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Natural Law and the Ethical Content of Economics

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Introduction

Natural law is an idea which, in varying shades of meaning, never wholly faded out and which from the very beginning impinged on the formation of also economic ideas. Since antiquity, it was held that the true nature of man is the divine reason operating in him and ruling over the senses. Reason was thus acknowledged as the natural, which is also to say the divine, law. As such natural law was expected to provide the foundations for all institutions, which, in the final analysis, had to be identical with moral principles.¹

These ideas passed from Pantheism into the Theism of Christianity and provided the general background for the common European system of ethics and the ideal for judging man in his relations with other men. Gradually Theism led to Deism, and Deism to the Atheism of positivist philosophy. The all-embracing holism of catholic ethics degenerated into individualistic ethics and further to relativism, rationalism and utilitarianism. Legal positivism, by rejecting the view that laws should reflect objective moral standards, subscribed to the autonomy of human laws and finally severed whatever connection there still remained between the divine norm and the foundation of the legal system. There was for human knowledge nothing whatever that was universally valid.

From philosophy and jurisprudence, positivism spread into economics. It has become an accepted view that economic thought can step outside the relationship in which it stands to the ethical problems, the valuations, the behaviour, or even the prejudices of its own time.

Differences in the concept of the natural law and its interpretation have affected understanding and conceptions of man and his relationships to the state, society

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¹. O Gierke, 1934, *Natural Law and the Theory of Society 1500 to 1800. With a Lecture on The Ideas of Natural Law and Humanity by Ernst Troeltsch* vol I, translated from *Das deutsche Genossenschaftsrecht* [vol IV 1913] by Ernest Barker (Cambridge University Press) p 205. A moral law is natural but not in the same sense as the law of gravitation. A moral law says that things ought to be done and not that they are. There are, however, links between moral laws and laws of natural science. Firstly, they both have the common source, and secondly, they are bound up with universal truths.

and the community, and set the meaning of economic activity and the link between economics and morality. In what follows, I have attempted to trace the evolution of the major ideas of the natural law and in this way shed some light on the ethical contents of both economics and law. This approach would also make the reader ponder over some of the perennial questions such as: What is primary, ego or social association? Is man a social animal by nature? Is man a political animal? Is the justification for human existence to be found in the individual alone or in the social whole? Is society a synthesis of individuals, or does it contain something more than the simple totality of individuals?

Development of the Idea of Natural Law

The Emergence of Natural Law

Until the Greek Enlightenment, the mores and laws as well as the norms of religion were looked upon as being of divine origin. Hence the order according to which a people lived was a divinely instituted order.² The sacred origin meant that law was essentially unchangeable through human ordinances, and that it had the same force everywhere. There was an assumption of the validity of laws based on the actual existence of laws of morals and of courts which the individual was to follow. The second assumption was that obedience to the law brings advantage, its disregard, disadvantage.³

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- ² The Greeks believed that Zeus did not rule directly over their fate but that he delegated this task to secondary divinities who accompanied men throughout their life. One of the divinities concerned with morality was Nemesis. She had at first been a moral idea, that of the inexorable equilibrium of the human condition. Man could displease the gods in two manners, either by offending the moral law, in which case he incurred their wrath, or by attaining too much happiness or riches, in which case he excited their jealousy. In either case such an imprudent mortal was pursued by Nemesis, or the divine anger. If he had offended only by an excess of good fortune he might hope to appease the goddess by sacrificing a part of his happiness: *New Larousse Encyclopedia of Mythology*, 1959, translated by Richard Aldington and Delano Ames, revised ed by *Larousse Mythologie Generale*, Guirand (ed) (Hamlyn, London) pp 163-164.
- ³ See for example, H A Rommen, 1947, *The Natural Law. A Study in Legal and Social History and Philosophy*, translated from *Die ewige Wiederkehr des Naturrechts* [Verlag Jakob Hegner, Leipzig, 1936] by Thomas R Hanley (B Herder Book Co, St Louis) p 4; and W Windelband, 1892, *A History of Philosophy* vol 1, *Greek, Roman, and Medieval*, reprinted from revised edition [1901], translated from *Geschichte der Philosophie* [Freiburg] by James H Tufts, Harper & Brothers, New York) p 72.

Following the frequent changes of constitutions, men came to perceive that not all law is unalterable and unchanging divine law. The assumptions of the sacred origin of laws and their obedience began to waver and thus morality became a problem. The Sophists challenged the timeless validity of political laws. They questioned the law's claim to authority since they realized that the established or conventional right was in fact a mutable and arbitrary right. This observation together with the realization of the variety of rules prescribed by customary morality among different peoples, shake the belief in the universal validity of laws.

Greeks called the essence of things which remains unchanged *nature (physis)*. It was asked whether this unchanging nature also determined a law "that is exalted above all change and all differences". They concluded that only law justly authorized by nature was universally valid for all men and all times. This concept was in contrast to law given and established by human institution (*thesei*), the validity of which was confined to a certain time and a location. These written laws could go beyond nature and might even force men to act contrary to nature.⁴ Any act of disobedience to laws not sanctioned by the law of nature could thus be justified on moral grounds. In Sophocles' *Antigone*, when Antigone is brought before the King of Thebes, Creon, for defying his edict to bury her fallen brother Polynices, she has this to say in her defense:

That order did not come from God. Justice, that dwells with the gods below, knows no such law. I did not think your edicts strong enough to overrule the unwritten unalterable laws of God and heaven, you being only a man. They are not of yesterday or to-day, but everlasting, though where they came from, none of us can tell. Guilty of their transgression before God I cannot be, for any man on earth.⁵

The introduction of the idea of natural law set the stage for the lasting inquiry about the moral basis of human laws. The prevailing thought was that all distinctions between men before the law rest only upon human institutions, and that nature demands equal right for all. Thus, if positive law deviates from the demand of nature, then the explanation for this law is to be sought only in the interests of those who make it.⁶ It follows, that if the personal interest of legislators is the ground for setting up the law, then regard or disregard for the law becomes an individual's prerogative.

⁴ Windelband op cit, pp 72-74.

⁵ Sophocles, 1975, *The Theban Plays. Antigone*, translated by E F Watling (Penguin Books, Harmondsworth, Middlesex) p 138.

⁶ Windelband op cit, p 75.

