal increase of the pressure of taxation (government expenditure) which describe the economical

5 F.Bastiat: L’état. Paris 1849, p.11

history of the 20th century, is the unavoidable consequence of the lack of institutional methods for adequately controlling the tax-recipients. The existing institutions basically amount to the tax-recipients being expected to control themselves, and to temper their own demands for income.

It is a small wonder that, under such circumstances, government expenditures have become truly uncontrollable, and that the state-sector has become the source of large-scale and permanent economic turbulence. Especially since the dismantling of the gold standard, which paved the way for permanent inflation (which is, of course, a very special form of confiscation: the state, having acquired a monopoly on the issuing of money, is able to create means of payment for themselves, with or without help of a banking system controlled by them; said means of payment are then used to confiscate large amounts of services and goods, which are then no longer available for the workers, entrepreneurs, savers, etc. in the private sector).

The antagonistic relationship between the private sector and the so called private sector was nicely framed by Joseph Schumpeter:

> "The friction or antagonism between the private and the public sphere was intensified from the first by the fact that, ever since the princes' feudal incomes ceased to be of major importance, the state has been living on a revenue which was being produced in the private sphere for private purposes and had to be deflected from these purposes by political force. (The theory which construes taxes on the analogy of club dues or of the purchase of the services of, say, a doctor only proves how far removed this part of the social sciences is from scientific habits of mind.) ... Until 1914 roughly—if we agree to consider modern times only—that injury was confined within narrow bounds. But since then taxes have grown, by degrees, into the dominant item of business and family budgets and into a major factor in the explanation of unsatisfactory economic performance. Moreover, in order to wrench ever-increasing amounts from an unwilling organism, a huge administrative apparatus has come into existence that does nothing but struggle with the bourgeoisie for every dollar of its revenue. That organism has in response developed organs of defense and does an immense amount of work in self-protection"[6]

6 J.Schumpeter: op.cit. bij p.474, p.198 Schumpeter refers a.o. to the speech by F.D.Roosevelt at Worcester, Mass. (oktober 1936): "Taxes, after all, are the dues that we pay for the privileges of membership in an organized society."

This self-protection; work off the books, tax-evasion, etc.; is of course lawful and even fully morally responsible behaviour. The fundamental principle of law/right guarantees its lawful nature, and the fundamental norm of ethics, that everyone should respect themselves as a rational being, implies that no-one is morally obligated to simply relinquish their means, a part of their lives, to an aggressor without a fight. Not even when this aggressor "legalizes" himself, in so doing "criminalizing" self-defense against financial assault.

The dynamics of the fiscal relationship can be understood analogously to any "arms race". Any increase in the pressure of aggression elicits an increase of the countering defensive efforts. As the aggression increases, it becomes more advantageous for taxpayers to spend means on defending what they have, rather than on producing new value. As the taxpayers come up with various new techniques of defending themselves, and start applying them, it becomes more advantageous for the tax-recipients to expand their arsenal of techniques of confiscation, and to use any men and means at their disposal to keep their standard of living intact. Of course, the latter will also be strongly motivated to start various propaganda efforts promoting patriotism, civil virtue (w.i.t.s. servility, subservience), etc. This is simply because the expenses required for fiscal repression can be much reduced if many citizens are provided with the opportunity of hiding behind such "virtues" when ratting out their fellow men to the fiscal authorities. As the conflict comes to a head, fiscal repression can become and end unto itself, keeping it in place long after it has become clear that it can only lead to the confiscation of already produced goods, while stunting the production of new, and the maintenance of existing, means.

Like all parasitic relationships, the fiscal relationship is not exactly sustainable if the speed of parasitic "extraction" exceeds the growth or regeneration of the body the parasite is feeding on. The fiscal relationship is, in fact, even less stable than this biological metaphor suggests. If a population of worms is parasitizing a population of ruminants, or a population of ruminants on a population of grass, then we still have the certainty that a ruminant will remain a ruminant, a worm a worm, and grass grass. In the fiscal relationship we have no guarantee at all that a

taxpayer will not turn into a tax-recipient. Take a population of 100, 60 taxpayers and 40 tax-recipients. If 10 taxpayers were to switch sides, the ratio taxpayer/recipient would go from 4/6 to 1/1. This places the remaining taxpayers under a disproportionally increased burden of taxation, giving them all the more reason to also enter into the class of tax-recipients. While it is true that this expansion of the "public sector" (in the economic sense of the words) is to some extent a shift of productive activity to the "public sector", there is usually a significant loss in terms of productivity and coordination of production and consumption in society* as a whole. It is in the state sector that "production for production's sake" is the norm (rather than "production for consumption") since it is precisely here that the tie between the income of the producer and the willingness to buy of the consumer has been severed. Additionally, it is also in this public sector that a consumer has the occassion to achieve their aims without having to offer some supply in exchange for their demands.

Contracts between producers and consumers in the private sector, have the character of a trade in which the producer delivers a good or service Q in exchange for a price (wages, fees). The consumer however, does not pay the full price to the producer of Q. A part of it goes to the fiscal agency (say for example 50%). In this example,it could thus occur that the consumer pays 50000 fr for Q, 25000 to the producer, and 25000 to the fiscal agency. The fiscal agency will receive the 25000 fr without any quid pro quo, or in any case without the consent and accord of the producer or consumer. The fiscal agency cannot possibly know if the government services they make possible, by spending this 25000 fr, are indeed valued at at least 25000 fr by the taxpayers. They cannot possibly know if their services are appreciated by the taxpayer, though they are likely to be appreciated by the tax-recipients as these latter live off of the fiscal operation. In this case, there is a transfer of 25000 fr from the private into the public sector. We all know that this would not have come to pass absent government force. If the fiscal agency were to buy Q themselves. they would not pay 50000 fr but rather 25000 fr, unlike a consumer in the private market. They may fork over 50000 fr as a buyer, but they will recoup 25000 fr as the fiscal agency. If they so please, they can also sell Q at the market price of 50000 fr. In this way, the fiscal agent will have

gained 25000 franks from the whole purchase/sale operation, and they have had to "supply" naught but force/compulsion. It is clear that under such circumstances, any consumer would benefit from attempting to consume through the fiscal relationship, via the "political method": as a tax-recipient they only pay half for Q compared to what they would have to pay as a taxpayer. This is obvious: the fiscal relationship allows tax-recipients to smear out the expenditures required for the achievement of their goals over the entire population of tax-recipients *and* taxpayers. The fiscal relationship is essentially redistributive, and as clarified above, necessarily impacts production.

The true perverseness of the fiscal relationship is to be found in the fact that the only way to effectively protect one-self from confiscation is to gain control over the operation of the fiscal agency itself. This is to say to gain power and influence in the relevant levels of decision-making in the state apparatus. However, once acquired, there is little chance of this control being used for purely defensive purposes. Anderson and Hill describe the dillemma as follows:

> "Despite the general acceptance that it would be in the common interest to make theft punishable, a different domain of *legal* transfers remains unimpeded. The legislation that relates to use and ownership of means are subject to change through the legislative process. This means that, if it is impossible to enrich yourself using illegal theft, it may be possible by changing legislation. If this were to happen only once, it would not result in a decrease of the net-wealth of society* as a whole. That net-wealth would simply be differently distributed. If, however, the members of this society realize just how vast the possibilities for enrichment are when using legislatively backed transfers... Then, a whole lot of means will be diverted towards the legislative system in order to either achieve or prevent such transfers. Add to this fact that those means could have contributed to the production of a higher average level of wealth in the society in question. The fact that it is used instead in organizing transfers means that less wealth will be produced, and thus that society will be poorer for it than it otherwise would have been. The end result is a "negative sum game"."[7]

- a game in which the value of the means which are input than the value of the prized paid out. The growth of the state makes everyone

7 T.Anderson & P.J.Hill: The Birth of a Transfer Society. Stanford, Calif. 1980, gecit. uit Anderson & Hill: The Birth of a Transfer Society: The American Constitution In Historical Perspective. Onge-publiceerd manuscript, Univ. of Montana, 1978, 4–5.

poorer, the taxpayer in the short term, but in the long term the tax-recipients as well.

Why does anyone play the game at all? There are two main reasons: 1) most people tend to overestimate their "luck". This is the reason so many enter lotteries and such, even though they know that the odds of them losing is far greater than their chance of winning. They are enticed by the few, rare but truly large jackpots which are much larger than any amount they ever plan to spend on the lottery, even over a lifetime. 2) At no point in time are the taxpayers ever faced with the tax-receivers. At any one time, it is *current* taxpayers that come to face *current* tax-receivers. Tax-receivers are not very likely to have a great amount of consideration for their fellow people, and as such are not likely to worry overmuch about the interests of *future* taxpayers or *future* tax-receivers. "As long as it outlasts me" in not an uncommon response when people are explained what the consequences of a particular policy will be. Furthermore, handy manipulations may influence the spread of the beneficial and detrimental consequences of a policy in such a way that the benefits appear quickly, sometimes almost instantaneously, while the detrimental consequences appear much later (when the costs must be borne by the next generation). In other words, it is possible to create apparent wealth from which almost everyone, save perhaps the most marginal groups, may benefit immediately, but for which the bill will later be presented to a group of mostly different people (the next generation). Inflation and the system of so-called social security are certainly the most important techniques in which both the synchronous (intra-generational) and the diachronous (inter-generational) redistributive effect is expressed. Inflationary expansion of credit creates the impression the people are willing to save more than what they are actually planning to save. Social security organisations give people the impression that they are saving money, but their savings are not at all invested but rather made available for immediate consumption. Both techniques initially create a consumption-euphoria, borne by massive capital consumption on the one had and by the illusion that the future is assured either way, on the other.[8] Both systems are inherently fraudulent,

8 Cf. the remark by J.B.Say.in H.Hazlitt, op.cit. with p.455, p.20: “The same principle (referring to “Say’s Law”) leads to the conclusion that the encouragement of mere consumption is no benefit to commerce; for the difficulty lies in supplying the means, not in stimulating the desire of consumption; and we have seen that production alone furnishes those means. Thus, it is the aim of good government to stimulate production, of bad government to encourage consumption.” Also Van Den Doel: Het Biefstuk Socialisme. Utrecht–Antwerpen.

and will eventually be experienced as the purely fiscal operation that they truly are. Their beneficial effects rely solely on the ignorance of most people, who are not able to fully grasp all the consequences immediately. The dimension of time is essential to properly understanding the fiscal relationship. At any one time, there will be people who are willing to apply the "political method", even if their loot would have been far larger if their predecessors in the tax-receiving class would not have been so greedy. As a side-note, one could remark upon the fact that the utilitarian argument that the properly understood self-interest of all will move each to acting in the common interest, even if their goals are not oriented by any conception of right/law, only stands a chance at being convincing if we assume all people to be immortal (and thus all part of the same generation). Under this presumption, utilitarians may be able to fashion a plausible start to their argumentation for the position that each person has the right to do or not do as they see fit, which is to say that each person has the right to do that which they consider to be of the highest utility, and thus for the position that there is no need for a limitative, contentually determined, concept of right/law, besides this "utility". Said presumptions are, of course, not at all believable. People are not immortal, and they are keenly aware of that fact. For finite, mortal beings, it is not necessarily irrational to start up a "negative sum" game, certainly not if violence and deceit are essential components of this "game".

The *legality* of the fiscal operation should not blind us to its true nature. Its consequences in the longer term are wholly comparable to those of a transfer-activity in a Hobbesian "State of Nature". In light of those consequences the legality of these enforced transfers is totally irrelevant. "The entire discussion", Anderson and Hill remarked, "faces us with an interesting dilemma: not dealing with theft is likely to cost a society* dearly. By making some of these transfer-activities to be illegal, all we do is change the arena in which these activities are expressed. Lacking any further information, we cannot form a judgment on whether this solution leads to less

"social wastefullness" than the other."[9] The war of all against all can of course better be fit into some legal mould - and maybe there is no alternative at this point in history, but these are not valid reasons for not recognizing it unlawful nature. Nor is it a reason to make this time in history last any longer than it strictly needs to be. An essential reform, required in order to halt the perverse dynamics generated by the fiscal relationship, would be to at least attempt to deprive the most central elements of the class of tax-recipients (political, administrative and other state personnel, the legal owners and personnel of monopolized, privileged and subsidized companies, etc) of the ability to vote. This would give taxpayers a rudimentary though not wholly ineffective control over government expenditure. In any case, such a reform, potentially coupled with a system of variable reimbursement (in which there would be some system by which every member of state personnel would receive a predefined cut of a sum determined and approved by the taxpayers or their representatives) would probably be able to end the constantly repeating tragedy of "uncontrollable" government spending, and allow for a return to the original idea of democracy in which the positions of voter and tax-recipient are not compatible.

I would like to point out that this general suggestion is insufficient for a guarantee of compatibility with the fundamental principle of law/right, and as such it is not necessary to dwell on the matter. This would be required if this book were devoted to the problems of democracy as such. If that were the case, we would be forced to wonder, when interpreting the idea of the people controlling the state, just who "the people" and "the state" are, exactly.

The "negative sum" nature of the fiscal relationship is explained in its totality by simply pointing to the fact that taxation in any form will weigh on production, encourage consumption, and thus lower the tendency to save, invest, and the future standard of living compared to that absent the taxation. This effect is easily understood. The reason for the existence of the fiscal relationship is the redistribution of means from taxpayer to tax-recipients. Means, however, must be produced before they can be

9 Anderson & Hill: op.cit. with p.481, 5

taken away, and furthermore they must be taken before they can be consumed. In other words, the means must be taken while they are en route to the eventual consumer, in the process of production. Either you can take the means where they are located, or you can extract means of payment that a producer earned during production, and use these for the purchase of the means (at a reduced price, since the fiscal agency does not pay taxes).

In the private sector, all means must be acquired in the production-process. As such, any taxation must either discourage production or encourage capital-consumption, since no-one wants to produce means that will be taken from them, and anyone who is taxed more because they consumed less in the past than they could have if they didn't guard or increase their capital, is not likely to make the same "mistake" again and will likely consume their capital. A tax on consumption is impossible. In the best case, a tax on consumption could slow capital consumption. In actual fact, the effects of a tax on consumption is equal to the effect of an income-tax (if, at least, there are no de-savings: consumption expenditure paid for not from current incomes but from accumulated capital is discouraged by consumption-taxes). So-called "indirect taxes" are also nothing but income taxes.[10]

All income taxes discourage the acquisition of income. Income taxes are logically equivalent to a fine: any who drive faster than the allowed maximum of y are fined according to the formula f(x-y), where f is a certain mathematical function that is 0 when x<y, and x the actual speed of a driver. Those who generate an income greater than y are also fined, or taxed, according to the formula g(x-y), where g is a mathematical function, x the actually produced income, such that the tax owed increases as (x-y) increases. All taxes on capital discourage the retention and formation of capital. They are also equivalent to a fine. If you are caught with narcotics you are fined according to some formula k(x-y), k once again being mathematical

10 M.N.Rothbard: Power and Market. op.cit. 83–111; Charles W.Baird: “Proportionality, Justice and Value-Added Tax” Cato Journal 1,2,405–420

function and (x-y) some "illegal" amount of narcotics, and in the same way, if you are found to be in possession of capital, you are are taxed or fined according to say some formula l(x-y), where (x-y) is some "punishable" amount of capital. The only difference between a tax and a fine is that a fine is *meant* to discourage certain activities, while this discouragement is an *unintended* consequence of taxation. Beside this subjective element, taxation should be consid-erded to be the punishing of labour and capital.

Such punishement leads, *ceteris paribus*, to a decrease of taxable mass. People at all times compare the benefits and costs associated to their various activities. If some activity (labour, saving) is taxed more, then *ceteris paribus* other activities become more attractive, but what is making them more attractive is the fact that they are not taxed, or taxed to a relatively lower extent. So, the increase in taxation means a loss of subjective value for those who are forced to alter their plans, so as to limit the damage. In general, taxes encourage flight from the "legal" market and "legal" system of production (unemployment, work off the books) as well as capital consumption. This is the case simply because all "legal" labour and savings carry an "opportunity cost" (eg leisure, immediate consumption, as well as tax-avoidant labour- and saving-activities, emigration) which rises as taxation increases and eventually becomes prohibitive. In the end, the system of production can only be maintained by direct violence (slavery), for example by taxing a person's mere presence in a certain territory. This method was used, among other things, to chase the serfs and bondsmen out of the manorial economy, and force them to produce for markets controlled by the royals, and to force natives in areas to be exploited into finding work in the mines and plantations, the only places where they could make the money to pay their taxes. The expression "wage-slave" relates only to these situations: it shows that taxes can be used to force a person to cooperate in certain production-processes which they otherwise would have no interest in.

Can these production-inhibiting effects of taxation not be compensated for by state investment? The answer is one in the negative. State investments are, praxeologically speaking, consumption

expenditures by politicians and bureaucrats.[11] The true state investments are those in which a person invests their own means in order to gain greater power and influence in the state apparatus at a later time (e.g bribes, quid-pro-quo, etc in the hopes that they will later help to bring about the political ambitions of the briber; the purchase of weapons and training of terrorist-groups in the hopes of seizing power at a later time). An investment in the economical sense of the word entails the trade of a *certain current good* (eg. money) for an *uncertain future good* (or services), which the investor expects to be sufficiently attractive to future consumers that they will be willing to spend sufficient means on it, so that the production will end up being profitable. In other words, in an investment *saved* means are applied in a manner of which it is hoped that the future consumers will appreciate it to a sufficient degree that it can be said that the effort made will not have been in vain. An investor that does not have the means at hand may borrow them, which means that they must first convince their financiers that their project offers good prospects.

The state, on the other hand, does its work with confiscated means. They do not need to convince their financiers, at least not as long as their ability to confiscate has not been exhausted. In any case, they can easily convince their financiers that, even if the project will flop, they can easily transfer their debts to the future taxpayer. Any person who buys government bonds makes themselves complicit in taxation.

So, there is a fundamental difference between economic investment and state investment. State investment is not guided by the judgment that a certain project creates an intertemporal coordination between current consumers and future consumers, but rather by the judgment of some group of tax-recipients or another, that this project is a) "better" than any project or bundle of projects the taxpayers could have started up with the confiscated means if they were still in possession of those means and b) "better" than any other alternative project said tax-recipients could finance with said means. (a) makes it clear that tax-recipients aim to ignore the value-judgments of the taxpayers. As such, state investment must result in what is called "garbage goods".