The Content of Natural Law

The intellectual head of the Sophists, Protagoras (480-410), established the contents of the classic law of nature as the qualities bestowed on all men in equal measure. They are a *sense of justice* and an *ethical respect* for others which enables men to form a permanent union in society and the state:

Zeus therefore, fearing the total destruction of our race, sent Hermes to impart to men the qualities of *respect for others* and a *sense of justice*, so as to bring order into our cities and create a bond of friendship and union. Hermes asked Zeus in what manner he was to bestow these gifts on men. 'Shall I distribute them as the arts were distributed – that is, on the principle that one trained doctor suffices for many laymen, and so with the other experts? Shall I distribute justice and respect for their fellows in this way, or to all alike?' 'To all' said Zeus. 'Let all have their share. There could never be cities if only a few shared in these virtues, as in the arts. Moreover, you must lay it down as my law that if any one is incapable of acquiring his share of these two virtues he shall be put to death as a plague to the city.' ... for a man cannot be without some share in justice, or he would not be human.⁷

The epistemological foundation of this idea of natural law is the social nature of man who acquires his mental and moral existence not from himself as an individual but in a multiform intellectual and moral communion with other human beings.⁸

Classic natural law presupposes Being as a Trinity: the *self-subsistence* (a capacity for knowledge) of the individual identity of Being and thinking endowed with free will and the bearer of rights; the *reunion* with the Absolute – a higher consciousness – the source of the objective moral truth, taking man back to his original spirituality; and a capacity of *self-perfection* which make the development of man's natural endowment both a duty and a natural necessity. Individual reason is thus only a part of universal divine reason; completely determined in its nature and its activity by this universal reason, it is consubstantial with the divine and

⁷ Plato, 1956, *Protagoras and Meno*, translated by W K C Guthrie (Penguin Books, Harmondsworth, Middlesex) pp 54-55.

⁸ Neuroscience has recently established that already 12 weeks after conception, nerve cells in the developing brain work with purposeful activity. Deprived of a stimulating environment a child's brain suffers. Children who do not play much or are rarely touched develop brains 20% to 30% smaller than normal for their age. By the age of three, a child who is neglected or abused bears marks that are difficult to erase. See, for example, M J Nash, 1997, "Fertile Minds" *Time* 3 February 36-47.

dependent upon it. Thus universal reason is for individual reason the highest law. While individual reason's independence is limited by time, its ultimate destiny is to be taken back into the divine all-mind essence.

To the content of the natural law, in the narrow sense, belong only two norms, namely, "Good or justice is to be done"; and *Suum cuique* or "give to everyone his own".

In a real sense a good thing or a just person is *causa sui*. Goodness is not inherent and original. It is communicated and dependent through articulation from the strictly eternal and actual source of all possibility, the Absolute whole. What is good or just according to nature must also accord with reason and essence. Therefore, one must act in conformity with reason and essence in order to be (materially) good or just.⁹ An immanent form is assumed to direct human *will* and *action* towards *good* which is understood as the striving for the *ideal*, for *perfection*. While matter can be seen as ontologically independent of mind, both the world of mind and the world of matter are two levels of being articulated from the Absolute whole.¹⁰

The formula of fairness – *suum cuique* – by assigning each and every individual a share and place equal to his/her abilities (*jedem das Seine*) is the bond which holds a society together. To give everyone what is due to him according to nature presupposes a moral society where wise men are in control.

From the conclusions of the first primordial norms follow others (for example, the norms of the Decalogue and other formulations of ethical principles), which also share in the immutability of the first principles.

The natural law of Greco-Roman antiquity and of the Middle Ages was a divine law, the *lex aeterna*, the source of a humane sense of morality and justice, to guide the conduct and operation of earthly activities. The idea of natural law as divine and therefore a fundamental, unchangeable law expected all human laws to draw their binding force from it as well as to endeavour to realize it.

⁹ Rommen op cit, pp 220-229.

¹⁰ Economists distinguish between use-value and exchange-value. However, use-value is either utility, or exchange-value due to utility. In economics we also speak of the intrinsic value, but do we really mean it? What we mean is that the thing or action is good. But can there be things or actions of intrinsic value or goodness?

Ideas of the Classic Natural Law

Since the very beginning there has been a distinction between the two conceptions of natural law which have survived to the present day. One is a holistic idea of natural law, the other an individualistic idea of natural law.

Holistic Idea of Natural Law

The holistic concept of natural law is grounded in metaphysics. It is significant that the notion of God as the supreme Lawgiver is intimately connected with this conception.¹¹ The holistic concept understands natural rights as social rights, divine, super-individual rights, within the framework of an order which is binding upon all, and which assigns to all their suitable positions in the whole. The link between the divine theory of natural right and economics can already be observed in the teachings of Plato and Aristotle. Social arrangements are viewed as resting on nature rather than convention because it is believed that what a man does has meaning beyond the mere fact that he wants to do it.¹²

According to Plato (427-347), the laws of this world directly emanate from the divine will. The divine law, the moral law inborn in man, is but a part, and the positive right is no more than an imperfect interpretation of this moral law. Through the thesis that virtue, the fundamental ethical conception, consists in the pursuit of knowledge, it was shown that there exists a knowable objective world of such values as goodness, beauty, and justice; further, that evil's deeds are done not for evil's sake but because of man's imperfection whereby, because of ignorance or culpability, they appear to him as good. The good is the highest absolute end of all reality to which all other ideas are teleologically subordinated as a means to the end. And it is the immortality of the soul which combines in its essence something which corresponds to the timeless, unchanged essence of the world of ideas and something which corresponds to the world of perception.

Plato and Aristotle made no distinction between natural law and moral law. All man's laws were thought to originate from the divine law which was the objective, supra-individual law (*überindividuelles Recht*).¹³ Morality was thought independent of circumstance and the conception of morals asserted intellectual power over the

¹¹ Rommen op cit, p 5.

¹² G H Sabine, 1948, *A History of Political Theory* (George G Harrap & Co Ltd, London) pp 55-56.

¹³ W Andraea, 1959, *Vom Geiste der Ordnung in Gesellschaft und Wirtschaft* (Gustav Fischer Verlag, Stuttgart) pp 87-88.

conscience. Morality was derived from the concept of *good* (which was *perfection*) and as such transcended the individual.

A theory which pictures social relations in terms of contract and which conceives the state as primarily concerned with maintaining freedom of choice was rejected. It was argued that an agreement, resting solely upon will, can never show that justice is intrinsically a virtue. Human nature was considered as innately and inherently social: therefore, the maximum advantage to the state also meant a maximum advantage to citizens.