11 Cf. J.B.Say: Traité op.cit. in fine. Rothbard: Power and Market. op.cit. 173 and further

(b) makes it clear that the costs that the decision-makers will consider, are their own subjective alternatives, not those of the taxpayers. Since it is the case that politicians and bureaucrats that are making the decisions often do not plan to consume the good or service to be produced, and that they are often unable or unwilling to wait until users for the produced good show up, the decisions they make are in many cases simply personal consumption-decisions, created by the *immediate benefits* they expect from the projects (prestige-projects, monuments, luxurious offices, etc.).

State investments do of course create all kinds of *physical* activity in a whole number of places, but since this activity is financed by means of which the rightful/lawful owners would have used towards other ends, all this physical activity is but a shift away from the activities which would have occurred in other times and places, and which would have conformed more to the actual value-judgments of the taxpayers.[12] Because of the confiscation of said means, those projects cannot be executed. They remain invisible, while the activity the state starts is all the more visible (press-conferences, opening ceremonies, press coverage, etc). People do not have the option of comparing the visible of the state with the invisible in the private sector, which has not come into being because the state confiscated the means for its realization. Many people have the impression that state-intervention fills a void: they do not see the gaping holes the fiscal operation leaves in the projected structure which would have come into being through voluntary cooperation.

Sometimes, the claim is made that state intervention creates an environment in which the taxpayers can work more productively. Examples given include the building of roads, the organization of monetary and juridical systems, etc. These examples pop up again and again in the literature. In discussions closer to daily life we are more likely to hear of the massive amounts of waste and redundancy in the building of many roads and public transportation systems, about the turgid and ineffective nature of the juridical system, and of monetary instability and shock, etc, but still these arguments plague theoretical discussions.

12 Cf. F.Bastiat: “Cequ’on voit et ce qu’on ne voit pas” in L.Baudin: Frédéric Bastiat. Paris 1962. pp. 128–135.

The idea that, if the state would not supply certain goods, these goods would not be supplied at all only actually applies to the so-called "garbage goods".[13] Other than these, there are no legitimate services which would not be supplied through voluntary means if there are sufficient people who deem the delivery of said goods as the most valuable use of their own means. The existence of so-called "collective goods" and "external effects"[14] (insofar as these are not the result of state intervention itself) are fundamental technological and economical givens of the market. They are aspects of reality, which do not simply disappear if the market were to be eliminated. On the contrary: the costs generated by them are best able to be minimized on the free market itself, because there they may be judged by those involved themselves, in the totality of their own concrete situations, rather than requiring transfiguration into the pseudo-objective units of so-call risk-benefit analyses. It is undoubtedly the case that the availability of roads, public transportation, currency, courts, education, medical care, etc. make the taxpayers able to working more productively than if these things were not available. There is, however, no reason whatsoever to assume that these things would not be available if they were not made available by the state by the use of confiscated means. They would, however, be available in different qualities, quantities and forms, more in accordance with the wishes of the consumers. The fact that state-monopolies and forged competition by state-departments make the production of such services by voluntary cooperation more difficult, or even impossible, is not an argument for those monopolies and privileges.

FISCAL CLASSES: A HISTORICAL NOTE

The opposition between the class of tax-recipients and the class of taxpayers rest on a praxeological analysis, and corresponds to the distinction between law/right/justice and injustice in philosophy of law/right as I have described it above. The origins of the theory of fiscal classes is to be found in the 18th century "theory of conquest", which emphasized the role of violence, exploitation, and oppression in the formation of the historical

13 Cf. A.B.Laffer: De fiscus onder het mes. Brussel 1981. p.52.
14 Cf. F.van Dun: op.cit. bij p.472.

socio-political formations. It was however, only when this theory was connected properly to the only recently developed science of economy in the start of the 19th century, that it became possible to give a universal meaning to the historical appreciation of the position of the priviledged classes in society* at the time. The purely historical realization of the violent origins of the privileges of various groups did not provide any insight into the fundamental mechanisms of society*, and in particular of the non-political formations such as the economical system and the family, when compared to the political formations consolidated in the state. In its practical implications, it was therefore limited to arbitrary, utopian speculations, devoid of scientific foundations, to the idea of a revolution which would sweep away the old order, and replace it with a new one. What was missing was a *theoretical* foundation for the distinction between the "military" and "industrial" (which means to say productive) classes. This foundation was finally found in the science of economics: labour, production, industry, these are the basis for a prosperous society*. This makes the conditions under which productive activities can best develop identical to the conditions under which prosperity in society* may be maximized. Though J.B. Say remained true to the classical understanding of value, he still places strong emphasis on the fact that the production of value (which is to say: production in the economical sense, rather than a technological one) can only reveal itself in a free society*, where the interaction of individual participants in the economic system is of a voluntary nature. Say's economical analysis provided the foundation for a praxeological approach of the problem of classes. After him, Augustin Thierry revealed the opposition to be that between freedom and power, between the people who attempt to realize their goals without harming the freedom of others, and those who attempt to do so by their ability to rule over others. Political progress can only be made by the productive people joining together against the rulers.

Charles Comte, Charles Dunoyer and Thierry himself further elaborated the opposition in their analysis of the market as the totality of interactions based on mutual consent and voluntary exchange, and noted the parasitical relationship of the classes who attempt to realize their

goals by means of the state apparatus.[15] Comte and Dunoyer also made explicit the perverse dynamics of such a class-structure, in which the productive class is continuously weakened, and the non-productive class has the tendency to grow. Thierry brought forward the clearly anarchist implications of this liberal analysis. First by remarking that civilization and slavery are the products of two different classes, and afterwards by questioning even the traditional "tasks" of the state. He pointed out that the excesses of the police are far more dangerous than the absence of the police: there is no criminal that poses a threat greater than the threat of the potential abuse of power of a public official.[16]

The weak point in this class-theory was, of course, classical economics itself, more specifically its theory of value. As the latter took the foreground more and more, repressing from view the truly important contribution of the classical economic doctrine (the analysis of competitive processes and specifically their equilibrating tendencies), the class-theory which was based on it too lost its specific character. It must be noted however, that Say and his followers in France (the "French School" or the "Parisian Group": Pellegrino Rossi, Michel Chevalier, Dunoyer, Comte, Cherbuliez, Frédéric Bastiat, and the Belgian Gustave de Molinari, to name but a few) should in no way be seen as followers and exponents of the Anglo-Saxon tradition of Adam Smith, David Ricardo, Malthus and Mill. Though they may not have been fully cognizant of the fact themselves, they were much closer to a very old tradition (Condillac, Turgot, Quesnay, and so on until the late-scholastic contributions of a De Molina) which postulated a *subjectivist* theory of value which is essentially different from the *objectivist* labour theory of value of the Anglo-Saxon tradition. The latter had become, as a consequence of the Reformation and its long aftermath, completely separated

15 Cf. L.Liggio: Charles Dunoyer and French Classical Liberalism" Journal of Libertarian Studies 1, 1977, 153–178. R.Raico. Classical Liberal Exploitation Theory: A Comment on Professor Liggio's Paper." Journal of Libertarian Studies 1,3, 1977, 179–183. M.Weinburg: "The Social Analysis of Three Early 19th Century French Liberals". Journal of Libertarian Studies 2,1,1978, 45–64. J.T.Salerno: Comment on the French Liberal School" Journal of Libertarian studies 2,1,1978, 65–68. G.De Ruggiero: Storia del Liberalismo Europeo. Bari 1925, hk 2. J.P.Mayer: Political Thought In France: From Siéyes to Sorel. London 1943. E.Harpaz: L'Ecole libérale sous la Restauration. Genève 1968. M.B.Kingsley: French Liberal Thought in the Eighteenth Century. London 1929. E.Faguet: Le Libéralisme. Paris 1912. The classic explanation of the classical liberal "theory of conquest" is, of course B.Constant: De l'esprit de conquête et de l'usurpation 1814.

16 A.Thierry in Le Censeur Européen viii. p.241.

the subjectivist theory of value, which had survived in the Catholic areas of the southern half of Europe, and it had taken to the labour theory of value as an analytical stopgap. It was not until Jevons that the contribution of the French School was properly appreciated.[17] This heralded the end of the disregard that the post-Ricardian English school, reasoning increasingly in objectivist and mechanistic terms, had had for the French School. In this discussion, one must keep in mind that, before the "marginalist revolution" of Jevons, Menger and Walras, the meaning of the distinction between these two fundamentally dif-fernt approaches to the theory of vale could not become very clear. Because of this, the French School was easily tempted into accepting the terminology of the labour theory of value, without actually denying their own subjectivist interests.

Said interests were expressed in Say's insight that value cannot be disconnected from valuation/appreciation. This means that only in a free society*, where people are free to act on the grounds of their own valuations of various differing alternatives, is maximalization of value possible. The *laissez-faire* of the French School was not a dogma, not a doctrinary prejudice, but rather a consequence of its implicit subjectivism. This subjectivism entails trying to understand economic reality "from the point of view of the actor", not from some "Olympian" point of view from which said reality appears as naught but an objectified system of relations and mechanical, in principle quantifiable, stimulus-response connections. As such, as I noted earlier in this book, it is essentially "anti-scientistic", and as such it could not but appear "shallow" and "unscientific" in the age of scientism. This probably explains the lack of understanding for what the French School attempted to do. This lack of understanding was also present in France, and in no less than the *pace-maker* of scientis-tic fashion in the social sciences: Saint-Simon. Saint-Simon was very close to Say, Comte and Dunoyer. Thierry, who would later have a falling out with him, was Saint-Simon's secretary for a time.

In regards to Say, Saint-Simon noted that the former undoubtedly wrote "the most useful work" on political economy, but he also added that Say had proven that "politics is the science of

17 W.S.Jevons: The Theory of Political Economy. Harmondsworth 1970. 67–68.

production".[18] Saint-Simon interpreted this position as a proof of that, in a rationally organized society*, production must be subordinated to a system of political control. Which means to say production must be subordinated to a system of decision-making hierarchical and authoritarian in structure, authorized for all economic decisions. Such an interpretation of course directly contradicts Say's conclusion that a rational order would be free from precisely such hierarchical and authoritarian intervention in free traffic. These radically opposing conclusions can be explained if we consider Say's subjectivism contrary to Saint-Simons objectivism. To say, action was a matter of judging, based on hypotheses: action is necessarily speculative and risky. To Saint-Simon, the existence of an economic science itself was enough reason to believe that action does not necessarily need to be speculative and risky, if action itself could be made subsidiary to the science of production. To him, scientific knowledge is the opposite of speculation: it rests on *certain* knowledge of facts and on mathematical *certainties*. To Say and his allies there was no such things as knowledge outside of the context of action itself: knowledge must be produced, and as such the production of knowledge is dependent on the circumstances in which action takes place. Dunoyers defense of "the market", of a free society*, was fundamentally based on the fact that only free competition is compatible with a continuous process of dialogue, open criticism, comparison of theories and convictions, and this with the production of knowledge. More specifically, against the Saint-Simonists, he wrote:

> "These authors get it all wrong when they accuse critical philosophy from wanting nothing but to break down things, and proposing only negative goals. The truth is quite the opposite: critical philosophy aims at eliminating all obstacles which get in the way of free and lawful exercise of human abilities. It aims for a very positive goal, namely to create the space in which human abilities may unfold. It demands the abolition of all privileges, all monopolies, all evil and violent restrictions, and wishes for each the opportunity to develop their abilities within the bounds of right/justice and fairness."[19]

To Saint-Simon, such "space" only meant the room for error, for sinning againts the principle of "scientific

18 “Lettres à un Américain” (I.viii) Industrie. in Oeuvres de Saint-Simon et d’Enfantin. ii. 182, and followign

19 Ch. Dunoyer: “Note historique sur l’industrielisme” in Revue Encyclopédique 33. p.194

politics".

Saint-Simons objectivism led him to bastardizing the class-theory he was borrowed by Comte, Dunoyer and Thierry. It is useful to very schematically represent just how much this bastardization was dictated by the formalization of objectivist theory of value (which, in Adam Smith and even Ricardo, was more of a suggestive stop-gap than a formal theory). It is interesting to remark that on of the first to formalize the labour theory of value was the Saint-Simonist Enfantin.

The class-theory developed by Thierry, Dunoyer, Say and others, rested on the subjectivist insight that trade can only be explained if we assume that the different parties have different, even opposite preferences relating the possession of the goods or services traded. A has a but would rather have b, which he doesn't have. B has b but would prefer having a, which he does not have. Only under these circumstances will both parties be inclined to trade. Both parties are expecting to win, which is to say both are expecting to be better able to achieve their goals, whatever those may be, if they engage in the trade than if they were for some reason unable to make the trade. This insight, that trade *always* relates to unequally valued goods or services, and never to "equivalents" is what characterizes the subjectivist tradition. It was explicitly mention by, among others, Condillac.[20] The argument for the free society*, for the "economic" method, rested, in other words, on the insight that freedom is a necessary precondition for all people to be able to move in the direction of their most preferred position, in all circumstances. Any intervention, which prevents people from freely disposing over their means, means that they must content themselves with a position they appreciate less than that they would have absent the intervention. In other words, any intervention means that at least one of the parties, who are the objects of said intervention, will be forced to make a trade that they would not accept of their own free will, or to let an opportunity for a trade pass by even though they consider it to be an opportunity for bettering their position, for bringing the achievement of their goals closer. If there is no free traffic, at least one party will lose because of the interaction.

20 Condillac: Le commerce et le gouvernement (1776), in Daire & Molinari: Mélanges d’économie politique. Paris 1847. p. 267

Put differently: in a free society* (besides unintended external effects) only those interactions come to pass which are considered to be beneficial by all parties involved. There is "harmony", while in an unfree society* some people force interactions which others experience as detrimental. There is "conflict", "antagonism" between those whole live off production and trade and those who live off robbery and violence.

This subjectivist approach explains free trade "from the perspective of the actor". The objectivist labour theory of value on the other hands sees the "value" of a traded object as independent from the value-judgments, and thus the plans, goals and prospects, of the market-participants. We need not dwell on the details of this theory in its different forms. The essential point is that, if "value" is decoupled from this act of subjective valuation, and projected onto the object, any proposed trade between objects a and b would have to meet one of the following three conditions: 1) a is worth more than b; 2) b is worth more than a; 3) a and b are worth the same. Value *to whom,* or *to what end* is not discussed here, there is no "actor's perspective" here. It is clear that those that accept this proposition will have to conclude that a free exchange can only relate to equivalents: no-one would willingly trade something of "greater value" for something of "lesser value". To put it in other words: 1) in a free trade, there is neither profit nor loss for either party; 2) if there is profit or loss, that is an indication that the trade is not free (provided both parties know the value of the good traded); 3) profit for one part means loss for the other, as one party gains that which the other loses.

In fact, this doctrine means that free exchange is totally inexplicable. Why would anyone bother getting rid of, or acquiring, anything if what they gain or get rid of is worth no more and no less. The absurdity of the theory is clear when it is applied to consumer goods (direct trade). This is why the theory is only applied in cases of indirect trade, but this does not alleviate the absurdity. It does not allow for the understanding of concrete transaction, and as such it has no explanatory value in the domain of the sciences. It implies a) that the exchange of equivalents can only be understood as a *game*, and b) that to the extent that exchange is not a game, any exchange is necessarily involuntary. Which is to say, in any trade one party wins and the other loses, one exploits the others, since the only reason the latter engages in the exchange is because they

are forced to do so by force or external circumstances.

Such a conception is of course a choice vehicle for social philosophy: it implies a radical antagonism among people (or, in collectivist terms, among "peoples", nations or classes), as well as the proposition that only the removal/lifting of human multitude could eliminate exploitation of one by the other. After all, in that case, the necessity for interpersonal trade disappears.[21] The most detrimental result was however that the proponents of said doctrine become unable to understand the ratio of economic traffic, and thus of the coordinating function of market-operations, especially on inter-temporal transaction (credit, "labourer-entrepeneur-capitalist"-relationships). This left them considering market relationships as irrational, and morally suspect, painting them with the same brush as hegemonic relationships based on physical violence and fraud. It's not hard to guess what the consequences of this simplistic theory of value were to the Saint-Simonist interpretation of the classical class-theory.

The so-called labour theory of value implies that one person's profit is another's loss, and in so doing joins the ranks of the mercantilist systems, and other nationalist and collectivist doctrines which express the belief that every individual, as an individual, is necessarily in mortal conflict with all other individuals, or that the individual is in mortal conflict with the community. This doctrine is, as shown previously, pure nonsense. It is of course true that, while the position of some individuals or groups improves, the position of other people or groups worsens, but, excluding the application of the "political method" it cannot be said that the improvement of one parties position is the cause of the worsening of the position of the others. What is true is of a wholly different nature. The world, the world of people, is in constant motion. Changes, innovations, discoveries, etc., are unavoidable consequences of human thought and action. Such changes don't affect everyone equally: some fare well by them, the changes increase their chances of achieving their goals, they win. Others lose, because they have planned their actions, their career, maybe even their whole lives on the basis of expectations that those changes would *not* occur, or because they are not able to enact an adequate change of their plans. In no case is it possible to simply

21 Cf. Marx. in R.Freedman (ed.): Marx on Economics. Harmondsworth 1976.p.232 e.v.

state that one person's profit is the cause of the other's loss: this can only be stated when the use of unlawful ways of action can be shown.

It is an elementary theorem of economical analysis that profits and losses have no cause other than the absence of perfect knowledge, which is to say the presence of uncertainty. In the hypothetical construction of the perfectly coordinated economy, in which everyone knows exactly what is going to happen, and has the time and knowledge to account for everything in their plans (so in which nothing unexpected ever happens), there is neither profit nor loss, and money has no reason to exist. As Ludwig von Mises wrote:

> "In a system without change in which there is no uncertainty whatever about the future, nobody needs to hold cash. Every individual knows precisely what amount of money he will need at any future date. He is therefore in a position to lend all the funds he receives in such a way that the loans fall due on the date he will need them. ... All transactions can in fact be effected through transfer in the bank's books without any recourse to cash. Thus the "money" of this system is not a medium of exchange; it is not money at all; it is merely a numeraire,an etherical and undetermined unit of accounting ... This notion of "neutral money" is unrealizable and inherently contradictory."[22]

Money is a means with which people can somewhat protect themselves from the consequences of the uncertainty they face every moment. You can find it objectionable not to be omniscient, but to rant and rave against the (of course only partial) remedy for this uncertainty is primitive mysticism. It is as nonsensical as believing that eliminating all mechanics is the best way of preventing breakdowns of vehicles.