The thoughts of both Plato and Aristotle on the natural law, holistic in character, were concerned with the realization of goodness in the state. They did not focus on the individual but on the state as the personification of morality and of all virtue. The first and fundamental aim of justice was not freedom for its own sake, but order. In contrast to the Sophists' attempts to justify freedom *from* the laws, Plato and Aristotle attempted to discover and establish the ethical basis of the laws.

They came to the notion of natural justice through the doctrine of ideas (which are supermundane) and through teleological thinking. The mind lays hold of the essence of a thing by finding the ideal concept which becomes a norm. Thus positive law should strive to be as close as possible to a true law which is the measure and criterion of justice for the former, and the only law that benefits the common weal. And so in one way what we call just is whatever produces and maintains happiness and its parts for a political community.¹⁴ Only philosophers, freed from the illusion of the senses, and not the mass of men, can see into the world of ideas to grasp the real essence of the immutable, eternally valid law. Thus natural law is an ideal law, a norm for the lawmaker, a criterion and a measure for the positive laws.¹⁵

Aristotle (384-322) distinguished between positive law and law according to nature common to all humanity, advancing the distinction between what is naturally just and what is legally just:¹⁶

¹⁴ Aristotle, 1990, *Nicomachean Ethics*, V: 1129b 15, in S M Cahn (ed), *Classics of Western Philosophy* (3rd ed, Hackett Publishing, Indianapolis/Cambridge) p 252.

¹⁵ Rommen op cit, pp 14-15.

¹⁶ Ibid at 17. It is worth noting that Aristotle distinguishes between "natural slaves" and "legal slaves". In the first category belong those who are as far inferior to others as a beast to man. They possess bodies but not the souls of free men. The second category was reserved for those who became slaves through the accidents of life.

There are two sorts of political justice, one natural and the other legal. The natural is that which has the same validity everywhere and does not depend upon acceptance; the legal is that which in the first place can take one form or another indifferently, but which, once laid down, is decisive. ... Some hold the view that all regulations are of this kind, on the ground that whereas natural laws are immutable and have the same validity everywhere (as fire burns both here and in Persia), they can see that notions of justice are variable. But this contention [that natural laws are immutable] is not true as stated, although it is true in a sense. Among gods, indeed, justice presumably never changes at all; but in our world, although there is such a thing as natural law, everything is subject to change; but still some things are so by nature and some are not, and it is easy to see what sort of thing, among those that admit of being otherwise, is so by nature and what is not, but is legal and conventional, assuming that both alike are changeable. ... Laws that are not natural but man-made are not the same everywhere, because forms of government are not the same either; but everywhere there is only one natural form of government, namely that which is best.¹⁷

While the above reasoning lacks clarity, there is a distinction between natural law, which has its source in the essence of the just (in nature), and positive law, which originates in the will of the lawmaker and which is the objectification of the universal idea of justice (embodied in the natural law) to real life. Aristotle was convinced that man through positive law attempts to apply natural law.

The above was translated into the application of economic principles. Justice in private exchange means an individual receives, as a result of exchange, neither more nor less than what he had at the beginning:

For the one who receives an unjust share does not do injustice, but rather the one who willingly does what is unjust, ie the one who originates the action; and he is the distributor, not the recipient. Further, if the distributor judged in ignorance, he does not do injustice in violation of what is legally just, and his judgment is not unjust; in a way, though, it

¹⁷ Aristotle, 1976, *The Ethics of Aristotle. The Nicomachean Ethics*, V: 1134b 8-24, translated by J A K Thomson, revised ed by Hugh Tredennick [Notes, Appendices] and Jonathan Barnes [Introduction, Bibliography] (Penguin Books, Harmondsworth, Middlesex) pp 189-190.

is unjust, since what is legally just is different from what is primarily just.¹⁸

Aristotle emphasizes equality as the precondition of justice in distribution:

If the people involved are not equal, they will not [justly] receive equal shares; indeed, whenever equals receive unequal shares, or unequals equal shares, in a distribution, that is the source of quarrels and accusations.¹⁹

His *justitia distributiva* can work only in a moral society and cannot be determined by price mechanism alone.

It was reasoned that all that is necessary for the household represented natural or genuine wealth to which there is a limit. It is supplied by nature and provides the means of subsistence. Property which so arises is assigned by nature and as such constitutes genuine wealth. Natural wealth thus has an ethical significance, being related to the satisfaction of needs felt. However, there is also an unnatural kind of acquisition which knows no limits and as such does not have a natural existence. Unnatural finance produces wealth by means of exchange in a way that it enriches one party at the expense of the others and must be considered a source of all evil. Money, while not of a natural existence but a product of the law, is useful to facilitate the exchange.

The origin of society was attributed to economic considerations. According to Plato, the state originated because the individual was not self-sufficient, but had many needs which he could not supply himself. However, the starting point of Plato's approach to this fundamental problem is ethical. "No two of us are born exactly alike" so each should do what is natural to him. The governing considerations in the application of the principle of division of labour are "different natural aptitudes which fit us for different jobs", and as a consequence of this, "quantity and quality are therefore more easily produced when a man specializes appropriately on a single job for which he is naturally fitted, and neglects all others".²⁰ Plato describes a self-sufficient state (a state with "a few luxuries" such as salt, olive oil and cheese and time available to pray to the gods) as *true* and

¹⁸ Aristotle, 1990, *Nicomachean Ethics*, V: 1136a 25, 1136b 10 and 30, in S M Cahn (ed) op cit, pp 263-264.

¹⁹ Aristotle op cit, V: 1131a 20; *ibid* at 255.

²⁰ Plato, 1955, *The Republic*, translated with an Introduction by Desmond Lee (2nd revised ed, Penguin Books, Harmondsworth, Middlesex) pp 117-119.

healthy. For others, however, it was a “community of pigs”.²¹ To go beyond the true state, exceeding the limit of necessity, would require “to cut a slice off our neighbours’ territory” who, in return,

will want a slice of ours too. And that will lead to war ... And so we should make it our business, if we can, to choose men with suitable natural aptitudes for the defence of our state.²²

Thus we come to the guardians who in order to not to turn against their fellow citizens, they alone of all the citizens

shall have no private property beyond the barest essentials. ... If they acquire private property in land, houses, or money, they will become farmers and men of business instead of Guardian, and harsh tyrants instead of partners in their dealings with their fellow citizens ...²³

Individualistic Idea of Natural Law

The idea of individualistic natural law originated with the Sophists. To the Sophists natural law served as a point of reference for the reform and improvement of the existing positive law. It is to be noted that from the Sophists’ conception of natural law emerged fundamental ideas which deeply influenced the development of thought in future Western civilization.

The Sophists’ criticism of the positive laws and their individualism led Epicures (341-270) to doubt that anything can be objectively and naturally right:

... pleasure is the starting-point and goal of living blessedly. For we recognized this as our first innate good, and this is our starting point for every choice and avoidance and we come to this by judging every good by the criterion of feeling.²⁴

For Epicures and his followers throughout the ages, utility and pleasure became the sole principles of ethics and law. He inferred from the principle of utility that justice consists entirely in positive laws:

The justice of nature is a pledge of reciprocal usefulness, [ie] neither to harm one another nor be harmed. ... justice was not a thing in its own

²¹. Ibid at 122.

²². Ibid at 123-125.

²³. Ibid at 184-185

²⁴. Epicurus, 1990, “*Letter to Menoeceus*”, ibid at 316.

right, but [exists] in mutual dealings in whatever places there [is] a pact about neither harming one another nor being harmed.²⁵

The utilitarian theory of society is thus developed from the atomistic assumption, ie that man is not a social animal by nature and that individuals exist by and for themselves, entering society for the sake of goods which they cannot obtain or protect as individuals.

In general, the individualistic idea of natural law is closely linked with the doctrine of the mythical state of nature and with the concept of the state as a social institution resting upon a contract among free individuals. Here, the state is not metaphysically necessary. It is arbitrary and artificial and its origin is determined by utility. Bound to the individualistic conception of natural law are the natural rights of an essentially independent individual.

The Stoic Ethics

The Stoic School founded by Zeno (340-265) maintained not only that virtue that resides in the soundness of reason was the highest virtue and the sole good, but that the ideal state was the rational society of all men regardless of nationality and history. This focus on reason and cosmopolitanism made Greek Stoic ethics very attractive for the School's Roman followers. The Stoics were convinced that man has an inborn notion of good and evil and that the very essence of law rests not upon the will but upon nature. With Cicero (106-43) it was the law within us, identical with divine reason itself, which was the natural law, universally valid, eternal, and unchangeable. It was the model and the norm. It was held that the true nature of man was the divine reason, sovereign over the senses, operating in him. Nature was synonymous with reason, and reason was synonymous with God – the moral was made equivalent to the natural.²⁶ Thus reason, which was the natural and also the divine law, provided the moral foundation of all human institutions. It also provided the ideal for a single objective moral world-order determining universally the relation of rational beings to each other. Life according to nature and reason is a duty, it is the law which man has to subject himself.

Cicero's conception of natural law became the formative principle of Roman jurisprudence.²⁷ He believed that the command of reason is innate equally in all men and inseparably connected with their instinct of self-preservation. Out of this

²⁵. Epicurus, 1990, "*The Principal Doctrines*" XXXI, XXXIII, in S M Cahn (ed) op cit, p 320.

²⁶. Gierke op cit, p xxxv.

²⁷. Windelband op cit, p 177.

universally valid natural law (*lex naturae*) which is exalted above all human caprice, and above all change in historical life, develops the commands of both morality in general, and in particular those of human society – the *ius naturale*.²⁸ It is a timeless law imposed on mankind by their common nature – reason – in response to human needs and instincts. The law of nature was an ideal law, founded on ideal principles (among which was that of equality) which could only become objectified if men were purely rational. The Stoics were aware that besides the natural law, there were institutions of positive law. This was later encapsulated in two distinct institutions: the domestic law of individual states applicable only to their own citizens, *ius civile*, and the law which different states recognized in their relations to one another, the *ius gentium*. Here the notion of the natural freedom and equality of all human beings becomes apparent and, as a consequence, the notion of the rights of man, and of mankind in general.

The *ius gentium* was conceived as a body of law common to all peoples and as such it must have been natural and therefore could claim a higher sanction than any earthly legislature.

The Stoics' ideas of things natural strongly affected Adam Smith's reasoning and they also became the foundation stone of the physiocracy. The Stoics set the direction of modern analyses of economic and legal concepts particularly those relating to contract and the nature of property. The extreme individualism of Roman law resulted in the notion that each one has a right to do what he likes with his own, in the advocacy of a complete freedom of contract. This development left modern law and economics with the persistently recurring concept of private property which includes the right to enjoy, abuse and destroy and of the untrammelled right to bequest.

Christian System of Natural Law

The combination of the Stoic theory of natural law with Christianity resulted in the Christian system of natural law which dominated theology, jurisprudence, political theory and history for a millennium. The most influential among the Early Church Fathers was St Augustine (354-430) who held that man, because he doubts, must know the norm of the good. Through his capacity to reason, man gains the immediate perception of incorporeal truth. The knowledge of the original righteousness is in all men; it exists and men are drawn towards it by their own nature. However, the appropriation of divine truth depends on the cooperation of

²⁸ Ibid at 176-177.

the impelling power of the free will.²⁹ Therein, both holistic and individualistic ideas survived side by side under the cover of natural law. A fellow Dominican of St Thomas, Meister Eckhart (1260-1329) held:

The divine nature is One, and each Person is both One and the same One as God's nature. The distinction between essence and existence is apprehended as One and is One.³⁰

The Early Church Fathers drew a distinction between the *absolute* and *relative* law of nature. The absolute law of nature was a law which knew no *dominium* over subjects, or of owners over property. It applied to man's uncorrupted state of primitive grace. This law was thought to have vanished beyond recall. The relative law of nature was half-way between the vanished ideal and the actuality of positive laws. Man and his destiny became the central tenet. This was in contrast with Greek and Stoic points of view regarding man as only a small part of the whole.

St Thomas Aquinas (1225-1274), in contrast to the Early Church Fathers, did not regard the political state as a consequence of the Fall, but "a necessary member of the world's life". Therefore, law and right must flow from divine nature and must be so conceived. The *lex naturalis*, upon which morality and the life of society rest, stands above all human institutions. It is the law discovered by man's divine faculty of reason, as it seeks to apprehend the purpose of God's will and the rule of his reason. Man is by his nature destined for life in a state, the end of which, following Aristotle's teaching, is to realize virtue. The civic virtue to which the state should educate its citizens is but a lower step on the way towards a higher destiny – salvation offered in the community of the Church. The ancient thought of the state lives again in Christianity, but it is no longer an end in itself, but the best means for carrying out the divine plan.³¹

St Thomas identified reason and revelation as emanations of the divine being in order to unify them. In his teachings the natural law was the eternal incarnation of God's wisdom and God's command and the model order of this world. God implanted the ideal of perfection into man's nature and man ought to will and strive for it. The doctrine of conscience explained why natural law could always be universally known to men and was hence obligatory. "The existence of truth in general is self-evident, but the existence of a Primal Truth is not self-evident to

²⁹. Ibid at 8.