This leads us to the fundamental motive for Saint-Simons' reversal of Say's analysis of economic traffic and for the revolt against capitalism in general, which has so many intellectuals under its spell. This motive is fear of uncertainty, the disgust for the fact that man cannot fully, one hundred percent, master his own situation and life's circumstances, and thus that we are not free in the sense

22 Mises: Human Action. Chicago 1966. p.249

of which God can be said to be free. It is a revolt against reality, against the fact that humans are not the all-knowing, infallible god of their dreams. Saint-Simons' dream of a world governed by "le Conseil de Newton", in which all-knowing, infallible science guides all interactions according to a plan in which everything is coordinated ex ante is probably the most naive, but therefore also probably the clearest symptom of that fear.

Saint-Simon himself wasn't able to do much more than posit that the coordinating function of the market processes Say and his followers showed to exist, could not possibly exist, and that such coordination would only be possible if directed and supervised from above by some scientific authority, which would lead humanity as the true representative of God on earth, the bearer of the *scientia divina,* a guide to lead humanity back to paradise. This was Saint Simon's basic idea as expounded in his first publication, *Lettres d'un habitant de Genève à ses contemporains*, which would continue to dominate his work in various variants. It would dominate, in fact, a large part of the intellectual opinion in Europe, until the cusp of the Second World War. Saint Simons association with the group surrounding Comte and Dunoyer led him to devote greater attention to the relation between the productive and non-productive classes, but under his pen "*l'industrielisme*" was transformed from a negation of rule and exploitation into the consecration of a technocracy controlling industrialized society* as if it were managing an *atelier* (ed:workshop). Centralization, authority: there was no place for a free market in his system.

Saint-Simon's notion of *industrielisme* was still rather close to that of Dunoyer and Comte. His productive classes still encompassed labourers and capitalists, The Saint-Simonist publication *Le Producteur* was not a platform for the glorification of the proletariat, but would even, at a certain moment, call for a Holy Alliance of bankers.[23] Furthermore, Saint-Simon did define the opposition as the "bourgoisie" of magistrates, officers and holders of state bonds, but this was not yet juxtaposed to the proletariat. What was lost to him, was the praxeological foundation of the opposition between the classes. This ripped the class theory from its analytical foundations, and gradually transformed it into a merely empirical statement about sociological

23 Cf. Hayek: The Counter-Revolution of Science. Indianapolis, 1979, p.279.

contrasts between rich an poor. The labour theory of value was applied by Enfantin to appear to provide a theoretical foundation of this disfiguration of the class-theory. This paved the way for identifying the productive class with the proletariat, and expanding the non-productive class by including all capitalists, landowners, etc. The fiscal relationship, and with it the distinction between law/right and injustice, disappeared into the background. An important consequence wast that, even though many tried to interpret the state as simply being the executive committee of the ruling class (Marx), the state had to, in fact, be considered as an independent phenomenon. It was disconnected from class-contradictions and indeed, as an institution for mediation it was even considered a way to, if not solve, at least improve class-contradictions, as an ally of the productive class. This formed the foundation for the justification of the specific form of capitalism which would develop during the 19th century, mainly on the West-European continent (France in particular), and which would later spread and be called, in it's various shapes and forms, monopolycapitalism, neomercantilism, the corporate state, the comittee-economy, the mixed economy, social wellfare state, etc.

The "new" class-theory, which was mainly elaborated by Marx, was a very rickety construction. The identification of "capitalist" and "bourgeois" is the illegitimate identification of an *economic function* with a *sociological category.* The bourgeois class included not only businessmen, but also and mainly officials, bureaucrats, judges, professors, rentiers, shopkeepers and clerks. The proletariat included not just labourers in the private sector, but also those in the public sector. The attempt to depict this complex social reality in categories of Ricardo's distribution-theory ("labour","land","capital"-"wages","profit") shows a very simplistic approach. It is a marked sign that Marx does not, even in what are his most lucid works to most, *The 18th Brumaire of Louis Bonaparte,* and *Civil War in France,* attempt to connect the engaging description of the game of coalitions, fractions, interest-groups, etc. attempting to acquire control over state-power, with the "economical" interpretation of class-conflict.

Marx was of course, an ideologue first, a man of prejudice and rationalization. His class-theory must been seen in light of this. In the strategical and tactical senses, as a political weapon

it was certainly not to be scoffed at. As a political weapon, the analytical theory of Thierry, Say, Comte, and others, was not very potent. It did undermine the legitimacy of the state, but the boundaries between the two fiscal classes had, after the French Revolution, become partially invisible. The still existed, but not longer as empirically perceivable boundaries denoted by dress, speech, physiognomy. The two fiscal classes could only be identified through analysis, no longer by merely watching and listening, The marxist class-theory, on the other hand, played directly into the oppositions given to perception, and thus it possessed an immediate utility for the demagogy of politics in the age of the masses.

From a strategic perspective, its influence was possibly even more far-reaching. To a 19th century observer, there were fundamentally only three large alternatives: the status quo, socialist revolution with its removal of all uncertainty, or the libertarian society* based on the individual right to self-determination and consequently, the free market economy. Marx succeeded in fabricating an interpretation of free market capitalism, based on his labour theory of value and his own class-theory, which obfuscated the distinction between this free market capitalism and the status quo, and thus made the libertarian critics of said status quo appear as apologists for the established order. The key element in this, in certain ways masterful, hocus pokus was the labour theory of value, which made it possible for Marx to hide the distinction between the "political method" and the "economic method", and to interpret market-relations as a sub-category of hegemonic relations.

As Franz Oppenheimer, himself a libertarian socialist, wrote:

> "In the case of a thinker of the rank of Karl Marx, one may observe what confusion is brought about when economic purpose and economic means are not strictly differentiated. All those errors, which in the end led Marx's splendid theory so far away from truth, were grounded in the lack of clear differentiation between the means of economic satisfaction of needs and its end. This led him to designate slavery as an "economic category," and force as an "economic force"—half truths which are far more dangerous than total untruths, since their discovery is more difficult, and false conclusions from them are inevitable."[24]

24 Oppenheimer: op.cit. with p.468, p.12

It is true that Lenin gave less attention to free market capitalism than Marx did, and devoted it rather to the more and more commonly manifesting "monopoly-capitalism", but neither he nor his followers would dare proffer the hypothesis that a radical individualism might actually be a real alternative, besides the statist status quo and the increasingly unclear view of the socialist utopia.

THE STATE AS PROTECTOR

The fiscal relationship is the core in the being of the state itself. It makes it so that all that the state does is necessarily redistributive, that the state is the *via regia* for those who are of the opinion that the best use of anothers means is the attainment of their own goals. This also applies to the function that is central in any attempt to legitimize the state, and in general of legitimizing the "political method" - it's function of protection. It is conceptually impossible to use the fiscal route to offer everyone equal protection: the state as a protector is merely the focus of the efforts of those who wish to impound the means of another. They threaten to punish all those who are unwilling to be protected by them: it is, in other words, essentially a *protection racket*.

The authorities' claim on a contribution to the production of "protection" rests solely on the argument that, if the citizens were to not accept the protection of the authorities (and thus the system of taxation that finances this "protection"), they would be defenceless against *other* aggressors, who -so it is claimed - are far far worse than the authorities. Evil is unavoidable, but the evil embodied in the current authority is less bad than the evil embodied by foreign authorities, or the opposition to said current authority. This is a weak argument: the actual/current aggressor is unwilling to provide their competitors the opportunity to prove the opposite. That is to say they are unwilling to give their "charges" the opportunity to determine for themselves who offers the best price-quality ratio for protection and defence.

The territorial organisation of the state implies an effective destruction of the right to self defence of all that inhabit the territory

against the intervention of the authorities of the state involved.[25] It is true that a citizen can sometimes call upon the state to protect their *legal* "rights" against other citizens, but not always: some legislation is passed with intentions other than to have them enforced strictly. In any case, there is no necessary connection between the legality of such a "right" and its lawfulness, and the citizen has no choice: if they were to turn to an organization other than the state in order to defend his rights, he puts himself outside of the law/legislation (though there are always organizations which are *above* the law/legislation and can run roughshod over the legal "rights" of other citizens without any opposition). Additionally, the state is really not all that interested in effectively protecting the individual citizen as the argument would have one believe, and the costs of many security-measures is still borne by the citizens themselves. Fences, locks on doors and windows, safes, etc are examples of techniques of self defense which citizens use to protect themselves against each-other. These techniques are however, worthless when faced with the authorities themselves. Also, only a very small fraction of conflicts among citizens are brought before the courts of the state, and even then usually because these courts have a protected monopoly. Many contracts would, by the way, be found to be invalid if brought before the state's courts. Contracts are, essentially, expressions of common interests between parties. That which keeps them in place is not so much the knowledge that they could be enforced by courts, as it is the realization that the willingness of others to engage into a contractual relationship with someone is partly determined by their reputations (especially in the world of business).

Even the state intervention under criminal legislation can hardly be considered to be mostly aimed at protecting the citizens from criminals. It is no rarity for the compensation/reimbursement of the victim to be considered a secondary or even wholly irrelevant matter. The policy of criminal legislation is mostly aimed at punishing and deterring those who break the official rules that determine the public order and good morals. These latter two categories are usefully politically malleable and manipulate-able, and do not necessarily have anything to do with the protection of people's rights. On the contrary:

25 Cf. Auberon Herbert: The Right and Wrong of Compulsion by the State and Other Essays. Her-uitg. Liberty Press, Indianapolis.

so-called "victimless crimes" make up a not unsizeable part of criminal legislation, as do "crimes against the internal and external security of the state". No-one has the right to withdraw from the bonds of the state, no-one has the "right to ignore the state".[26] In many cases, the citizen is prescribed how they may or must protect themselves, even if the citizen doubts the efficiency of said protection, and knows that there are better methods. This is not just the case is the domain of criminal legislation, but also in, for instance, the domain of the insurance against various risks.

The inefficiency of state-protection is obvious: the state is not willing and not able to offer personalized protection, fine-tuned to the particular and variable needs of each person. They must take the needs of some few as the norm for everyone. Thus, they must take means from the protection of some to maintain the protection of others. Furthermore it is the case that the means that they make available for protection are no longer available for other ends: taxation, road-construction, etc. "Protection", of course, is an elastic concept: just about everything the state does can be catalogued under "protection" rather easily. The state protects *interests* and the technique of positive rights/law/legislation makes it possible to make any interest into a "right". But in any case, the state must decide how much protection it will offer, in what form, and to whom. The absence of a market for protection-services (other than those of the producers of locks, safes, and other anti-theft equipment) makes it so that they will not have a reliable source of information (a system of prices) at their disposal in order to orient their activities so as to maximally serve the needs of their consumers. They must therefore act arbitrarily. In the best case, they can only rely on the pressure various pressure groups exert on the apparatus of control, but it is of course completely baseless to consider this lobbying to be a system of the formation of prices, or even as a process resulting in "shadow-prices". It is certain that there can be no economic calculation, making massive waste inevitable.

The redistributive essence of the state very clearly bring to light the

26 H.Spencer: “The Right to Ignore the state” in Spencer: Social Statics (1850) R.Schalkenbach Foundation. New York, 1970, pp.185–193.

contradiction of classical liberalism, namely its belief in the legitimacy of the state. Mill's famous formulation that "the sole end for which mankind are warranted, either individually or collectively, to interfere with the liberty of action of any of their number is self-protection"[27] is correct in the sense of theory of law (if expressed in a rather unfortunate manner), if it is not interpreted as an excuse to violate the right to self-determination of others, meaning that A, acting in self-defence against an actual or imminent attack by B, has the right to violate the right to self-determination of G. This latter interpretation is however necessary if one wishes to use Mill's formulation to justify the liberal night-watchman state. But this leaves the path open to the justification of a Hobbesian war of all against all as well: who could possibly prove that the violation of the rights of G by A was not motivated by A's desire to defend himself against imminent aggression, and who would be the judge of whether any evidence brought for this is actually evidence indeed?

It is of course absolutely excluded from possibility that an individual or organisation would use *thei*r means *exclusively* for the protection of others[28] if said individual or organisation has acquired their means by way of aggression or threats of aggression against their "charges", and must continue to keep acquiring means in that manner. But, this is what happens when the state levies taxes in order to acquire necessary means - regardless of the goal those means will be used for, even if this goal is protection. Even the liberal night-watchman state is a *protection racket*: you buy or protection or we confiscate your means. Even the minimal state is illegitimate. No matter how difficult some people may find it to form some idea of a society* in which problems are not solved by referring them to authorized services and committees, such psychic problems should not get in the way of out judgement of right/law/justice and injustice - not even in this matter, which is as good as taboo in most discussions.

People need protection, there is a demand for protection. Every person has an absolute right to self-determination; every person

27 J.S.Mill: On Liberty (1859). p.64 in uitg. Harmondsworth 1974.

28 F.van Dun: “De staat als wijsgerig probleem” in Rechtsfilosofie en Rechtstheorie 8,1,1979. R.E.Barnett: “Toward a theory of Legal Naturalism” in Journal of Libertarian Studies 2,2,1978, 97–108.

has the right to protect themselves using *their own means*. No-one has the duty to protect others against aggression from a third party, and no-one has the duty of refraining from protecting others from aggression by a third party. These are the general principles which have to serve us. It speaks for itself that anyone who has the right to defend themselves also has the right to delegate the execution of this right to an agent of their choice, and that everyone has the right to offer their services as protector or security guard, body guard or detective, to others. The production of protection is the production of a service like any other, and the fundamental principle of law/right leaves every room for the organization of the production of this service in a lawful manner. Just like "education", "food", "paper" or "steel", "protection" is not a homogenous good, but rather the name of a category that encapsulates a mass of very different services and things. It is also not a collective good that, once delivered to a person, immediately becomes available to all others. There is nothing special about "protection" as an economic good, and certainly there is no reason to claim that it will not be produced by anyone if it is not produced by the state. Protection was, and is, delivered via the market, despite all claims to a monopoly made by the state.

The only remarkable characteristic of the industry of protection is that it comes with a great many risks, but this characteristic is not exactly unique to this industry, Such risks encourage specialization, as well as the formation of commercial or mutualistic groups which enable the spreading of those risks. These risks include not just the risks to the personnel of such organisations when they need to physically intervene to stop aggressions, but also heavy financial risks. For instance, an organization that is attempting to apprehend the perpetrator of an act of aggression could decide to seize a suspect, even if they have no proof against them, if they hope to acquire such proof through the arrest. In an order of right/law, they can only do this if they possess sufficient funds to pay full damages to the person if they turn out to be innocent. After all, the liability of such an organization is identical to that of any individual. They do not possess privileges like the courts and police-corps in a state. The latter bear, like the legislators themselves, little or no personal responsibility for their mistakes. If the victims

of "official" mistakes get any damages paid out to them at all, these are paid by the taxpayers, not by those who made the mistake, with all the obvious consequences to the quality of the services being provided.

A competitive market for protection services is able to offer a very extensive and varied assortment of such services. From locksmiths to judges, from police-officers and night watchmen to insurance agents. It also contains a mechanism to coordinate demand and supply, service and need: the price mechanism, supplemented of course by the usual channels of information such as advertisement, newspaper reporting, consumer-groups, etc. It is useless to speculate about the details of the various options, both because the industry for protection is largely monopolized within the framework of the state, and because there is no surer way to make a fool of yourself than to claim to be able to predict market-revolutions, certainly in a domain so jealously controlled by the state as the production of protection and safety are.

The risks associated to the production of protection, and certainly to the tracking down of suspects or evidence, are great and can only be borne by an organization that is willing to reimburse any innocents they inconvenience. This point was seized upon by Robert Nozick in order to justify the state.[29] According to him, a competitive market for protection services would quickly devolve into a "monopolistic" market, dominated by one organization which would, as a dominant organization, have the right to forbid competition within its territory based on the fact (?) that the procedures utilized by its competitors are "too risky". It is useful to linger on this point for a moment, for Nozick is after all the last in a long line of authors who have attempted to defend the legitimacy in principle of the state, and in so doing explicitly refers to the risks that the protection-industry is faced with.

The operative fundamental principle in Nozick's justification of the state is the so-called compensation principle, according to which everyone has the right to forbid risky actions by others on the condition that they compensate the other for it. It is evident that the fundamental principle of law/right

29 R.Nozick: Anarchy, State, Utopia. New York 1974. pp.78–84. Over Nozick, zie o.a. Journal of Libertarian Studies 1,1977; J.Paul (ed.): Reading Nozick. Totowa. N.J. 1981.

cannot recognize such a "right": those who take unlawful actions are bound to pay damages, but willingness to pay damages does not give them the right to take unlawful actions. That is precisely the risk that the protective organisation runs: if they seize a person on the basis of suspicions and that person turns out to be innocent, that person is entitled to damages. If these are not paid the protective organization makes itself guilty of aggression. The thing that drives such an organization to run that risk is precisely the fact that they believe that they are seizing someone that is themselves an aggressor, which is to say someone who has taken an aggressive action. Nozick's compensation principle however claims that anyone has the right to ex ante forbid risky actions (actions which they deem risky) merely by offering damages. Now, under the fundamental principle of law/right, everyone has the right to engage in an agreement with another, in which they obligate themselves to paying a certain sum, while the other party obligates themselves to not take certain actions. This is not what Nozick is talking about: his compensation-principle gives a person the right to forbid actions they judge to be risky if they are willing to pay damages, regardless of whether the other agrees on the adequacy of said damages. This means: the dominant protection-organisation has the right to determine themselves what damages to pay, in order to be in accordance with the compensation principle!