³⁰. Meister Eckhart, 1994, *Selected Writings*, "On the Noble Man", selected and translated by Oliver Davis (Penguin Books, London) p 104.

³¹. Ibid at 327.

us.”³² The supreme commandment of the natural moral law was “Good is to be done!” meaning the same as “realize your essential nature!”³³ The realization of *good* is through the virtuous conduct carried out by living individuals. This conduct, however, pertains to a twofold wisdom. One comes through revelation and the other through natural reason.³⁴ The pursuit of *good* is their moral obligation. Positive laws offending against the natural moral law were considered not binding in a moral sense. It was acknowledged, however, that positive laws were necessary for the establishment and orderly functioning of the community life.

In the Middle Ages, society was thought of as an organic body with members expected to maintain themselves by rendering services to their fellow men; to use money for making profit was thought morally wrong and unnatural. The social standing of any occupation was valued according to its serviceability to the community. Economic aspects of life were affected by three main notions. Firstly, as *sub specie aeternitatis*, all men were regarded equal. Secondly, earthly considerations derived their value and significance only as means for a higher end, which was salvation. Thirdly, in contrast to previous ages, work, including physical labours, assumed dignity and nobility, for the first time in history.

Whenever the Christian doctrine of the Middle Ages sought to condemn the base aspects of trade, it looked to Platonic tradition and to Aristotle for support.³⁵ Aristotle was influential in moulding the views with regard to the nature of money, usury, the principles of exchange and the nature of justice. Everywhere, economic and legal ideas centered around the idea of justice. The dictum was “justice should be done”. Each should receive that to which he is entitled and under no circumstance should one take advantage of one’s neighbour. There should be a just price and a just wage. St Thomas Aquinas drew on Aristotle when he claimed that price was objective, inherent in the value of goods, and any departure from the just price (a payment necessary to maintain the producer) was against the natural law. Price thus had an ethical form, with cost of production determined on the principle of justice. What was believed to govern the economy was not the market price mechanism, but the moral code. Property should be private in possession but common in use. Wealth was good only if it helped to a life of virtue, and so might

³² St Thomas Aquinas, 1990, *Summa Theologica*, Part One, Question II, First Article, in S M Cahn (ed) op cit, p 398.

³³ Rommen op cit, p 48-49.

³⁴ Aquinas op cit, Part One, Question I, Sixth Article, pp 390-391.

³⁵ E Roll, 1973, *A History of Economic Thought* (Faber and Faber, London) pp 25-35.

be poverty in so far as it freed man from burdens of wealth bringing him closer to God. Meister Eckhart wrote:

One meaning of the Latin for 'man' or 'human being' in the true sense of the word is the person who entirely submits to God, together with all that they are and possess, turning their face up to God and not to their own possessions which they know to be behind, beneath and beside them.³⁶

The Crises of Classic Ideas of Natural Law

Utopias

In the period following the Middle Ages, when men were awakening to the fact that social relations had become unjust and immoral, "it was natural that they should find comfort and satisfaction in casting into a romantic or ideal form their conception of what society ought to be".³⁷

An important link between the classic Christian doctrine of natural law and that of its emerging modern interpretation during the Renaissance was the humanistic utilitarianism of Thomas More (1480-1535). In opposition to mediaeval tradition, his intellectual activity, while directed towards nature, attempted a humanistic renewal of Greek thought:

... since nature urges men to strive together to make life more cheerful ... she surely bids urgently to beware of attending so much to your own interest as to prejudice the interest of others. ... it is a matter of duty to have regard for the public weal also. ... to attempt to deprive another of pleasure in favouring your own, is to do a real injury.³⁸

He protests against the perverted social arrangement which causes social injuries to individuals. Anticipating the views of both Adam Smith and Karl Marx, he explains that existing civil governments as institutions serving the rich as a defence against the poor:

³⁶. Meister Eckhart op cit, p 104.

³⁷. C M Andrews, 1937, *Famous Utopias. Being the Complete Text of Rousseau's Social Contract, More's Utopia, Bacon's New Atlantis (Novus Atlantis), Campanella's City of the Sun (Civitas Solis)*, with an Introduction by Charles M Andrews, Ph D (Tudor Publishing Co, New York) p ii.

³⁸. T More, 1516, *De Optimo Rei publicae Statu sive de Nova Insula Utopia*, translated by Rev W G Rouse (1st ed, T Martins Louvain Leaf h, ii *et seq*) in F Seebohm, 1914, *The Oxford Reformers* (J M Dent & Sons Ltd, London) pp 222-223.

can have no other notion of all the other governments that I see or know, than that they are a conspiracy of the rich, who on pretense of managing the public only pursue their private ends, and devise all the ways and arts they can find out; first, that they may, without danger, preserve all that they have so ill acquired, and then that they may engage the poor to toil and labor for them at as low rates as possible, and oppress them as much as they please. And if they can but prevail to get these contrivances established by the show of public authority, which is considered as the representative of the whole people, then they are accounted laws.³⁹

Very much under the influence of the ideal state of Plato, More attempted to build up a social structure based on an *a priori* conception of justice:

In all other places it is visible, that while people talk of a commonwealth, every man only seeks his own wealth; but there [in Utopia], where no man has any property, all men zealously pursue the good of the public ... in Utopia, where every man has a right to everything, they all know that if care is taken to keep the public stores full, no private man can want anything; for among them there is no unequal distribution, so that no man is poor, none in necessity ...⁴⁰

However, More's attempt to improve the aberrations of society brought about by the inequality of property, was aimed at making it possible for all citizens to enjoy in the same measure the ideal, nobler, *higher* goods of society: culture—philosophy, science, and arts.⁴¹ Following the Sophists, More held that the existing laws are artificial constructions and serve class or group interests since only what is *naturally* moral and *naturally* right can be properly called moral and right.