It is useful to determine how, in an order of law/right, risk-creating actions or activities would be accounted for, in order to make clear just the extent to which Nozick's theory undermines the order of right/law. Damages must, as previously stated, always be resolved between the parties, either directly or through mediation (both parties agree to present their conflict to a third party and to abide by that party's judgment). Those who are of the opinion that the actions of another are risky do not have the right to forbid said actions, but they do have the right to proclaim that, if they were to suffer damages from a certain boundary-crossing activity of another, they would demand very large compensation. By making this proclamation, they give the others, who are creating the risk, the possibility to determine for themselves if they are willing to bear the risk (the risk of having to pay damages). It invites them to either make an agreement beforehand, in which they,

in exchange for some sum of money to be paid beforehand, buy off the other's resolution to demand large damages in the event that damage from the activities does occur, or to insure themselves adequately and thus "internalizing" the risk. By the announcement ex ante, the other loses the right to dispute the requested damages, since this other, in continuing the objectionable activity, has made it known that they are willing to bear the risk. If someone were to simply ignore the proclamation of the damages which will be demanded, still cause the damage and then refuse to pay, they are simply an aggressor in the sense described in chapter 4: they can no longer demand the dispute over the damages to be put before a third party, ostensibly because the demanded damages are unreasonable while they are willing to pay reasonable damages -they have voluntarily chosen to bear the risk. In no case however, does anyone have the right to forbid the activities of another simply because *they* judge it to be risky.

Nozick's compensation principle in wholly *ad hoc*: Nozick admits that he has no theory of law/right. The fundamental principle of law/right does not imply in any way some right to turn your own fear of something going wrong into a legislation for others. To Nozick, the compensation principle is an essential argument for his justification of the state. When an organization of protection in an order of right gains a dominant position, Nozick believes that this organization, on the basis of the compensation principle, has the right to forbid all other organizations as being too risky. They themselves decide the compensation they will ask. This may seem reasonable when only considering those competing organizations which are present in the market at the time the organization involved becomes dominant. It is evident however, that if the compensation principle is called upon *after,* at a later time, against people who are dissatisfied with the services of the monopolistic provider and who plan to start a competing organization, it would become an easy paycheck indeed to have your own activities forbidden for a compensation!

As Nozick admits, it is hard to understand what the sense/utility of the compensation principle us: either one has the right to forbid risky activities, and then there is no need to compensate those who wish to engage in these activities (they must compensate themselves); or one does not

have that right. In the latter case, it is needed that *lawful* ways be found to convince the other than those activities had best not be engaged in. Using the word compensation without saying who has the right to determine how much this compensation should be, means nothing. Claiming that it is the author of a boundary-violating act that has the right to determine what this compensation should be is simply perverse. Damage is a subjective concept: how much damage there is depends on how (by whom) this damage is appreciated. In principle, only the one suffering the damage has the ability to say how much damage they are suffering. Of course a person can attempt to gain monetarily from the fact that they have suffered damage by claiming that they highly valued the damaged thing. This abuse is prevented under the fundamental principle of law by the causer's declaration of reimbursing this damage: this declaration makes any unilateral action of the claimant unlawful. They must either negotiate and possibly propose or accept mediation, though in some cases it is possible to prove the claimant's valuation of a certain object (eg by showing an insurance policy).

However, when the dominant protection-organization forbids competition, one cannot speak of objective damage, since their is no way to determine how much damage the competing organisation suffers as a consequence of the "ban" by the dominant organisation. Still Nozick seems to believe that the damage is an objective given/datum, or that there is a certain compensation that is the "correct" or "just" one, independent of the will and appreciations of the parties involved. This is an idea that brings us right back to the medieval notion of the just price. The compensation principle is not just theoretically unfounded, it is also wholly undetermined from a practical perspective.

It is of course the case that is the compensation principle is accepted, the justification of the state is a trivial matter. One need only claim that the freedom of the slaves poses a risk to the master, and thus that the master has the right to rob the slaves of their freedom, on the condition that he give them something in exchange (eg the promise to use part of the means they are taking from the slaves to "protect" the slaves against the aggression of other master?). But, if the compensation principle were indeed a fundamental principle of law/right, as Nozick suggests, then it applies to everyone. Why would a group of people not judge it to be too risky to have a power-monopoly near

them, and thus call upon the compensation principle in order to forbid Nozicks dominant organization, or to force it to split up into a multitude of competing small enterprises? They, at least, would have a number of good historical and theoretical arguments to support their fear of monopolistic abuse.

The fireworks of Nozick's arguments - and it is a sparkling and blinding spectacle which he brings to the stage in his book - obfuscates a game with loaded dice. He launches arguments in order to "prove" A's right against B, but refrains from explaining why B would not be able to make the same claims towards A. Nozick's attempt at proving the compatibility of right/law and state should be considered a failure. Not only because his compensation principle itself is incompatible with law/right. It is not just the implicit notion of the just price which is reminiscent of the primitive economic concepts of the past. Nozick also employs the idea that protection or defence is a largely homogenous pie which can only be efficiently delivered through a monopoly. His argument is that the starting position in which, in a certain society*, various organisations of protection exist alongside each-other, all with the goal of protecting the rights of their members of clients, will *evolve* through a market-process into a situation in which an organization will have a *de facto* monopoly regarding protection-services (in other words, that the production of protection is a "natural" monopoly - another old cow left in the ditches of economic science). The dominant producer, through the application of the compensation principle, gains a territorial monopoly *de jure* and becomes an *ultra-minimal state*, which however does still only serve its members or customers: those who want to buy protection can do so, from this ultra-minimal state; those who wish to offer protection are kept off of the market. This condition creates, according to Nozick, a moral obligation for the ultra-minimal state to transform itself into a *minimal state*, since it would be immoral to monopolize protective services in a certain territory and then not make said services available to all who inhabit that territory. Thus, a hypothesis about the evolution of the market in protection is transformed into the justification of a minimal state, which indeed does not levy tax in the classical sense, but still has the right to use violence against those who find the state's procedures to be too risky, and who plan to exercise their right

to self-defence for themselves.

Nozick acknowledges that his minimal state is a redistributive scheme in which some voluntarily pay to protect others (and to compensate them for the fact that they no longer have the right to protect themselves). He refrains, however, from determining the dynamics of such a redistributive minimal state. If marginal members or customers of the monopolistic, dominant protection-agency come to the conclusion that the expansion of the protection-service to non-paying inhabitants of the territory (when transforming from an ultra-minimal into a minimal state) has a negative effect on the price/quality ratio of these services (which is near unavoidable), then many of them will conclude that it would be beneficial to leave the organization and let themselves be protected for free. After all, the organization is "morally obligated" to protect everyone in their territory. If they live up to this obligation, the price/quality ratio for the remaining members of customers of the organization will deteriorate, motivating some of them to leave the organization, etc., etc. The monopoly of power starts crumbling. Do we need to wonder what the monopolist will give up first: their monopoly or their moral principles? It is quite probable that they will simply transition into levying taxes, so that no-one is left able to decide whether to pay for protection or rather be protected without paying, as compensation for the fact that they are not allowed to protect themselves or turn to another producer of protection. The minimal state faces a choice: disappear or confiscate. The compensation principle gives them every excuse they need in order to choose confiscation. After all, is the disloyalty of the marginal members of customers not itself a risky activity, which weakens the monopoly of power and in so doing robs people of their protection? Does the monopoly not have a right then, to deny them the ability to end their membership? The minimal state becomes a state - and Nozick will have to explain how this evolution looks in light of his exceptional proof of the proposition that taxation is theft.

The weak nature of Nozick's arguments is further evident from the aforementioned introduction of the "moral" duty of the monopolist to protect even non-paying inhabitants of his territory. On which grounds does the proposition rest, that the ultra-minimal state will fulfil their obligations, but the competitors of the dominant

protection agency will, against all mores, follow risky procedures, thus justifying the ban of their activities? Apparently Nozick wants to play it safe and assign to the state ab initio an unfounded moral superiority, and this I suppose is meant to placate us regarding the fact that the dominant protection-agency or the minimal state is not necessarily a mutuality, in which all the protectees are members and thus have some form of a say. Indeed, it could take any juridical or economic form. Nozick's minimal state could be the property of one man (autocracy), of some closed partnership/company (aristocracy), or of some open company/partnership, shares of which are sold on the stock market (plutocracy?). To Nozick, the form of the state is wholly unimportant. It is understandable why it is so important to him to believe that the people who control the "natural" monopoly of power have nothing but the best intentions. The justification of the state, however, does not require a judgment about the morality of the rulers, only about the legitimacy of their actions. Whatever the form of the state may be, it is always better to be ruled by angels than to be ruled by devils. The question is if even an angel has the right to rule over others.

On economic grounds, too, Nozick's theory of the "immaculate conception of the state" (as Rothbard calls it) is exceptionally weak.[30] There is no reason to believe that protection-organizations will spontaneously (which is to say without the use of violence, of the "political method") evolve into a monopolistic market-structure. There will of course be an evolution towards a certain uniformity and standardization of certain services delivered (in particular certain procedures for courts). This happens in all industries, but does not imply monopolization. It is merely evidence of the normal workings of the market-process. Nozick does not see the complexity of the industry of protection. Protection is provided by locksmiths, night watchmen, guard dogs, makers of alarm-systems, electronic and mechanical security-systems, detectives, policemen, lawyers, the press and communication media in general, jurists, judges, insurance-agencies, notaries, traffic-police, neighbours and other volunteers, and so on. Protection, it cannot be stated enough, is not

30 M.N.Rothbard: “Robert Nozick and the Immaculate Conception of the State” Journal of Libertarian Studies. 1,1,1977, 45–57

a homogenous good, but a mass of specialities, partly complementary, partly substitutable with each-other. It is exactly the sort of good that *cannot* be adequately delivered by a monopoly. The idea that one enterprise or organization would be able to monopolize all these specialities in a peaceful manner, even if it were to want to, shows a complete and total lack of insight into the workings of the market in general and that of the market for protection in particular. Such a monopoly would face such insurmountable problems of price-formation that its services would show all the inefficiencies that we are already used to today, now that the state is offering that protection.

Of course, protection sometimes involves the use of weaponry. There is however no reason to paint the competition between protection-agencies as being a series of little battles, fought by little private armies to settle conflicts of interests between their members, as Nozick (and others) do. One could just as easily assume that any conflict between two citizens of different state must lead to a war. Protection-organizations are contracted, by definition, to protect their customers or members against aggression, not to aid their customers or members in their aggressions. It is hard to escape the impression that Nozick's starting point (which he describes as a Lockean state of nature and from which the minimal state can arise without violating anyone's rights - "the immaculate conception of the state") is modeled in such a way that the distinction with the image of the state as a monopolistic armed producer of protection-services, complete with an army, imperial guard and police force, is almost negligible. It is however not necessary to think of armies, even little ones. The execution of the decisions of the courts against unwilling convicts does not require an army. One or two officers/agents per case is usually sufficient. Even if, in some region, there is only one enterprise or organization specialized in offering armed protection, still this organization will not have an army: its personnel would at any time be spread out over the whole region in which the organization is active, and each member of said personnel is engaged in the protection of different people. Armies, even little ones, are not raised to protect citizens from criminals, but to attack, and conquer, or to counter the attack of other armies. They have nothing to do with the workings of the market in protection, just as

states themselves do not. A distinction must be made here between commercial and mutualistic protection-organizations. The latter do not serve their customers, but their members. A commercial organization will not even consider protecting one of its clients from arrest by another organization if they are justly wanted for a crime. It would not benefit its reputation with its other customers, and needlessly drive up expenses. But in mutualistic organizations, ideological, religious or plain family bonds can lead to the protection of a criminal. History itself provides plenty of examples of the passions that can be elicited by ideologies, religions, and familial matters. But, as long as the people involved, the members of a family, sect or clan, or even the bodyguards of a single person, are not actively used to establish rulership, Nozick's story of the immaculate conception of the state lacks any credibility. Continued, systematic aggression is and remains a necessary precondition for the establishing of the state.

This was shown in a very witty manner by Roy Childs.[31] Even if we were to assume the minimal state to have been established in a completely lawful manner, without violating the rights of any person, it must quickly disappear under competitive pressure. This is the case not only because of the infidelity of its paying members or customers, as discussed above, but mainly because of the fact that they will unavoidably be out-competed by other organizations *that dutifully copy the procedures of the minimal state.* If they do, the minimal state cannot call upon the compensation principle! Their procedures are, *ex hypothesi*, the same as those of the minimal state, and thus no more risky. These competitors can, however, charge lower prices (they don't have to "compensate" anyone), they don't need to exert any control over the state to determine if they are not using risky procedures, they don't need to cover the whole territory, the are in a position to specialize, etc. If the minimal state does not have the right to forbid this competition - and Nozick offers no argument whatsoever for the existence of such a right - then it will simply dismantle the minimal state. The minimal state would irrevocably, through a series of morally acceptable steps, be disbanded and the stateless order of right/law would be restored. Right/law and state are and remain logically incompatible, even if that state is a minimal, or even ultra-minimal, one. A fortiori any state over the minimal one, for the function of protection

31 R.Childs: “The Invisible Hand Strikes Back” Journal of Libertarian Studies 1,1,1977, 23–33

is the central element in all attempts at justifying the state.

CONCLUSION

The logical incompatibility of right/law and state may be the most important immediate consequence of the philosophy of law/right as I have put it forward here. It is however useful to remark that the state herein is considered to be the organization of the "political" method in the sense that Oppenheimer gave to the word. The unlawfulness of the state manifests itself only when we consider the actions of the state in their totality, that is if we not only look at the output side, but also the input side. It is probably possible to mention admirable things about the state, if we were to consider only the output side of things. If we were to do so however, we would get only a partial, and a false, picture, and we would easily miss that the actions of the state are not "costless", but rather that they take many means out of the hands of the taxpayers, and greatly constrain their opportunities of action.

The state will not disappear in a day, but this does not make the philosophy of law/right "unrealistic". The task of the philosophy of law/right is to determine what right/law is - which I have tried to do in this essay - and past that, to determine how an order of right/law can "work" - which is a subject I have left out of the scope of this discussion. It is not the task of philosophy of right/law to take the "realism of provincialism" as an ultimate criterion of relevance and to refrain from saying anything which might alienate the tyranny of the "secularists" addicted to current affairs (as Julien Benda calls them).[32] The desire to rule and the desire to subject one-self to a ruler - all those forces which drive people to misrecognize their own boundaries and forget the reality of their own finitude, have marred, scarred and branded history. They will undoubtedly continue to do so for a long time, if they do not destroy themselves and all that is human in the short term. The call of the herd is far from extinct, and resounds even in the mathematical formulations of planners and statisticians, The end of the Legislation is not yet in sight. The tables of Legislation are still in place: "The individual

32 J.Benda: La Trahison des Clercs. Paris 1975. p.193

self is still the most recent of creations", wrote Nietzsche[33] - and many have not yet discovered it, neither in themselves nor in others. "Joy in the herd is older than joy in the Ego: and as long as the good conscience is called herd, only the bad conscience says: I. Truthfully, the devious, loveless Ego, which seeks it own benefit in the benefit of many, this is not what brings rise to the herd; that is the destruction of the herd." Right/law must create the room for individual development, but as such it is never something achieved: no-one is born with self-knowledge; self-knowledge and self-respect are not heritable properties.

The state, like tyranny, cannot disappear by revolution. A revolution can only replace one set of rulers with another. It may fight the symptoms, but as long as the causes remain in existence, so do the ailments. Fighting the causes is a long process, but this cannot be a reason to compromise on principles, certainly not in education regarding law/right. Whatever may be said about "political realism", and about what is "politically possible" or "politically impossible", it is not a static phenomenon. Every person counts: when someone changes their opinion this is a relevant political fact (here I am using the word 'political' in its proper sense, as in chapter 6). Even though we cannot, through a revolution, "get rid off", "abolish" or "let wither" the state, still we must plead for this abolishing tirelessly. As the American abolitionist William Lloyd Garrison put it: "Gradualism in theory is perpetuity in practice".

Philosophy of law/right can do little more than keep the idea of right/law intact, passing it on and encouraging it where possible. Philosophers of law/right are "clerics" (in Benda's sense of the word), or they are "secularists", partisans for one rule or the other, there is no middle road. Either they acknowledge the right of each person to dispose over themselves and no-one else, which makes them philosophers of peace, friendship and Freedom (ed: original "vrede, vriendschape en Vrijheid); or they recognize the right of some to dispose over others, which makes them philosophers of war, hate and slavery. There is no middle ground. Right/justice/law against unright/injustice, freedom against rulership, both that from the left, as well as the right, as well as the centre. The partisans of power will always

33 F.Nietzsche: Also Sprach Zarathustra (1883). p.88 in the translation by R.J.Hollingdale. Harmondsworth 1961 (ed: retranslated quote)

besluit 517

attempt to either co-opt a philsopher of law as one of their own, or to paint them with the brush of the opposition. For those one the left he is a right-winger, for those on the right he is a left-winger, for those in the centre he is too extreme. But in the end, they are far too busy dealing with each-other. The partisans of power require followers, and this is their Achilles' heel.

They need the sanction of the "clerics" in order to be truly secure; and herein lies the power of the "clerics". Benda writes:

> "No doubt the action of these clerics remained mainly theoretical; they did not prevent the secularists from filling all of history with the noise of their hatred and their killings; but they prevented them from having the religion of these movements, from believing themselves great by working to perfect them"[34]

The philosophy of law/right is powerless against power, but they can undermine the legitimacy of the state, the unlawful way of living, of the "political method", simply by retaining focus on its object: it cannot do more, but if it does this, it is not doing little.

34 J.Benda: op.cit. bij p.515. p.195.

Appendix A

THE INDIVIDUAL AS A SOVEREIGN SUBJECT OF LAW

The natural philosophy of law of Frank Van Dun[*]

INTRODUCTION

During the last decade the Dutch speaking world has seen a remarkable flowering of thesis regarding theory and philosophy of law/right. One of these, a thesis from Ghent "The fundamental principle of law/right. An essay on the foundations of law/right"[1] which was defended by Frank van Dun in 1982, can certainly be counted among the best writings on philosophy of law/right the Dutch-speaking world has ever produced. Literature relating to philosophy (of law/right) does not have an easy time getting any attention outside the circles of specialists. It is the intention of this article to, for the benefit of a wider audience, relay the essence of Van Dun's philosophy and theory of law/right, together with some critical remarks.

The strength and also the vulnerability of Van Dun's philosophical

---

* This review by the hand of Mark Van Hoecke en Luc Wintgens previously appeared in "het Rechtskundig Weekblak"of 23 January 1988, RW 1987-1988 pp689-697 and was included with permission of the authors and the RW. The references to the FRB have been adjusted to the new pagination of this edition

1 The print-edition appeared in 1983, under the same title, by Kluwer Rechtswetenschappen at Antwerp (606 pgs) References to the book will be made with the abbreviation FRB.

construction is that he, in line with great thinkers like Hobbes, Rousseau, Kant, Hegel, Marx, presents a global philosophy, which can serve as a sufficient foundation for political theories or juridical constructions with more practical goals.

Such global philosophies are of course also very vulnerable, precisely because of this ambition to provide a foundation for the totality of human society*, regardless of time and place. Such philosophical constructions are usually constructed a-historically, as is Van Dun's. They do not offer a temporally bound philosophy which has its utility at some, passing, time in history, but a typical philosophy of natural law as in the seventeenth or eighteenth century: a rationally constructed philosophy with the ambition of being a valid foundation for any system of law/right in all cultures for all moments in history.

Van Duns philosophy of right/law will elicit in many a reader, besides a greater or lesser degree of admiration for its sharp reasoning, logical construction and very clear style, the reaction that all of this is "very nice in theory, but not realizable in practice". This remark is in itself correct, but can hardly be considered to be sufficient criticism. This can be said of any philosophical theory in this genre. This does not detract from the immense influence some such theories, like those of Rousseau or Marx, can have. An influence which can, and often does, have a determining influence on daily life (in the way that Marx, through Lenin and others, has not been unimportant in the daily life in the Soviet Union in the twentieth century).

Van Dun too is a product of his time, as is any thinker. Though his theory has the ambition of being an "eternal" philosophy of natural right/law, its contents are definitely influenced by temporally distinct trends. Namely: neo-liberalism, the reaction to the practical down-sides of a far-reaching statization and collectivising. and the rejection of (over-bearing) egalitarianism.

As such, Van Dun's philosophy offers a theoretical basis for these anti-collectivist theories, even if the current Western-European liberalism, despite all of the deregulation and privatization, is to Van Dun but a variant within a system of all-ruling social-democratic collectivism.

Van Dun's theory is very radical: state and right/law are logically incompatible. Any form of a state, any theory of a state is an unacceptable and theoretically

unjustifiable limitation of individual freedom. Even the theory of the "minimal state"[2] defended by the American philosopher of law/right Robert Nozick is incompatible with the "fundamental principle of law/right" (FRB p 223, 504 and 506, and following). The radical nature of the theory, combined with a very strict logical argumentation[3], makes it intellectually very stimulating. On the one hand the reader feels that Van Dun is right, because he builds his argument in an irrefutable fashion. On the other hand, one finds themselves intuitively unwilling to accept the conclusions, without being able to point to a weakness in the reasoning. This forces the reader to either accept Van Dun's theory, with all the far-reaching practical consequences of doing so, or to decide for themselves why they think they can, must, reject this theory. Neither will likely to be found easy by the reader.

2 THE FUNDAMENTAL PRINCIPLE OF LAW/RIGHT

2.1 The sovereign right to self-determination of the individual.

The fundamental principle of law/right is the principle of material justice*. This means that each person is a sovereign subject of law/right balls, that every person has the right to do or not do with what is theirs, all their means, as they see fit. Thus it also means that no person has the right to do anything at all with the means of any other. (FRB, p.1).

The concept "person/human" is central to Van Dun. As a person, or a moral subject, you can have the right to use your own means (body, means acquired through labour, means acquired through contract, etc.) as you see fit, or you can not have that right. In the first case, in the conventional terminology of the book, you are a *master,* in the other, a *slave*. There are no other options. A group of people can unite in one of four different ways: (a) all people are slaves to each other, and thus all masters over each other, (b) some people are masters over all others (which makes those others slaves), (c) a person is master over

2 Nozick, R., Anarcy, state and Utopia, New York, 1974.

3 This logical arghumentation was further reinforced by a formal logical proof relating to the fundamental principle of law/right in Van Dun's contribution “De logische structuur van het recht” in *Liber Amicrorum Willy Calewaert*, Antwerpen, Kluwer Rechtswetenschappen, 1984, p. 87-122.

all others (who are then necessarily slaves), and (d) no-one is a slave to another, and thus each is (their own) master. This last formula is the basic structure of a society based on the Fundamental principle of law/right.

The fundamental principle of law/right is not merely posited and defended in an ideological sense. Van Dun attempts to prove its theoretical validity in various different ways. First he shows that there are only four different combinations of the concepts of master and slave. Afterwards, all three alternatives to the fundamental principle of law/right are investigated. During this investigation, the reasons for the invalidity or impossibility of the alternatives are shown. These reasons are *independent* of the possible validity of the fundamental principle of law/right itself. In other words, even if the fundamental principle of law/right itself were invalid, its alternatives would still remain as invalid or impossible as they are. In the end, only the fundamental principle of law/right remains, but its validity does not simply follow from the invalid nature of the alternatives. To make all this a bit more concrete, it serves us well to go into what the author means when speaking of the potential relationship between master and slave.

2.1.1 Rejection of any "master/slave"-relation

A "means" is defined by Van Dun as that which a person can acquire in order to organize their life in the manner they deem most fit towards making the best of said life. What "the best that can be made of it" is, is something that falls under the right to self-determination of the fundamental principle of law/right. Each person decides this for themselves.

Let us assume that a person decides that the best they can make of their lives is the writing of books, which they offer on the market in order to provide for their daily needs. If this person is master if themselves, then they are a slave to no-one, and they do not owe accountability to anyone in any form whatsoever (permission to publish, giving up part of his profit, censorship, a certain rate of production ...) In any other hypothesis, Van Dun claims there are inconsistencies, which we will discuss briefly below.

The first proposition mentioned above, that all people are slaves and thus master of each-other, implies that everyone, at all times, needs the permission of everyone else before any action can be called

lawful. Such a consensus-conception of the order of right/law is founded on the idea that anything that causes any intervention to others, even non-physical (eg. a father's dismay at his son's highest goal being the writing of books), is only lawful if the parties involved consent. Such emotions, which the book denotes with the term psychic damage, is not eligible for juridical sanction according to van Dun, because they are not controllable. This means that everything that does not entail a physical intervention in the totality of the means of other, can be done *lawfully*. Threatening to take an action which is lawful in and of itself, but that worries another greatly, is lawful, for example threatening to open a similar business right across the business of someone else. Opening a business is making use of the means "land" or "house" and "labour" and "capital". The fact that an other fears that their own use of their own means in their business will no longer offer optimal returns is a psychic effect of that action on his mind. Unless some metaphysical wonder were to make it so that everyone spontaneously agrees with everyone else (causing the concept of psychic damage or discomfort to vanish) this principle of what is called *consensus-theories* is not operationalizable.

In the second hypothesis that is rejected, some are master and all others are slaves. In this hypothesis, everyone has the right to do with their means only what one has been given permission to do by some "masters"(e.g. the king, potentially with his administration). This is actually a tautology, since every non-master only has the *right* to do what is allowed by the will of the master, namely the law/legislation. This, according to Van Dun, has nothing to do with *right/law*, for the will of the master has no normative value as long as a person that is not a subject of law/right (so, a slave) has accepted it as having such value. It does not obligate people in any other way than a rampaging horde of bison "obligates" people to get out of the way (FRB, p99). Van Dun call these *"legal/legislative"-theories* which have no connection to *"right/law"*.

The third hypothesis, according to which there is only one master, to whom all others are slaves, is also rejected. This alternative, which is called *mysticism*, means that there is some trans-human being (a nation, a god,...) which is *acknowledged* as the only master. This

immediately refutes this alternative, since mystical theories can only exist by the grace of those who want to subject themselves to them. For those who want to do no such thing, this alternative too remains devoid of normative meaning.

After this investigation, and with it the refutation of any possible alternatives to the fundamental principle of law/right, the author commences the difficult task of proving the correctness of the fundamental principle of law/right itself.

This proof goes, when represented schematically, in three steps. A first step shows that action is only possible if it is based on judgment. These judgments, every person must make for themselves. No-one can judge for another, at least not if the other does not want them to. The ability to judge, or the intellect, exists inside of a body. From this follows that everyone has at least one means that they can use as they see fit: their body.

A second step investigates whether, when people can or have to make judgments, they are *allowed* to. The answer to this is affirmative, as long as individuals remain within the domain of their own means. To know what one's domain of means is, one should investigate who made the means, who acquired it, and possibly who alienated or abandoned it.[4]

In a third step, the author shows that everyone should respect the right to self-determination of all others. After all, we cannot reasonably deny that people are rational. This is why there is an obligation to be reasonable, which implies that we should respect our own rational nature, and that of others.

Van Dun specifies this obligation to rationality as follows: "We should use our rational abilities in a correct manner; we should believe what is true, desire that which is desirable; we should prepare our judgments carefully, taking all relevant information into account; we should reason logically, etc. ..." He concludes: "Undoubtedly it is within our abilities to be unreasonable, but we cannot reasonably deny that we should be reasonable". (FRB, p. 150-151)

4 A means which is abandoned becomes a thing. A person that finds such a "res nullius", and takes possession of it, makes it into one of their means. This is lawful according to the fundamental principle of law/right because a thing does not belong to anyone (anymore).

2.1.2. The order of right/law according to the fundamental principle of right/law

Starting from the fundamental principle of law/right, thus provided with a foundation, an order of law/right can be constructed. During this, it should always be kept in mind that the fundamental principle of law/right allows for no other right of disposal over means other than that of the owner of those means. This is why contract is the form of right/law par excellence in such an order of right/law.

Those who do not respect the right to self-determination of others, can, according to the fundamental principle of law/right, be punished lawfully.

"*Lawful punishment*" entails that the person whose *domain of means* (this is the totality of a persons means) someone has, for whatever reason (negligence, envy, possessiveness, purposeful damaging), intervened, has the right to take just as much back from the domain of means of the aggressor as the aggressor took from their domain of means. They cannot take more without becoming an aggressor themselves, but this *right to self-defense* is so characteristic of each subject of law/right that it cannot be taken from them without their permission.

It should be remarked upon that, according to the fundamental principle of law/right, there is no distinction made between a criminal and a civil legal sanction. Both are identical.

A particular problem is posed by the "*devaluation*" of means, and, more generally, financial damages for which no-one can be held liable. Suppose that the aforementioned writer of books suddenly comes to the conclusion that the application of their means (money, time, materials, ...), after some initial success, no longer produces the desired results (money, fame, ...). It seems that the others are no longer willing to spend their means (money, time,...) on the product of the author, which causes the means said author initially invested to drop in value. According to the fundamental principle of law/right, nothing can be done about this. No-one can be forced to spend their means in any particular way. The writer is not obligated to write, but neither is the potential buyer obligated to buy the books produced. From this follows that those who voluntarily use their own means in a particular manner have no right to compensation when the means applied lose value. Such speculations are a necessary part of practical action, and each person bears their own responsibility for an "unjust" treatment by "the market". As a practical consequence of this, we learn that

everyone has the right to do or not do with their means as they see fit, but that no-one has the right to (compensation for devaluation of their) means.

2.2 "Political philosophy" contra "social philosophy"

When the fundamental principle of law/right is assumed and is followed through fully, the first criticism the author feels he must field is a criticism of the image of man that is expounded in the social sciences. The social-scientific study of man hides behind an image of man that can be best qualified as an "image of man"[5], a common denominator of that all people hold within them in possibilities, moral codes, desires, etc. It is obvious that the formulation of such a unitary image of man can only function as an *external* law/legislation in view of the fundamental principle of law/right and that thus in light of that principle it can have no normative value.

In opposition to this the author places the *political* conception of man, which starts from that very fundamental principle of law/right, and which knows no norms other than those that each individual imposes on themselves in order to achieve maximal self-realization. Such a maximal self-realization is identical to the "happiness" which is described as "the undivided, contradictionless joy in life of a person living in perfect harmony with themselves, nature and the others around them"(FRB, p 268). Starting from happiness as the highest good for the individual, the author criticizes the answer provided by social philosophy, which considers the absence of happiness to be a consequence of the fact that people do not sufficiently master their natural and social environment. Political philosophy on the other hard, describes the absence of happiness, from the view of the fundamental principle of right/law, to be caused by the fact that the individual does *not sufficiently master themselves.* Such a political conception of man is based in the irreducible uniqueness of each *individual*, and the irreducible multitude of individuals which follows from it.

Social philosophy reduces this irreducible uniqueness and

5 This use of words is also found in Mark Eyskens, in his book Bron en horizon. Het Avondland uit de impasse (Tielt, 1986). In his book, Eyskens talks of "vermenning". With this he means something different then Van Dun, but it does connect to it. With "vermenning" Eyskens means to indicate the extreme de-personalization, caused by reducing people to an infinitesimal part of an immense societal wheelwork. (p81)

multitude to the image of "man" and "society" with external (not the rules the individual imposes on themselves) rules", respectively. Scuh a community-ethic is unacceptable according to the fundamental principle of law/right, for it would only make sense if it were the same for all individuals, which would be a miracle we can hardly expect.

The irreducible uniqueness of individuals is the opposite of the interchangeability (because of equality) of all individuals, which is the consequence of the conception of man as "largest common denominator". In a community based on the fundamental principle of law/right, individuals are not "equal" in the sense of interchangeable, but rather *complementary.* They complement each-other, it precisely this that is the basis of the social character of individuals.

Such a conception of society bring us to the problem of the functioning of the society* based on it. Our mundane, daily understanding of "politics" is under the sway of the three aforementioned alternatives of master/slave relations which are refuted by Van Dun. These are always master/slave relations, and in this relation "politics/political" means: the striving towards maintaining or changing this relationship through action or inaction (and its consequences for those involved) (cf. FRB, p 327). The idea of individuality, the right to self-determination, and originality which is at the basis of the fundamental principle of law/right can also be expanded when speaking of politics. It is, then, Van Dun's intention to free this talk of politics from the obsession with *unity* which he feels the social philosophers push forward. The fundamental principle of law/right can function as a principle of society* if politics is understood in its original (Aristotelian) meaning, "ordering of the polis". The sixth chapter of the book, Van Dun dedicated to a deep analysis of this fact. In doing this, he does not shy away from pointing out an ambiguity which characterizes the thought of Aristotle. The polis as "political ideal", according to which everyone, on the grounds of the fundamental principle of law/right, can dispose over their own means, and thus gain their right, is overshadowed by the polis as "societal structure" whose primary goal is to educate/raise people into people (after which they regain their individuality as "people"). In Aristotle too, there seems to be a confusion between the social conception of man and the political conception of the individual. This confusion leads to the polis not being what it is supposed to be:

a *political space*, which leaves each person the possibility to use their own means as they see fit, in order to organize their own lives in the way that is the best possible one according to them. This political space, says Van Dun, is precisely that order of law/right based on the fundamental principle of law/right as described briefly above.[6]

2.3 Criticism of egalitarianism

The radically critical light the fundamental principle of law/rights cast on the existing order of law/legal order, forces the defenders of this order to as themselves critical question regarding what can be called "acquired contemporary positions in thinking". This includes things like the "right to work", and what's more, the "right to life". What the terms "right to work" or "right to life" should be understood to mean, according to the author, is nothing else than a "*right* to means(/sustenance)", the right to be sustained by others. According to the fundamental principle of law/right, no-one has the right to anything belonging to anyone else. This is of course the other face of the total right to self-determination of each person. No-one has the right to means, but on the other hand, everyone always has at least one means, their own body. They can use this to acquire other means which enable them to make the best of their lives. But the fact that someone has a means does not mean that they have a *right to other means*, namely the means required to keep maintain their life. Each person bears this responsibility for themselves. Every right to a means of sustenance which has to be provided by others is therefore denied by the fundamental principle of law/right. Every policy which would strive to give to each that minimum of sustenance, or in the general scope of redistribution, just as much as the others, is thus completely unacceptable to Van Dun.

Social rights are of course "passive" rights, as opposed to active political rights. In the framework of social rights, a person can only get something when others are obligated to give. Thus, "social duties" are logically prioritary in this framework. (FRB, p 386). This implies an institution, a legislator, which has the "right" to determine the "rights" and "duties" of people, respectively.

Van Dun does not deny that a more equal distribution of wealth may be desirable, but he points out that the inequalities that egalitarianism

6 It should be remarked that the only political space, and thus order of right/law according to the fundamental principle of law/right, currently exists in the relations between states. The best illustration of the fundamental principle of law/right can thus be found in international law/jurisprudence.

wishes to forcibly counter, are usually the consequence of a lack of freedom. In Van Dun's view, it is possible to use peaceful means to reduce certain differences in material circumstances. Examples include charitable organizations, educational programs, informational campaigns, boycotts and others. He is of the opinion that, in a free society*, undesirable inequalities have the tendency to disappear, while desirable tendencies will remain.

Egalitarianism on the other hand poses a certain type of "equality" that everyone, a priori, has a right to. In egalitarian doctrine, large differences exist between various schools regarding both the goals (what sort of equality?) and the means(taxation and subsidy, government intervention). Making everyone *completely* equal (thus also in age, health, intelligence, emotional state, etc.) is of course impossible. Many inequalities simply cannot be eliminated but can at most be compensated for. There is an essential problem in *measuring* inequalities, and in converting that measurement into a means of exchange, namely a sum of money. This is precisely the reason why those who speak of "equality" often do so in terms of income- or wealth-equality. Because of the other inequalities between people, such as age, and desire to save, it would be naive to believe that a (complete) levelling of incomes would allow for the realization of a (completely) egalitarian society. Van Dun refers to a study, published in 1978 in the English magazine *The Economist*. This study shows that in a strictly egalitarian society, in which everyone reaches 84 years of age and can invest their savings at a 10 percent interest rate, 74 percent of all wealth would be in the hands of 10 percent of the population. The oldest 10 percent. Furthermore, inequality between generations in such an egalitarian society could be amplified by economic highs and lows.