In a similar vein, Tommaso Campanella (1568-1639) in the *State of the Sun* asserts that “the state should be an artificial product of human insight for the removal of social injuries”.⁴² He wrote that:

All things are common with them [inhabitants of the State of Sun], and their dispensation is by the authority of the magistrates. ... They say that all private property is acquired and improved for the reason that each one of us by himself has his own home and wife and children. From this self-

³⁹ Ibid at 229-230.

⁴⁰ Ibid at 228.

⁴¹ Windelband op cit, vol 2, pp 428-429.

⁴² Ibid at 430.

love springs. ... But when we have taken away self-love, there remains only love for the state.⁴³

Both More and Campanella believed that it would be possible to realize the best possible political constitution by rational reflection upon a social order that would be in accordance with nature.⁴⁴ More, in *Utopia*, banishes selfishness but his definition of *virtue* as living according to nature, makes him reject ascetic abstinence from natural pleasure, which would be a denial of natural instinct. The Utopians had no hesitation in defining *virtue* as *living according to nature* since to this end men were created by God. God in his goodness created men for happiness and therefore there was nothing unnatural in his promoting the happiness of men on earth.

Secular System of Natural Law

In contrast to More and Campanella, the Renaissance was animated by more earthly interests. The sole purpose of an inquiry into solving social problems lay in improving the *material* condition of society.⁴⁵ The changing focus in the scientific study of society resulted in the contents of the divine norm in natural law gradually losing its unquestionable authority.

Following the rationalizing development of the doctrine of natural law within the Church, came the significant development which, while still conceding the fundamental principle of natural right as the social need, founded the pursuit of the public good in the interests of individuals.

According to William of Occam (d c 1349) there exists no inherent connection between God's essence and that of man. Natural moral law thus becomes a positive law, a pure divine will without any foundation in reality. God's absolute power paved the way towards Hobbes' absolute sovereignty of the king. The thoughts of Marsilius of Padua (c 1275-c 1342), while departing from the harmony of Church and state, attempted to establish the theory of state upon the utilitarian basis using the Epicurean theory of compact. John of Jandun (d 1328), as one of the chief representatives of Latin Averroism, asserted the superiority of reason over faith. Their thoughts were resurrected in the writings of Johannes Althusius (1557-1638) and Hugo Grotius (1583-1650) who through their individualistic interpretation of natural law set in motion a direction of thought which culminated in Adam Smith.

⁴³. Campanella, 1623, *Civitas Solis, The City of the Sun*, in C M Andrews op cit, p 282.

⁴⁴. Windelband op cit, pp 430-431.

⁴⁵. Ibid at 429.

Althusius conceived of the state as the outcome of a contract freely entered into by its members, inspired by their inherent social nature. The originally social nature of man was the starting point for Hugo Grotius' deduction of the inalienable and indestructible natural rights of the individual. Reason of an abstract asocial and a historical individual becomes a power that generates right.

It was Grotius who completely separated divine and human right, arguing that divine right was based upon revelation and human right upon reason, while at the same time demanding a separation of the spheres of life to which they apply.⁴⁶ His definition of natural law is as follows:

The law of nature is a dictate of right reason which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God.⁴⁷ Nevertheless, this secular conception of natural law, distinct from earlier classic ideas, still continued to find its basis in God's ordinance.

Modern Ideas of Natural Law

The Age of Individualism and Rationalism

The concept of the classic natural law of the idealist philosophers of antiquity and of catholic theologians of the Middle Ages has only its name in common with modern natural law, which has influenced political and economic theories ever since the seventeenth and eighteenth centuries. The doctrine of inherited sin disappeared and in its stead came a conviction in the power of reason which would lead men to organize their affairs in accordance with nature. There, natural law and right became an individual right inherent in human nature formed by rational exercise and recognizable by reason. Reason of the individual became the power that generated right. Utility was to make men solve their problems. The ideal became rational self-development.

There appeared three manifested differences. The individualistic trait manifested itself in the predominance of the doctrine of the state of nature as the proper place in which to find the natural law. The second was the nominalist attitude which found expression in the separation of eternal law and natural moral

⁴⁶ Ibid at 427.

⁴⁷ Quoted in Rommen op cit, p 71.

law, of God's essence and existence, of morality and law. The third was the resultant doctrine of the autonomy of human reason.⁴⁸

The state, which for millennia had been regarded as an institution of social life essential for the order of earthly things, lost its metaphysical root (as a *precondition* for the life of the individual) and was conceived, in a purely naturalistic fashion, as the work of human will (a *consequence* of the collective interests of individuals). The relation of man to God fell outside the state's sphere of action. For the Catholics, however, the state was a human arrangement requiring the sanction of the Church, while the Protestants regarded the state as an immediate divine order.

Intellectual development in this direction was assisted by Machiavelli (1469-1527) who freed politics from all moral and ethical considerations:

A prince ... cannot observe all those things which give men a reputation for virtue, because in order to maintain his state he is often forced to act in defiance of good faith, of charity, of kindness, of religion.⁴⁹

His prince, however, must not be thought of as a completely immoral Byzantine despot. He was expected to build his state on the goodwill of the people. The prince should not deviate from what is good, if that is possible, but he should know how to do evil, if that is necessary.⁵⁰ A new interpretation of the idea of natural law gained credence in cameralist and mercantilist economic doctrines. The primary aim of the economic doctrine was to mobilize all available means towards the building and maintaining of a strong state. It was wealth, above all monetary wealth, which was identified with the state's power and respect. The individual became liberated from the constraints of asceticism, duties and obligations imposed on him by his status in life. Under the influence of the Calvinistic form of Protestantism, accumulation of wealth and money-making in general was no longer regarded as sinful but was looked upon with favour.

The definite split with the divine norm as the basis of natural right came with Thomas Hobbes (1588-1679). His contribution was a fictitious social contract needed to overcome the pre-political condition of the state of nature where no law existed and where human life was one of unceasing conflict among fundamentally

⁴⁸. Ibid at 94.

⁴⁹. N Machiavelli, 1961, *The Prince*, translated with an Introduction by George Bull (Penguin Books, Harmondsworth, Middlesex) p 101.

⁵⁰. Ibid at 101.

selfish, quarrelsome, power-hungry, cruel, and perverse men – *bellum omnium contra omnes*.