The protection of the weaker parties in a (still partially) free market can lead, in the long term, to the increase of the inequalities instead of a decrease. Van Dun here cites the example of renter protection. Rent control/Rental price freezes have led, in many European countries after 1945, to a decreased interest in capital-holders in investing in real estate. This has led to a decrease in the supply of rental housing and on the medium-long term leads to housing-shortages. In other words it leads to a situation in which the "new generation" of candidate-renters can no longer find housing, thus becoming the disadvantaged

party. In the end, Van Dun posits, the only benificiaries of such policies are the *current* generation of renter, but it the situation of future candidate-renters becomes worse (FRB, p. 418-419). The same is true of policies meant to protect employees. In the long term, they make the hiring of personnel unattractive, leading to unemployment. As such they are very detrimental to later candidate-employees (FRB, p. 419).

This misunderstood influence of such juridical protection-measures on the economy, and thus in the situation of equality and inequality is, according to Van Dun, the weakest point in the presuppositions of egalitarianism. Even more fundamental is Van Dun's criticism that egalitarianism accepts inequality in political power as a means to realize economic equality (FRB, p. 430).

Van Dun is noy opponent to the realization of a greater equality in society*. He does however resist the use of violence, even when its goal is to create a more pleasant and just society*. He does not ask that equality be simply sacrificed for freedom, or some other ideal. He merely demands that everyone respect each-others uniqueness and individuality (FRB, p. 465).

2.4 The state as institutionalized violence

Redistribution through fiscal confiscation, Van Dun considers to be the being, the essence, the reason for existence itself for the state. So, any state is unavoidably a "class-state". The system of taxation places the class of "taxpayers" in opposition to the class of "tax-recipients". In other words those who, in the final tally, get more (back) from the state than they put into it in taxes is a "tax-recipient" in opposition to the "taxpayer" whose balance is not beneficial.

While the first forms of parliamentary democracy were formed with the goal of controlling the fiscal hunger of royals, this representative democracy has still shown itself to be a tax-inflationary mechanism. Besides the building of the state-apparatus, which tries to, based on sociological law, maintain and if possible strengthen itself, the very idea at the basis of democracy is violated, according to Van Dun, when the "tax-recipients" get a say

and a vote in determining the pressure of taxation, the form of fiscality and the spending of these state-incomes. Through the formation of various coalitions, various minority-groups can force taxation on the class of taxpayers, while reaping the (largest) benefit themselves. The lack of institutional methods for keeping these "tax-recipients" in check is what Van Dun sees as the main cause of the phenomenal increase in tax-pressure and government expenses of the twentieth century (FRB, p. 478). This becomes even more poignant when they, like the Belgian Government in the 70s, use "deficit spending" to distribute the expenses among the current generation, while pushing the costs onto the future generation(s).

The perverseness of the fiscal relationship is, according to Van Dun, expressed in the fact that the only effective way (with less effective ways being things like tax-evasion or working off the books) of protecting yourself from this violent confiscation is to gain power and influence over the state-apparatus yourself. It would be naive to believe that those who eventually succeed in this would use said control only towards defensive ends. It is indeed quite probable that this position will be used to transition from the class of "taxpayers" into the class of "tax-receivers" (FRB, p. 481).

Van Dun admits that this "war of all against all" happens in a civilised manner, and is probably an unavoidable stage at the current time. But, he states, this does not change the unlawful nature of it, and this must make us strive to make this moment in history take no longer than it has to (FRB, p. 484). Taking away the right to vote from the main groups of tax-receivers, such as specifically state-personnel, he sees as a possible step in the right direction.

This entire social-democratic construction means that, through social rights and the correlated fiscal duties, whole groups in the population are taught that they have an inalienable right to parasitise on the production of others. It teaches that true progress would mean expanding this parasitical lifestyle, once the privilege of a small ruling class of feudal land-owners, generalising and "democratising" it, so claims Van Dun (FRB, p. 427). This leads to people ending up trying to do only what they like doing, without worrying about the production of the means this requires, those

those they will simply try to gain in the fiscal process of redistribution. According to Van Dun, this behaviour is found clearly in many politicians, academics, social workers, etc, who seem to think it normal for others to produce the means required for their "useful work".

3. CRITICAL REMARKS

3.1 Man as a sovereign subject of law/right

According to Van Dun, every person is a sovereign subject of law/right. Every person has the right to do or not do with themselves as they see fit. Every person has a right to absolute self-determination (FRB, p. 33). This right is further specified as being, in its foundation, the right to dispose over one's own critical abilities (FRB, p. 114).

A problem which Van Dun does not address is the question for the precise definition and delineation of this "subject if law/right with its own critical abilities". These question arises specifically in relation to children, the mentally ill and the mentally impaired. The mentally ill and impaired, and people with severe brain-injuries are, claims Van Dun, outside of the scope of his book. He mentions people whose rational capacities are irrevocably destroyed (FRB, note with p. 120). It is clear that "destruction of rational capacities" implies the absence of said rational capacity, which is also the case in children, having not yet fully developed them. If they fall outside of the definition, then they are not sovereign subjects of law, and they become means with which others may do as they see fit. This does not appear to be Van Dun's position. But if we do acknowledge their sovereignty as subjects of law/right, we are faced with major practical problems, for their critical abilities are not sufficiently developed in order to maintain themselves as human beings in society*, or even survive without the help of a third party. What is the utility, or even the importance, for those people to be define as "sovereign subjects of law/right", if the "critical abilities" they can supposedly dispose over are not, or insufficiently, present?

By the by, the obligation of parents to take care of their children is something Van Dun sees as a "natural" moral obligation, not as a juridical

one. It is outside of the scope of the fundamental principle of law/right (FRB, p. 168). Of course children are not "means" at the disposal of their parent, but Van Dun still recognizes that they are strongly morally and economically dependent on their parent, giving the latter the possibility of exerting "great pressure" on their children. This pressure, according to Van Dun, should always be exercised "within the boundaries of right/law" (FRB, p. 108). He does not however specify what those boundaries are.

According to Van Dun, children have the "duty" of obeying the "rules of the house" they are staying in, which in fact is true of everyone. But, if these children are sovereign subjects of law/right, these obligations exist only in so far as the order of right involved was previously accepted by them. Van Dun does not show why a child should accept the mini-state of the family while the, also social-historically determined, national state should have no normative value at all.

In so far as a child cannot autonomously choose whether or not to be a part of a particular family, and live there, it is not, in the sense of the fundamental principle of law/right, a full sovereign subject of law/right. Saying such a choice does exist would be absurd for very young children and is still problematic for other children, in so far that they do posses the critical abilities, but not the means (money, labour, ...) needed to maintain themselves in society* autonomously.

3.2 Man as a rational being

The fundamental principle of law/right is based on a conception of man as being rational. The fact that man is necessarily a rational being is a central position (FRB, p, 143 and on). "Rationality" is, however, interpreted pretty widely in this instance. Intuition and emotions are also included. These, Van Dun sees as a product of past judgments and interpretations (FRB p 116).

We already pointed out, when discussing the proof of validity of the fundamental principle of law/right, that Van Dun takes the position that people can and must form judgments. From this, he derived the obligation to be *reasonable*, which is to say the obligation to respect the rational nature of yourself and others. This leads to more than one problem.

First, regarding the concept rationality. People are rational

because they possess critical abilities on the basis of which they can form judgments, which then provide the foundation for action. It seems, however, that in the book, multiple meanings are given to the word rationality. Rationality, including intuition and emotions is of course much broader than rationality as the consequence of our critical abilities alone. The broad definition (FRB p 116) is exchanged for a narrow one on p 150-151, and the latter is implicitly used in the rest of the argumentation.

A second problem relates to the normative aspect of this rationality. From the broad concept of rationality one can derive the norm that humans, as rational being, *should* also be reasonable. This brings us to the problem that it is impossible to be irrational. For: when you follow your emotions, your intuitions, and such, this is always rational. But the existence of an obligation to use your rational abilities, and thus be reasonable, only makes sense if we are also able to *not* fulfil this obligation. Plants don't have an obligation to grow, because they cannot but grow. People can, according to our daily experiences, behave unreasonably. The *broad* definition of rationality makes it impossible to not be rational, and is thus not usable as a definition.

A problem directly connected to this is that the obligation for people to be rational is derived from the mere fact that they have the ability to be thus. Such inferences should be handled very carefully. When a norm is derived from factual data, reasoning of the following sort is the result: when people have legs, they should also use them. Without any additional premise, this is not at all a necessary inference.

Further questions are raised by this rationalistic conception of man. Undoubtedly, people in principle have the ability to be reasonable. Undoubtedly it would be good if people were to behave more reasonable more often. But, as Van Dun states himself, people are capable of being unreasonable. In practice, people are too often unreasonable in order to be able to build an order of law/right based solely on the fundamental principle of law/right. In his rationalistic approach Van Dun sometimes gives a rather idealized image of reality. This is the case not only for the difficult to control workings of a society* that

would function wholly according to the fundamental principle of law/right (more problematic still is the workings of criminal law we will discuss later), but also for a number of, better controlable, historical examples. For example he posits that many black slaves in the 19th century USA were in better circumstances than many free farmers and land-labourers. He explains this through the existence of "a mass of collective provisions from the cradle to the grave" on the behalf of slave-holders, to whom they were a very valuable possession. They were better fed, better dressed, housed better and had access to medical care (FRB, p 393). Even though this was true in a number cases, in a lot of cases it was not precisely because not all slaveholders acted they way they reasonably, in their own interest, should do.

Senseless violence, irrational fights between family or neighbours, these things occur very often. Precisely because of this unreasonableness of people there is a need of a (juridical) organisation of society, in which this unreasonableness can be kept in check and partially prevented. In the absence of organised courts within a order of right/law based on the fundamental principle of law/right, unreasonable people will also not come to an agreement to mutual negotiation or mediation. Jurisprudence and court procedures exist mostly for the protection of reasonable people against other's unreasonableness.

According to the fundamental principle of law/right, free interaction between individuals is absolutely incompatible with forcible, eg, based on positive right, interactions . This is a logical position. Free interaction and force exclude each other. One cannot be forced to spontaneously act in a certain manner. But when spontaneous interaction is made *prioritary,* it is not contradictory to claim that when the spontaneous interaction does not work/please, the interaction-partners might possible forcibly have their relation restored (possibly by another) on the grounds of a number of rules of positive right/law. The priority of free/voluntary interaction make forced behaviour based on positive law/right into an *alternative*, for the sanctioning of *unreasonable* behaviour.

The mistake which Van Dun makes, in our opinion, is to believe that *reasonableness* is something that all individuals determine for themselves. If this is the case, no criticism of unreasonable behaviour is possible, since everyone always has right on their side. Because the meaning of the

reasonableness, and thus also of (un)reasonable behaviour , is a *shared* meaning, individuals must be willing to justify their conception of reasonableness and possibly (be forced to) revise it. Those who do not accept this, claim to have a monopoly on the content of what is reasonable. This is an incorrect understanding of the shared meaning of it. This is the typical attitude of fanatic or a dogmatic and is itself highly *unreasonable.*

3.3 Psychic Damage

According to the fundamental principle of law/right, inflicting psychic damage is always lawful (even though it may in some cases be morally reprehensible) (see 2.1.1): "The fundamental principle of law/right guarantees the right of each person to psychically damage others (and this right is necessary, because it is not a priori excluded that a person could be morally obligated to harm others: how would, for example the raising of children be possible if the caretaker does not have the right to do or say things that the child experiences as being very negative?)" (FRB, p. 71). This latter part is true in itself, but is more of a proof that a child is not a fully sovereign subject of law/right.

This brings us to the question of how psychic and physical damage can be separated from each other. It is known fact that the physical and the psychic have a mutual influence on each other. Psychic suffering can lead to physical illness. Is noise, for instance, psychic or physical damage? Most will also agree that psychic damage can be worse than physical damage (think for instance to relationship-issues within a marriage). According to the fundamental principle of law/right, the inflicting of physical damage is always unlawful, no matter how minute, while the inflicting of psychic damage is always lawful, no matter how large it may be.

Even physically using the means of another without damaging them (eg. using another person's forest to let your dog off the leash) is considered to be an unlawful action, which leads to restitution (but for what? psychic damage suffered? for, per definition there is no physical damage) (see FRB, p 201-202).

Two things can be said about the problem of delineating physical and psychic damage.

First, it does not appear to be the case that Van Dun thinks psychic damage irrelevant.

Implicitly, there is even an injunction against inflicting psychic damage, through the obligation to respect each-other's rational nature. A sanction for this is missing however, mainly because the *proving* of psychic damage is an unsolvable problem: "Protection of 'psychic integrity', ..., would of course pave the way for a great many theatrics: everyone would have an interest in pretending that what others are doing with their own means is deeply hurtful to them, so as to be able to make a claim for restitution for the 'injustice' that has been done to them." (FRB, p. 186) So, here Van Dun is changing his tone: psychic damage *should* not be protected, because it is difficult to *prove* it.

This problem of proof arises, partially, in cases if physical damage, for instance in measuring a chance, determining the value of a destroyed vehicle (subjective value versus catalogue-value), attributing a monetary amount to a certain percentage of disability (this percentage in and of itself is already a relatively arbitrary measure), the judging of complaints of pain without visible injury, etc.

In such cases, one starts from typical cases and standard situations, so one can also start from intersubjective scales of value in cases of psychic damage. The practice of contemporary Belgian jurisprudence (eg regarding the compensation of pain and sorrows) shows that this does not pose any essential practical problems.

The existence of an injunction against inflicting (serious) psychic damage furthermore has an important preventative function. If one were to follow Van Dun, spreading slander would become wholly legitimate (FRB p 206), we would risk an inflation of slander, both in the press and elsewhere. Those victimised will hardly be consoled by the fact that some reasonable and critical people will, after thoroughly investigating the information, will reject the slanderous claims and that the slanderer thus discredits themselves with those people.

3.4 Criminal law

Under the fundamental principle of law/right, there is no collectively organised criminal law, unless people voluntarily subject themselves to such an order of law/right (ed: legal order?).

There is only a right to punish someone when they lose their right to self-determination because of aggressive action.

The victim of said aggression then has the right to use all means to expel the aggressor and to force them to restitute the damages inflicted (FRB, p 195). The heirs of a murder-victim have the right to dispose over the murderer as long as the aggressor is not willing to pay restitution. If the victim did not have any heirs, then the aggressor becomes a "res nullius", along with all their possessions. In other words, they are declared to be an outlaw. (FRB p 196-199).

A particular protection-organisation may seize a suspect, even without sufficient evidence, if they expect to find said evidence during the arrest. This on the condition that they possess enough funds to restitute damages to an innocent suspect fully. (FRB p 505).

Just as with compensation from unlawful actions, in this conception there is no space for any (forceful) prevention. If expressed strongly, it comes down to the idea that everything is allowed (at least juridically) as long as you reimburse the victim. However, there is a lot of damage (psychic suffering, murder, maiming, invalidity) that can not truly be repaired, but at most imperfectly compensated for through a monetary payment. Furthermore, who will decide the precise scope of the damage, and the modalities of payment? Obviously, any society* has an interest in having, at least for those offences of which everyone agrees that they should be curbed, a global system of criminal law with injunctions, sanctions and an independent judicial apparatus.

4 CONCLUSION

The theory of the fundamental principle of law/right is a radical offshoot of two basic characteristic of Western (right wing) thinking: rationalism and individualism.[7]

Concerning the first element, we expressed criticisms above (3.2) on the idealized, all too rationalistic conception of man the fundamental principle of law/right is supported by.

As for the second element, we will, in addition to what we already said in point 3.3, point out that the social and historical context in which a person grows up, will always partially determine them. In theoretical

7 In connection to this, see also Van Hoecke, M., “Rationalisme et individualisme dans les diverses conceptions du droit”, in *Memoria del X Congresso mundial ordinario de fiiosofio del derecho y filosofia social* vol. V, Mexico, 1981, 289-300.

models, like those of Hobbes, Rousseau, Marx or Van Dun, it is possible to, as a mental exercise, disconnect people from this context. In reality however, any juridical ordering of society* must account for this. Humans as fully worthy beings are only conceivable within a community. For instance, only through interaction with others can a human develop the use of language, and language in necessary to develop the ability to think. Such a community (familial or in a broader context) is more and/or something other than merely a collection of autonomous subjects. Historical reality forces upon each individual a specific familial and social structure as an inescapeable *fact.* At the time a person is able to autonomously make decisions as a reasonable thinking being, they are already integrated into those societal structures to a large degree. To radically leave/step outside of these structures is impossible in practice. A whole array of choices are unavoidable made beforehand in a definitive manner by the environment: native language, ideological framework of raising, a certain transfer of knowledge, etc. A practical philosophy of law/right cannot push this to the side.

The strict separation between right/law and morals in the fundamental principle of law can also be considered to be the fruit of both rationalism as well as individualism in Western (right-wing) thought.

Especially the solution regarding criminal law and the (non-)restitution of psychic suffering show us that a certain communal basic-moral, too, is a historical given from which a particular person in a particular place and time cannot escape from. As such it is unavoidable that law/right would be concerned with this basic moral, and that it would enforce all values which are experienced to be essential forcefully, on all people living in a certain territory or within a certain group.

All these critical remarks do not take away from the fact that the natural law/right philosophy of Van Dun is a very successful construction, to which belongs the, not inconsiderable, merit of fundamentally questioning existing societal visions, and to show their weaknesses. This, logically speaking, should lead to further philosophical debate and thus to new, hopefully better theories (no matter their schools of thought).

Van Dun fundamentally faces each person with their own responsibility. One should not assume "the others will take care of it". Even though there may be a moral duty to help others, there are clearly down-sides to simply translating these

(moral) duties into correlating (juridical) rights. When everyone starts counting on "the others", this would lead to the collapse of society*. A number of decades of experience with the social welfare-state show that this formula does not come only with benefits. It also has unwanted side-effects, like a detrimental influence on economical development (at least within the current paradigm of a growth-economy) and the stimulation of certain forms of parasitism and irresponsibility (bureaucratisation, lack of work-ethic in state employees, abuse of social security). Both within as well as outside of the economic sphere there is a need for a stronger emphasis on our own responsibility. This goes too, for example, for people with psychic problems, failed students, artists who feel insufficiently appreciated, bankrupts, etc . who should not a priori look for the source of responsibility in "the others".

Finally, what Van Dun has done is to fundamentally shake the existing theories legitimising social-democracy. The principle that "the majority decides" is itself not legitimised in relation to those people that do not agree with it. Especially when this majority uses parliamentary democracy and fiscal legislation in order to take from the minority, in order to use the gains for their own benefit, does legitimisation become very problematic. With this, Van Dun pointed out a second weakness of the welfare state.

Though, where he rejects the fundamental principle of majority, we would like to point out a fundamental distinction between situations for which there is only one possible solution, no matter what, and situations in which there is room for multiple, parallel arrangements.

In the first case, an example of which would be the question if traffic should drive on the left or right side, it is clear that everyone still must drive in the same direction. This requires a majority-decision if unanimity cannot be reached.

In a lot of other cases however, there is no reason to enforce a majority-solution on a minority.

For instance, at the moment there is a threat of making a "unitary type" within secondary education in order to remove the "competition" between VSO and traditional education (ed: historical Belgian education system stuff, deep weeds, not going there.). The rather definitive designs which currently exist elicit a legitimate fear of this unitary type becoming a typical compromise that unites all the down-sides of both previous types, without any of their benefits. In higher education, for years now

a worrying drop in quality has been noted in certain subjects on student inflow, and precisely those subjects (foreign languages, history, mathematics) will be further reduced. All for a disastrous egalitarian conception according to which everyone "should be able to follow along as long as possible". It seems that the people involved think that the only solution is to reduce everyone to the lowest level. Not only does this threaten to seriously jeopardize our countries intellectual and economic future, it also forces the taxpayer to finance all this, even if they disagree.

At the very least, the option could be left open for the taxpayer to decide where their own money will go, to allow them to finance those types of education that they think will offer the best education to their children.

One final thought. In legal education, legal-technical and general subjects are traditionally kept strongly separate. This causes the students to not see any direct connection between these different subjects and approaches . Analyses like the one by Van Dun could provide the impetus to adopting a more critical and fundamentally reflective approach within classical legal-dogmatic education. Furthermore, it is only in this way that legal faculties can truly live up to their university education, and distinguish themselves from legal education outside of the universities.

Mark VAN HOECKE

Luc WINTGENS

Ufsal Brussel

APPENDIX B

AN INDIVIDUALIST THEORY OF LAW/RIGHT

A response to Van Hoecke and Wintgens[*]

The discussion professor Mark Van Hoecke and Luc Wintgens devoted to my book *Het Fundamenteel Rechtsbeginsel (FRB)* is remarkable because of its concise yet quite complete and correct rendition of the contents and structure of my argument. In particular, I appreciate the emphasis with which they refer to the logical structure of the rather extensive argumentation. This shows that it is certainly not the case that they cannot see the forest for the trees. The critical remarks that form the conclusion of their text are furthermore directed at fundamental points rather than details that any critical reader would add question marks or exclamation points to, which are undoubtedly present in a book of this size. Therefore, in the same spirit, I would like to constrain my reply to 1) clarifying and expounding on points which may be handled a bit too hurriedly by the authors, or by myself in the book and 2) answering their criticisms where I am of the opinion that it concerns essential matters.

---

* This reaction by Fran van Dun to the review by the hand of Mark Van Hoecke and Luc Wintgens has previously appeared in the Rechtskundig Weekblad of January 23rd 1988, RW 1987-1988 pp. 697-704, and was included with permission of the author and the RW. References to the FRB have been changed to reflect this new edition.

1 THE SCOPE OF THE ARGUMENT IN HET FUNDAMENTEEL RECHSTBEGINSEL

It seems useful to use this opportunity to repeat once more that the FRB only investigates the questions of the "what" and "why" of the order of right/law, not the questions of the "how and when". It speaks for itself that in answering the latter questions, attention should first be given to the historical contexts within which right/law (and the practice of thinking about right/law) has evolved. Van Hoecke and Wintgens do point out that my book is constructed "a-historically", but do not make the connection to the central question of the argument, even though this central question provides, in my opinion, justification for its a-historical nature. That question is: for the solution of which problems do people need right/law? Which criteria are relevant to judging the various alternatives which are proposed solutions to this problem? The "what" of right/law is precisely that solution sought; the "why" the totality of considerations which make the choice of that solution rationally, philosophically justifiable. It is of course a totally legitimate scientific or speculative endeavour to ask other questions: when and why have people become aware of the problem of right/law?[1] How was this problem first conceived? How can we explain how different people in different historical circumstances thought in specific different ways about this problem? How can we explain that one institution came into being or disappeared in one set of places, and another in another set of places? To what extent have right/law-theoretical conceptions influenced jurisprudence, and to what extent are right/law-theoretical conceptions nothing but rationalisations of existing practices? And so on, and on, this summation is far from exhaustive or limiting. In answering questions such as these, an a-historical approach would be unthinkable. When investigating the logical-philosophical "what" and "why" question on the other hand, it is prescribed if one does not wish to devolve into historicist prattle.

What is the cause of the problem, for whose solution people

1 The identification of a problem is a historical event, but the fact that something has only just started to be experienced as a problem does not mean it did not previously exist, nor that it did not previously play a part in the unfolding of events.

require right/law? My answer is scarcity, but scarcity in the distributive, not al-locative sense. This answer is certainly no original find of mine, quite the contrary. Scarcity is a state in which the ideas put forward for the application of a thing cannot all be realised. This means a choice must be made in which application will take place. This means to say that each application has a "cost", namely the value one could have achieved by choosing an alternative application. Scarcity can occur in the mind of one single choosing subject, eg "To which of *my* ends will I apply these means?". This is the allocative side of the problem of scarcity. In its descriptive aspects it is conceptualised in household-economy (business-economy), and for its normative aspects in ethics. The distributive side of the problem of scarcity on the other had occurs in the presence of differing subjects. "To *whose* ends will the means be applied?". Political economy (relating to the distribution of the *power* of disposal) and right/law (relating to the *right* of disposal) are the most important disciplines in this regard. It is essential to understand that the distributive and allocative aspects of the problem of scarcity each have their wholly own natures and logic, so that one cannot be reduced to the other. Just like the question of the distribution of power of disposal over given means cannot be reduced to the question of which goals are mutually exclusive alternative uses of those means, so can the question of the distribution of the right to disposal not be reduced to the question of how various goals should be appreciated when compared to each-other. For, it is far from excluded that the last question has many plausible, but mutually exclusive possible answers, or that one answer will be deemed very plausible by one person and absolutely ridiculous to an other. In right/law, such a *deadlock* is avoided by principled attribution of rights of disposal, unconcerned with the ad hoc settlement of the question of what, in each concrete case, is the only undisputable very best use of available means.

A good question is in itself already half of an answer. Exact theories of right/law are based on an exact formulation of the problem. Analysis of the problem of scarcity makes it possible to identify the formal properties any solution must posses, the

formal theory of law/right in its full generality and highest abstraction. By further specification, this formal structure can be fleshed out in different ways, namely by looking at the different ways in which human reality can be placed in relation to the framework of concepts thus created. It is after all plain to see that a persons first means is the person themselves: the bodily, physical as well as rational, abilities of people are themselves scarce means, moreover no other means may be acquired without the application of said bodily means. Concentrating on this fundamental relation of the right to disposal of people makes it possible to conceive different types of theories of right/law that cover the entire field of logical possibilities. It is the task of the philosopher of law/right to judge these material theories of law/right in light of logical, epistemological and ethical criteria, which are relevant to solving the problem which was the cause of the investigation.

That is the project of my book. It reaches the conclusion that only the individualistic theory of law/right, according to which each person, as a being capable of reason (rational), must be recognized as a sovereign subject of law/right is the only *philosophically* defensible theory of law/right. I'm putting the word *philosophically* in cursive here, because that is, after all, the issue under discussion. There are other perspectives on right/law than the philosophical one - and it is not that unexpected for these to reach other conclusions. It is one thing to consider right/law to be a means or policy-instrument for the achievement of certain goals, it is quite another to consider it as the solution to the real problem of scarcity in a world inhabited by many people, each with their own needs and wishes, desires, expectations, ideas and theories. I do not wish to contradict the fact that there are many circumstances and *fora* where it would be possible to argue, more or less convincingly, that another theory of right/law deserves preferential treatment because it offers more guarantees of serving certain, selected interests. I most certainly do not want to claim that in all those fora - where other measures are used than those of philosophy -the philosophically best defensible theory of law/right is capable of crushing all others under the weight of its arguments. It is not the case that I am claiming that everybody would gain in the short or even long term *in a transition to* the practical application of this individualistic theory of law/right. Such a utilitarian

strategy of argumentation I have explicitly rejected (FRB p xvi). One of the reasons for this is that it would be absurd to posit that the positions of interest which have grown and been established around the institutions and practices of such an unlawful society* could possibly be maintained integrally or for a substantial part, in such a transition. In short: I am not concerned with the "political viability" of the theory I defend. That is a job for freedom-loving politicians, pedagogues, moralists. In regards to right/law too, should one take into account the demands of a rational division of labour between a philosophy of law/right and the political action which could let itself be inspired by it. This remark also applies to the relation between philosophy of law/right and the actual work of jurists. A theory of law/right provides an intellectual framework withing which jurists can get to work. One should not expect a theory of law/right to make the creative input of jurists regarding concrete problems and conflicts obsolete. A theory of law/right must be able draw the distinction between lawful and unlawful action, it is not reasonable to expect it to reduce the field of lawful (permissible) solutions to one completely determinate prescription in every concrete case.

2 THE FUNDAMENTAL ALTERNATIVES IN RIGHT/LAW

Van Hoecke and Wintgens gave a concise but correct representation of the main lines of argumentation for the fundamental principle of law/right. Here, I'd like to go deeper into the ideas they propose in the terminology of "master/slave"-relations. Given the fact that it is useful to consider an individual human to be one subject of law/right, or *person* (this position, possibly softened with some not very essential limitations, is not likely to be contradicted by many), people can be qualified in a law/right-theoretical perspective as 1) either sovereign persons (belonging to no-one but themselves) 2) or autonomous persons (belonging to no-one that does not belong to them in turn). Finally, it is also logically possible to consider humans as being mere objects (not as persons). Now, it can be proven that the individualistic theory of law/right in the *FRB* logically follows from the following premises: a) if a person is autonomous, all people are autonomous (equality) b) no two people have all their property (properties)

(including themselves) in communal possession (juridical individualism); c) all persons or subjects of law /right are either humans themselves, or persons belonging to one or more human subjects of law/right (humanism); d) there are only a finite number of persons (finitude).

Alternative theories of law/right, which reject the *FRB*, thus imply the denial of one or more of the premises. In other words, alternative theories of law/right have to claim, implicitly or explicitly: a) either that, *in the area of fundamental (human) rights*, there can be no equality (the so called legalistic theories); b) or that, outside of situations of contractual relations or some special factual relation, one human can be legitimately held liable for the actions of another (the so-called consensus-theories); c) or that there exist non-human *persons* whose will is law/legislation for humans, and for whom no human can be held liable or responsible (the so-called mystical theories); d) or that there exists at every moment in the order of right/law an actual infinity of persons. Each of these positions encounters insurmountable objections of an epistemological or ethic nature, and are (except the legalistic theories) not operationalisable.

The individualistic theory of the *FRB* escapes these objections, and can also be defended independently. In this point, Van Hoecke and Wintgens are probably too concise not to be misleading. Namely, the proof is not worded using the normal "third person plural", which is to say it is not *about* (ed: orig over: "about, above, over") people but rather *between* people. It is a *dialogic* proof, in the first and second singular person. The crux is that, in a philosophical dialogue, no other fundamental principle of law/right is compatible with the fundamental rules of dialogue itself. A philosophy that defends any other theory of law/right would thus invalidate/dissolve itself in that sense that it makes the right to philosophise (which means to say to enter into an open critical dialogue with others) dependent on the permission and regulation of some higher, possibly non-human, authority. This would make such a philosophy no longer able to provide or prove any independent foundation for the right of this higher authority - this right is itself no longer philosophically defensible. It is on the argumentation briefly sketched out here that I rest the position that the individualistic theory of law/right of the *FRB* is the only philosophically defensible theory of law/right.

Another way of phrasing it: the individualistic theory of law/right of the *FRB* is precisely that theory which can be justified on this basis.

It is also precisely this which explains what Van Hoecke and Wintgens call its "radical" aspect. Once the foundation has been laid a theoretician cannot but follow it to its final logical consequences. Here, the words of Socrates apply: "We mus follow the argument, wherever it lead us". Where those consequences are in conflict with our pre-theoretical intuitions (prejudices), we must either use the theory as the norm for the correction of our prejudices, or abandon the theory. But, the latter would mean accepting a theory of law/right which is not philosophically defensible and/or not practically operationaliseable.

As a material theory of law/right, the fundamental principle of the *FRB* is in many points practically comparable to the well-known theory by John Locke regarding the natural rights of man. The big difference is to be found in the fact that Locke posits, beside and above the natural rights of men, a natural legislation/law which expresses man's subservient position in relation to God (and the servitude of people in relation by the goals set by God). In the *FRB*, this religious "escape clause" is not present. This denies the author and reader any excuse to simply ad hoc resolve the matter by pointing to the divine mission of humanity, when some conclusion from the theory seems hard to digest for whatever reason. There are more theories of this type: "People have the right to do ask the please as long as they do it in service of my conception of what the highest good is". It speaks for itself that such a theory is incapable of eliciting much intellectual discipline, since it is at any time easy to withdraw from any of its conclusions by further specifying what is meant by "the highest good". The theory of the *FRB* on the other hand does generate such discipline. It allows everyone the possibility of attempting to realise their ideas (about the highest good or anything else), on the condition that this can be done without violating the same/equal right of others. It obligates us to think of lawful (which means compatible with law/right) methods for solving our problems. It does not allow use to call upon our ideals and opinions as excuses for not taking into account the rights of others. (In any case, it seems to me that it would be a good exercise for jurists and students of law/right to look for solutions compatible with right/law, or even with traditional private law/right, rather than crying out for a "definitive regulation by the legislator or

the authorities" at the first hint of difficulty).

3 CERTAINTY OF RIGHT/LAW, NOT UTOPIAN CERTAINTIES

It is of course true that the theory of law/right of the *FRB*, or its real application, offers no guarantee that people will use their lawful freedom in such a way that some ideal situation or other, desired by this or that person, will be achieved and maintained. But this is of course true for *every* theory of law/right, even those that would recognize an almighty God as only sovereign subject of law/right, for example. Proponents of such theories should probably find it rather blasphemous when some shuffler comes along, claiming the ability to predict how God would use his omnipotence. As such, such a theory offers no guarantee whatsoever in relation to the guaranteeing of the realization of some desired outcome or the other. The same is a fortiori true for theories of law/right which posit state-sovereignty as the foundation for law/right: what these theories entail is that the formally valid prescriptions of the state-authorities create "right/law" for their subjects, not that they are aimed at realizing any *objective* societal ideal. If anything can be learned from history, it would be that states are institutions manned by folks that prefer using the mantle of state-right to force their own *subjective* ideals onto others.

To give an extreme example: the individualistic theory of law/right does not exclude each person using their right in order to commit suicide, which would of course put an end to the individualistic theory of law/right. Of course, no other theory of law/right can exclude that the sovereign subjects of law/right that *they* acknowledge will use their right to exterminate all their subjects (as happened in the mini-state of 'lord' Jones and his sect in the jungle of Guyana, not so very long ago).

What can and will happen is something which escapes the control of every theory of law/right. The only thing a theory of law/right can control is the logic that rules the formation of judgments in relation to right/law and injustice. It is remarkable that so many seem capable of recognising this in relation to the individualistic theory of law/right (which is then characterised as being impractical, utopian, etc) but not in relation to alternative theories of law/right in which God or the State are not only brought onto the stage as sovereign subjects of law/right - despite all philosophical

objections - but they are furthermore considered "guarantees" for a good procession of real events. As if a utopia becomes less utopian when packaged in thick layers of magic and superstition! God is no longer fashionable: "God will intervene and put things right" is no longer a believable fable to fool people with. But "then the state must intervene" is?

4 WHO IS A SOVEREIGN SUBJECT OF LAW/RIGHT?

Let us now devote some attention to the critical remarks Van Hoecke and Wintgens have made on the FRB.

The first point is the question of the precise definition and delineation of [the] 'subject of right/law with their own critical abilities' (Van Hoecke and Wintgens). This is an appropriate question, since the argumentation for the fundamental principle of law/right rests on the ability for self-representation in a critical dialogue. Those who speak in and along with such a situation of critical dialogue, in so doing confirm themselves to be an actual subject of law/right in the sense of the FRB. Possession of said critical abilities (rationality) is a necessary and sufficient condition. That is to say every human, qua rational being, is an actual subject of law/right, a subject of right/law in and of themselves (and thus not, say, on the grounds of some convention).

From this position (and the argumentation it rests on) it of course follows that humans who are not rational beings, are not actual subjects of law/right: this can occur due to genetic defects or severe brain-damage. This means that these humans (as well as animals and things) can only receive an artificial and relative legal-personality - namely on the basis of agreements, and then only for those people which have made such agreements. Van Hoecke and Wintgents write, correctly, that "destruction of rational capacities" implies and absence of said rational capacities. They posit that this absence of rationality is "also the case with children, who have not yet fully developed this capacity". There is however, a big difference between not having and not-yet-having-fully-available. The fact that one cannot enter into a dialogue with (young) children does not mean that one cannot enter into dialogue with a person (who at this time is still a young child). The same is true of people that are sleeping, or completely drunk, or unconscious. What follows from this is that children *qua/as* children, sleepers *qua/as* sleepers, etc. are not subjects of law/right in the sense

of the *FRB*. These people are however actual subjects of law/right on the basis of their normal human constitution (which includes rational abilities) . It is of course true that it is difficult in some cases to determine whether the absence of rational behaviour is due to the absence of the ability for rational behaviour or not - but the general fundamental principle of law/right, which gives no-one the right to dispose over any other without that others permission, obviously puts the burden of proof on the one claiming the other not to be a subject of law/right when the normal run of events would be that that other would become capable, after some smaller or larger amount to time, of actively manifesting their rationality. (Do take note that, with this discussion, we are no longer investigating the logical structures of the idea of law/right, but that we are instead entering the terrain of empirics or experience - a terrain which is in permanent flux and motion, because of, among other things, the evolution of the sciences and technologies which may provide relevant evidence.) As such, it seems reasonable to me to assume that those who would in the normal run of events develop into something actually capable of demonstrating its rationality to indeed be actual subjects of law/right, and to hold to this hypothesis until it is refuted in a concrete case. As such it I find no difficulty in considering an unborn human fetus as an actual subject of law/right. On the other hand I see no reason to count even the higher orders of animals such as chimps and dolphins among the class of actual subjects of law/right. Even though I, as a layman in the field of animal studies, should of course be very cautious, I have not yet seen signs of any argumentative behaviour that would allow them to adjust their behaviour to any conclusions or considerations regarding their mutual rights and duties.