Hobbes began his study of society by examining the origin of the property rights. He says in *De Cive* that:

In a *state of nature* every man has a right to do and to take whatsoever he pleases: whence the common saying that nature *has given all things to all men*, and whence it follows that in a state of nature utility is the rule of right.⁵¹

He asserted that property is the creation of the state because “lawmakers were before that which you call *own*, or property of goods and lands ... for without statute-laws, all men have right to all things”.⁵²

Hobbes leaves aside Grotius’ notion of the social nature of mankind and holds that it is the instinct of individual’s self-preservation which forms the state. Hobbes’ individuals renounce all their natural rights and delegate them to an absolute ruler. To escape from a *condition* “without a common Power ... which is called Warre; and such a warre, as is of every man against every man” and where the life of man is “solitary, poore, nasty, brutish, and short”, men out of the instinct of self-preservation, and not because they were inherently social, united themselves to a community of interests – the state.⁵³ The sacrifice of natural right is the basis of the social contract:

There must be some coërcive Power, to compell men equally to the performance of their Covenants, by the terrour of some punishment, greater than the benefit they expect by the breach of their Covenant; and to make good that Propriety, which by mutuall Contract men acquire, in recompence of the universal Right they abandon: and such power there is none before the erection of a Common-wealth.⁵⁴

⁵¹ Cited in P Lafargue, 1918, *The Evolution of Property from Savagery to Civilization* (6th ed, George Allen & Unwin, London) p 30.

⁵² Quoted in R Schlatter, 1951, *Private Property. The History of an Idea* (Russell & Russell, New York) p 140.

⁵³ T Hobbes, 1904, *Leviathan or the Matter, Forme & Power of a Commonwealth, Ecclesiasticall and Civil* (Cambridge: University Press) pp 83, 84.

⁵⁴ *Ibid* at 97.

The laws and coercion are necessary to curb the vices and corruption of human nature. The institution of government thus represents an ethical second best.⁵⁵

Through the social contract, man transfers all his natural rights to the sovereign. Thus, natural law becomes the *command of the sovereign* who has the absolute power to make rules and to enforce them in all aspects of human activity, in politics, economics and in ethics. The sovereign's judgment is the law of God as well as the law of nature. Since man in a state of nature is but a *corpus naturale*, it is the social contract which makes man a *homo socialis*. In contrast to previous thinkers, who had viewed the state as part of the state of nature, Hobbes' definition of the social contract is that the state can be *deliberately* constructed.

Hobbes' idea of natural law can be encapsulated in the axiom "*agreements must be kept*", all else is pure will.⁵⁶ Moreover, he saw no reason why human actions and passions could not be treated in the same way as physical phenomena (indicating a value-free method of "social physics").⁵⁷

Baruch Spinoza (1632-1677) conceived of human nature as governed by the passions and not by reason. He asserted that citizens surrender their natural freedoms only in so far as is necessary for the existence of an orderly political life-in-common. His *status naturalis* is ruled by fear of the might of others and power to instill fear into others. He held that the authority of the state is vested in all people.

Thus law and order cannot be derived from human nature, but from the absolute will of the sovereign, or of the people at large, who save men from the natural law where might is also right. The spiritual root of sociability is denied and the individual reason, not needing the mutuality of other minds, becomes self-sufficient.

John Locke (1632-1704) advanced a milder version of the Hobbesian theory of the state and nature. In contrast to Hobbes' *Monarchia absolutissima*, Locke's

⁵⁵ Sabine op cit, p 161.

⁵⁶ Rommen op cit, pp 84-85.

⁵⁷ Andreae op cit, pp 87-88. Similarly, Hobbes' forerunner, Machiavelli, in the vein of Nominalists, conceived the state not teleologically, but in purely naturalistic fashion as a product of needs and interests. Rommen argues that for Hobbes "Nature" and "natural" became the opposite of *civitas*, "reason" and "order". Consequently, the entire Hobbes' theory "amounts at bottom to a denial of the natural law." Rommen op cit, p 82.

social contract only formalized what had already existed in the state of nature. He regarded the state of nature as the state which existed prior to the establishment of civil society, but which still existed in the absence of civil society.

For Locke, the law of God was the law of nature. The content of the law was the order fixed by God, attaching injurious consequences to certain actions, and useful consequences to others. The former were forbidden, the latter commanded. In this way moral law gained a metaphysical root without losing its utilitarian content.

The purpose of Locke's idea of natural law was to establish the natural rights of the individual. His natural law was a law of the consent of the governed, where no man or government had arbitrary power over the life, liberty, or possessions of another, and as such it laid the foundations for constitutional government.⁵⁸ It was a symbol encompassing individual rights emanating from individual self-interest. Locke's individualism displays the supremacy of commutative justice and of self-interest over distributive justice and common good. Underlying this approach is a presumption that the common good is nothing real, that it is but the sum total of individual goods or interests. Hence, the free pursuit of self-interest on the part of individuals restricted in their action by the like freedom of others must work like the "invisible hand" of Adam Smith and would produce automatically a sort of social harmony.⁵⁹

Prior to the age of individualism and rationalism, the law of nature or of reason alone was supposed to provide an adequate rule of life and it was generally believed that it was uniformly imprinted in the minds of all men. As a result of Hobbes' and Locke's contributions, the content of the law of nature had become substantially enlightened self-interest, but because of the harmony inherent in nature, this self-interest was thought to be steered to the good of all.⁶⁰

The age of the rationalism of natural law is associated with the names of Pufendorf, Thomasius, and Kant. They, and hundreds of their followers, were the first to set free natural law from the shackles of Scholasticism.

Samuel von Pufendorf (1632-1694) attempted to find a middle course between Hobbes and Grotius and laid theoretical foundations for the justification of the

⁵⁸. There was a divergence between German and Anglo-French approaches. From Pufendorf, to Thomasius, Wolff and Kant, the conception of natural law and the social contract was restated in such a way as to make the state appear the guardian of valued liberties, rather than their potential enemy.

⁵⁹. Rommen op cit, pp 89-90.

⁶⁰. Sabine op cit, p 462.

paternalistic state. To him, man is not essentially social: “the individual’s instinct toward self-preservation could be rationally and successfully fulfilled only by satisfying his social need”. Thus, it is not by natural tendency that man develops sociality but purely because it is to his advantage. Pufendorf did not see natural law as a continuation of metaphysics, the science of being, which, when applied to the free will of rational man, becomes the science of oughtness.⁶¹ For him natural law was placed in God’s will and was of the same age as man. Thus not God’s essence, but human nature, must be the source of natural law.

Christian Thomasius (1655-1728) added to Pufendorf’s sociality, after the manner of the Enlightenment, a utilitarian interpretation. It was no longer sociality that was the source of natural law but the happiness of the individual attainable through a virtuous, respectable and just life.