5 THE POSITION IN LAW/RIGHT OF CHILDREN

Van Hoecke and Wintgens are completely correct when remarking that "one faces very great practical problems" when one considers children (and sleeping, or unconscious, or blind-drunk people, etc.) to be sovereign subjects of law. It is however the question if these problems would be any less great, or any less practical, if we were to *not* consider them to be sovereign subjects of law/right. What I spy in their remark is the, in my estimation totally unreasonable, expectation that a correct theory of law/right would a priori imply the impossibility of "practical problems".

The *FRB* allows, within the formal structures of right/law, for space for a broad range of considerations (of moral, economic, etc. natures) in light of which people can solve concrete problems in concrete circumstances. That the *FRB* does not speak of the uncountable ways in which children can be treated or raised, does not mean that it would not be able to make a distinction between lawful and unlawful practices in this regard.

The picture of the family as a "mini-state" should be attributed wholly to Van Hoecke and Wintgens. As they themselves conclude a few lines before this remark, I compare the position of the child to that of the guest in the house. The young child, in this regard, is an involuntary guest: "accepting the order of right/law of the family" does not factor into it at all. For an older child, things are a bit different. However, I do consider both to be actual subjects of right/law, so that the parents too do not have the right to damage the child's bodily integrity or its property rights. What's more, I also see the conceivers of the child as those who are responsible and liable towards third parties as long as the child has not voluntarily withdrawn themselves from the custodianship of their parents. (*FRB*, p 168)

It of course remains true that the *FRB* says less about the parent-child relationship than one would like it to; but this is a fortiori true of any other theory of law/right. When one, for instance recognises the national legislative power as sovereign, meaning they have the right to regulate the juridical relationship between parents and children down to the smallest details, this still does not offer any guarantee that the legislator will issue any decree in the matter, nor that the decrees they would issue would be in any way connected to those one might want them to. It is not fair to compare a "worst case scenario" under the rules of law/right of the *FRB* to some ideal legislator under some other theory of law/right. In the same way it would not be fair to compare the possibility of the intervention of a Ramses or Herodes, legitimate under a whole slew of alternative theories of law/right, to the behaviour of the most ideal set of parents under the application of the fundamental principles of law/right of the *FRB*. The relevant comparison is that the *FRB* acknowledges children as sovereign subjects of law/right, and that this status implies that others to not have the right to take unlawful actions towards children, while alternative theories of law/right do not create any limitations on what those others (parents, legislators) can do in relation to children.

If one then assumes that under other theories of law/right, this juridical indeterminateness would be sufficiently compensated by the exalted morality of eg the people exercising legislative power (they only make good legislation), then one is just as right in assuming that in a order of law/right based on the fundamental principle of law/right the (smaller) juridical indeterminateness will be adequately compensated by the exalted morality of eg the people who make the house-rules that children must abide by as long as they are guests in that house.

6 RATIONALITY AND REASONABLENESS

The interpretation Van Hoecke and Wintgens give to my concept of humans as rational beings is incorrect. For starters, I do not see how the *FRB* "gives multiple meanings to the concept of rationality" (Van Hoecke and WIntgens), or how "the broad definition [of *FRB p116*] is exchanged for a narrow definition (on FRB, p 150-151)". The fact that not every component of the definiens is required in an argument in the argumentation, does not after all mean that the others are denied.

Furthermore Van Hoecke and Wintgens ignore the distinction I quite explicitly make between "rational" and "reasonable". That a human is rational (a being possessing reason, which is to say a being with rational abilities) does indeed mean they cannot be not-rational, but not that they cannot be unreasonable. Quite the contrary: "Only of a rational being can it be said that they are unreasonable" (*FRB*, p. 4). In other words, it is only in relation to a rational being that the question of whether or not they are reasonable makes sense. That "the obligation for people to be rational, is derived from the mere fact that they have the possibility to be" (Van Hoecke and Wintgens) is as such an incorrect representation of my (pro)positions. There is no obligation for being rational (that is to say to be what one is), there is an obligation to be reasonable. As such, my argument is not a variation on the theme "A human has legs, so they should have legs" (Van Hoecke and Wintgens), moreso on the theme: if a human being has legs, the they, as a rational being, should make use of them as reasonably as possible.

The question of philosophical importance is, why the norm that one should be reasonable is valid at all. "That question itself is a confirmation

of the validity of that norm" (*FRB*, p. 150). After all, anyone asking the question wants to know the reasons that argue for this position, which is to say the arguments which make the acceptance of the position reasonable. If a person were to show, while asking that question, that any random answer would satisfy them equally, even though it has no connection to what was asked, they would immediately also show that, as far as they are concerned, there is no question at all. "There is no way to bring into question the validity (of the demand for reasonableness). One can only refuse to think; one can choose to live unintelligently, but it is not possible to justify such an attitude, neither to oneself or to others" (*FRB*, p. 150-151). There can be no philosophically valid argument to refute the validity of the norm in question.

7 RIGHT/LAW AND REASONABLENESS

Van Hoecke and Wintgens posit that "people are too often [unreasonable] to be able to build an order of law/right based solely on the *FRB*". What they probably mean is that, given the unreasonableness of so many people regarding so many things, an order of right/law according to the fundamental principles of the *FRB*, in many ways must leave much to be desired. If that is what they mean, then I whole-heartedly agree with them. Only, I would be curious on which theory of law/right an order of law/right could be supported which, despite the unreasonableness of so many people regarding so many things, does not leave much to be desired. Once again: I claim that the theory of right/law of the *FRB* is the only philosophically defensible one, not that a world ordered by this theory, in the worst possible circumstances (including the moral and cultural levels of people), would be a more pleasant place than another world with much better circumstances ordered according to some other theory. The remark relevant to the theory of law/right is simply this one: who, under the regime of the fundamental principle of law/right, is of the opinion that conditions can be improved, has the right to attempt to do so with all lawful means (their own first of all), alone or together with others of the same opinion. Additionally, no-one has the right to force them to contribute to the creating or maintaining of situations which they judge to be wrong. What distinguishes the theory of law/right of the *FRB* from its alternatives, is that no-one has the right

to dispose over others.

If - as Van Hoecke and Wintgens claim - people are indeed so very unreasonable, then it would follow from this that, in a juridical regime in which some have the right to dispose over others, the odds would be large that the former would make unreasonable use of that right. This seems to me to be as incontrovertible as the fact that the same premise also means that, in a regime in which everyone has the right to dispose over only themselves, odds are great that people will make unreasonable use of their own right to self-determination. What can be concluded from this, is that there is a need for greater reasonableness, not that the given measure of unreasonableness of people can be used to deduce anything at all about the correctness of one theory of law/right or the other.

"Unreasonable people will, in absence of organised courts within an order of law/right based on the fundamental principle of law/right, not come to an agreement to agree to mediation of some impartial judge in mutual negotiations with the other party" (Van Hoecke and Wintgens). But, why would there not be organised courts in such an order of law/right? The fundamental principle of law/right also does not exclude the use of compulsion in order to bring someone before a judge - it simply demands that if this is done unjustly/unlawfully, the victim must be fully compensated by those who visited that injustice upon them. This does not mean, contra Van Hoecke and Wintgens "that everything is permitted ... if one only offer restitution to the victim"[2]. It simply means that those that take an unlawful action do not have the right to withhold reparations of right/law and possibly damages from the victims of that act, no matter what the motive of the action may have been. The fact that I, while wearing a rented suit, decide to jump into the water to save child from drowning does not mean that I can push the costs of the loss of the suit onto the rental business without compensation.

8 SHARED REASONABLENESS

The remarks of Van Hoecke and Wintgens about the shared nature of reasonableness are not as relevant as the authors seem to believe: "Those who

2 This remark by Van Hoecke and Wintgens is simply weak, it could just as easily be said that under Belgian law everything is allowed as long as you're willing to bear the prescribed punishments.

do not accept [that individuals should be willing to justify and possibly (be forced to) alter their concept of reasonableness] claims to have the monopoly on the contents of what is reasonable." Is it not rather the cases that those who claim to have the right *to force* others to revise their concept of reasonabless, are laying claim to a monopoly? Furthermore, I no way deny that the meaning of the concept reasonableness is a shared meaning. How could I do such a thing after all that I have said about the dialogic context in which reasonableness is revealed to be a valid norm? What I do deny is that people have the right to force others to justify their conception of reasonableness when it is they who are claiming that right, instead of refering to some unlawfulness they themselves were the victim of. To posit such a right boils down to acknowledging tyranny as the only legitimate order of law/right.

All this being said, I must admit that I do not understand how Van Hoecke and Wintgens come to claim that I do not recognize the shared character of reasonableness. Both in my ethical (*FRB*, p 293sqq) as well as in my political considerations (about the constitution of the political space, *FRB*, pp 357-376) I have explicitly pointed out the essential importance of dialogic relations to the development of man into a self-conscious ethical and political subject. Both of these cannot, in my opinion, be counted among the more obscure parts of the book, and are also explicitly mentioned by Van Hoecke and Wint-gens in their review. They cannot have supposed that, to me, dialogue is something in which no "shared meanings" are present at all? If this is indeed the case, they are mistaken: the more intensive the dialogical interaction, the more meanings become a common good.

Just as perplexing to me, are their suggestions that I "as a mental excercise, disconnect man from the social and historical context in which they grow up", or that I would deny that "by the time a person can make autonomous decision as a reasonably thinking being, they are already largely integrated into societal structures" (Van Hoecke and Wintgens). These suggestions are radically opposed to many positions throughout the book (a.o. *FRB*, pp 4-5, 9, 115sqq, 125sqq and elsewhere, up to the last section of the book pp 515-517).

Van Hoecke and Wintgens are of course correct when they say that a practical philosophy of law/right cannot "push to the side" these facts;

it should also not be silenced by them. The fact that "a whole slew of choices are already unavoidably and definitively made by the environment" does not mean that *all* choices are already "made by the environment". It also does not mean that, faced with tradition and habit, philosophy of law/right can only be practical when it is silent. From the fact that conformism is often the most obvious possible alternative, does not follow that this is always the case, nor that there can be no right to try a new, unusual, non-conformist idea.

Van Hoecke and Wintgens here deliver a strong example of the "people have legs, so they should have legs" fallacy. They, for instance, write "that so to a certain communal basic morality is a historical given, from which a certain person in a certain place and time cannot escape from. As such it is unavoidable for law/right[3] to get involved with this basic morality, and that values which are experienced as being essential be forcibly enforced to all persons in a certain territory or in a certain group". Let it be "unavoidable", that says nothing about the *right* to forcibly enforce "values experienced as being essential" upon others. If Van Hoecke and Wintgens mean this remark to be a criticism of the fundamental principle of law/right - and this would seem to be the case - then they are implying that those who are sufficiently numerous and convinced of their sacred correctness/holy right to enforce their opinions as law/legislation to all, without fear for effective resistance, have the right to do so.

9 PSYCHIC DAMAGE

In relation to the concept of psychic damage, too, does the interpretation of Van Hoecke and Wintgens seems ill-founded. When they posit that it is correct that education/raising is not possible if the caretaker does not have the right to, from time to time, confront their pupils with very unpleasant actions or opinions, they see in this "a proof that a child is not a full sovereign subject of law/right" (Van Hoecke

3 Here they clearly mean the law/right currently *in effect* (regardless of any considerations relation the law/right-philosophical *validity* of it). Less misleading would be to not speak of *law/right*, but rather of what is considered to be"law/right" by prevalent opinions in a certain socio-historical context.

and Wintgens). This is all too crazy, is the right of the soccer coach or the theatre-critic to give the players or actors their undiluted opinion about their performance, a "proof" that soccer-players or actors are not full sovereign subjects of law/right?

It is also not the case that I am of the opinion that "psychic damage should not be protected *because* it is difficult to prove" (Van Hoecke and Wintgens). It is my position that it should not be protected *in right/law*, even if it could be proven, because the claimed *right not to be psychically damaged* is not operationalizable (quote Van Hoecke and Wintgens themselves). Does the religious fanatic have the right to reimbursement every time someone utters an opinion that fills them with holy outrage and disgust? Or do those others have a right to restitution when he puts forward his claim and makes them sick with the thought of having to share a planet with such arrogant close-mindedness? Such examples can be multiplied ad infinitum, but you still won't find one where the right not to be psychically damaged offers the only coherent solution.

The matter seems to come down to this: Van Hoecke and Wintgens read more into my text than what it says. What I posit, is that an action which causes psychic damage is never unlawful per se. This does not mean that, if an unlawful action also causes (or: only causes, see infra) psychic damage, this fact would not be relevant consideration in determining the damages owed.

Van Hoecke and Wintgens are right in saying psychic damage can be worse than physical damage. The same is true of financial damage as a consequence of reputation-loss. But this also means that sanctioning by means of psychic or financial damage (or the threat of it) can be far more effective than say fines or prison-sentences in creating social cohesion and maintaining a certain degree of conformism in relation to certain norms and values. A society* based on the fundamental principle of law/right no more needs to be an "atomistic" society* than a society* that relies on a state and its legislation and regulation, its officials and policemen, for its internal cohesion.

Furthermore, the fact that psychic damage can hit harder than physical damage is not relevant criticism on the fundamental principle of

law/right: I have never claimed that an unlawful act is the worst that could ever happen to a person. I am, however, not inclined to build a theory of law/right on the basis of casuistic reactions of the type "this shocks me; it ought to be forbidden".

10 SOME POINTS OF DETAIL

In relation to my position that slander is not an unlawful action per se, Van Hoecke and Wintgens claim it risks creating "an inflation of slander". First of all, we should consider that rejection of my position has always lead to problems regarding freedom of expression. Secondly, an "inflation of slander", if we go along with the metaphor, is also a devaluation of (the credibility of) slanderous talk. Thirdly there are possibilities to discourage and stop slanderous lies aplenty within the framework of the fundamental principle of law/right. Fourthly it cannot be said that a "ban on slander" works very effectively. Van Hoecke and Wintgen's claim that the existence of the ban on the inflicting of (serious) psychic damage has "*an important preventative effect*" seems to me to be, in absence of empirical evidence, made up out of whole cloth.

Van Hoecke and Wintgens are correct in wondering why someone who makes an illegitimate action that causes no damage to another (eg letting your dog run loos in another persons forest), should pay damages. In this we refer to *FRB*, pp 201-202. This however only states that such a person runs the risk of ex post facto having to pay a price for the unpermitted use of an others goods. This price may include an added reimbursement for "psychic damage" (the annoyance caused to the owner of the forest), not because the causing of psychic damage itself is unlawful, but because the person taking an unlawful action is obligated to provide restitution for the entirety of the damages.

In the FRB, there is no independent criminal law/legislation. Between two sovereign subjects of law, there can only be reparation of law/right, and restitution by the one who has entered the domain of abilities/possessions of the other without permission[4]. It is only when this person

4 This should of course be interpreted as applying not only to personally entering the domain of another, but also all unallowable boundary-crossing effects originating from someone's actions (or possessions) that end up in the domain of the other, in so far as they have the character of a physical or material intervention (dust, noise, vibration, animals running loose, etc.)

withdraws themselves from this obligation (and thus refuses to withdraw from the domain of the other), that he should be expected to reliquish his right to self-determination, making himself the subservient element in the domain of that other. As long as they do not offer to still reiumburse the other for the violation of that others rights, and the damage following from it, for that long the other person has the right to dispose over them. One could call this latter part "criminal/punitive law/right", but in fact it is merely an application of the rule that each sovereign subject of law/right has the right to dispose over their own means. I see this principled approach to criminal law/right as being one of the positive points of the individualistic theory of law/right compared to say, the prevalent conception of law/right in which 1) criminal/punitive law is not at all integrated into law/right in a principled fashion; 2) the legislator can declare, at any time, any action, behaviour, or attitude to be a crime (ever if there is no unlawful action, eg victimless crimes); 3) the victim is often completely forgotten as a party in proceedings and 4) the willingness of the perpetrator to completely reimburse their victim does not necessarily end the criminal/punitive process or the punishment.

Frank Van Dun

Translators Thanks

First and foremost, my thanks go out to professor Frank van Dun, for writing this magnificent work, and giving me permission to donate this translation for publishing.

My decision to translate this rather hefty tome was made before I finished its introduction. There is this strange “place” online, called the “Austrian Economics Discord Server’. Some magnificent person visiting this strange, new sort of meeting-space shared a pdf of the FRB, while expressing his opinion that the lack of a translation of it was a true and lamentable shame. Noticing that the book was written in Dutch, my mother-tongue, I was curious and intrigued. Franz-Herman Krauel, you forever have my thanks for bringing this book to my attention, and so allowing me the opportunity to do something to help the friends of freedom.

Further thanks should go to “Rich” (FIXTHIS), the creator and runner of the Austrian Economic Discord Server, and by extension, those who help him keep it clean (enough).

More typical, but just as profound, thanks go out to my lovely wife, and Cuautli. My beautiful Sofia, thank you for being so patient. Both in terms of the actual time this translation took, as well as in terms of how much I have (and will probably continue to) blabbed on about these important ideas. You and Cuautli are motivation to want to spread these ideas to everyone, so that we may all be free by respecting the rights of all others.

Bibliography

A

B

C

D

E

F

G

H

I

J

K

L

M

N

O

P

Q

R

S

T

U

V

W

X

Y

Z