Immanuel Kant (1724-1804) presents in his philosophy the individualist natural law in its highest form. He upheld the three principal rights of a citizen – freedom, equality and reliance. Freedom of the individual is the starting point of his system. He argues that in a properly organized state, where everyone restricts his freedom so as to make the establishment of a collectively universal will/law possible and to avoid collision with the freedom of others, men can find security and justice. (“*Kein Mensch darf zum Objekt eines anderen Menschen erniedrigt werden*”). This *consensus prudentium* has been aimed at all forms of unfreedom. It was directed against slavery and serfdom. However, this argument seems impotent, judged by history, to restore breaches of natural law such as the maldistribution of property and wealth, as well as its economic and political consequences.

Kant’s *categorical imperative* demands that instead of acting according to impulses men should rather act according to the moral command, that must be fulfilled solely for its *own sake*. Thus moral action must not appear as means in the service of other ends. “Act as if the maxim from which you act were to become through your will a universal law of nature!”

Morality and legality, ethics and law become separated. Inner freedom, the moral autonomy of the individual, is the sphere of morality; external freedom requires positive laws. The motive of moral legislation is duty; the motive of legislation is not morality but the keeping of external freedom. Natural law is no longer connected with eternal law. Thus, freedom as a starting point prevents the existence of a natural law with a material content. However, in a state of nature, law has only a provisory character. It becomes valid only when it can be enforced, that is, in a state. The supreme rule of justice can rule only in the state which came

⁶¹. Rommen op cit, p 96.

to existence through a contract. Kant held that the state of nature is already social and that the state protects existing natural rights and is merely an institution resting on a free contract. His social contract is seen as a practical manifestation of reason itself.⁶² The idea that men have made a contract to establish the state means rather that they have been prepared to submit their own personal will in matters external to them to a collectively universal will, which is, of course, the will of reason.

The era of the individualism and the reforming zeal of the eighteenth century added, to the traditional contents of natural law, its ideal of civil liberty and equality and economic freedom as a condition of social harmony. This individualistic natural law raised its ethical and politico-economic aims to the dignity of natural justice. It played a positive role in the suppression of the absolutist state and in this version passed into the nineteenth and twentieth centuries as the natural law *par excellence*.⁶³

The Crisis of Modern Natural Law

Critique of Rationalism

The doctrine of Jean Jacques Rousseau (1712-1778) stands almost diametrically opposed to Hobbes' conception of natural law. Rousseau, a man whose teachings contributed to the French Revolution in 1789 as well as to the formative development of European culture in general, viewed men in a state of nature as good, free, and equal. It is civil society which makes them corrupt, unfree, and unequal. The historical state is the world after man's Fall and as such it is not an ethical institution:

Destitute of solid Reasons to justify, and sufficient Forces to defend himself (the rich man); crushing Individuals with Ease, but with equal Ease crushed by Numbers; one against all, and unable, on Account of mutual Jealousies, to unite with his Equals against Banditti united by the common Hopes of Pillage; the rich Man, thus pressed by Necessity, at last conceived the deepest Project that ever entered the Human Mind: this was to employ in his favour the very Forces that attacked him, to make Allies of his Enemies, to inspire them with other Maxims, and make them adopt other Institutions as favourable to his Pretensions, as the Law of Nature was unfavourable to them. ... 'let us unite, said he, to secure the Weak from Oppression, restrain the Ambitious, and secure to every Man the Possession of what belongs to him: Let us form Rules of Justice and of Peace, to which all may be obliged to conform, which shall not accept

^{62.} Ibid at 100-105.

^{63.} Ibid at 106-108.

persons, but may in some sort make amends for the Caprice of Fortune, by submitting alike the Powerful and the Weak to the observance of mutual Duties.' ... Such was ... the origin of Society and of the Laws, which increased the Fetters of the Weak and the Strength of the Rich; irretrievably destroyed natural Liberty, fixed for ever the Laws of Property and Inequality; changed an artful Usurpation into an irrevocable Title; and for the Benefit of a few ambitious Individuals subjected the rest of Mankind to perpetual Labour, Servitude, and Misery. ... The Civil Law being thus become the common Rule of Citizens, the Law of Nature no longer obtained but among the different Societies, in which, under the Name of the Law of Nations, it was qualified by some tacit Conventions to render Commerce possible⁶⁴

Consequently, the return to a state of nature is essential. To achieve a spontaneous way back to men's natural goodness (and to God), a removal of erroneous and corrupt influences in men's education is what is needed. To remove the negative influences of positive law, the right of revolution exists. He argues that, because of the existence of imperfect knowledge among men, it would be impossible for them to agree on a foundation for the establishment of society. Thus, there must be the *state of nature* and the *state of reason*. He maintains that there are two principles prior to reason, one being self-preservation and welfare, and the other a natural aversion to see any other being suffer or perish. Rousseau argues that from these two principles, which he calls *necessity* and *sociability*, flow all the rules of natural right: "Rules, which Reason is afterwards obliged to re-establish upon other Foundations, when by a gradual Exertion of its own Powers it has at last stifled the Authority of Nature".⁶⁵ Men do not have to enter into the social contract; they enter into it because it is their will. Since he introduced into his teaching an irrational element, a return to nature, he signalled a departure from the rationalism of the rest of the Enlightenment.

Critique of Individualism

It was Johann Gottlieb Fichte (1762-1814) who broke away from the individualistic interpretation of natural right. Fichte critically appraised the individualistic interpretation of natural rights and dismissed it as fiction. Instead, he replaced the notion of the absolute, self-sufficient individual with that of a creative community saying:

⁶⁴ J J Rousseau, 1761, *A Discourse upon the Origin and Foundation of the Inequality among Mankind*, reprinted 1971 (Burt Franklin, New York) pp 135-138.

⁶⁵ Ibid at lvi.

If there are to be human beings at all, there must be plurality of them ... As soon as we define the concept of the human being, we have to pass beyond the thought of the individual, and to postulate the existence of a second, for thus only can be explained the first.⁶⁶

While leaving moral self-determination intact, human beings, epistemologically considered, became for him members of the whole, parts of an organism functioning on the principle of spiritual reciprocity. He regarded the claims of the individual to the freedom of his body as the means of performing his duty as natural rights (which is the unity of law and morality). But these rights can be exercised effectively only through the state (and not through the natural working of supply and demand) which provides employment, regulates income distribution and ensures that everyone has property which his contribution to the common labour pool made his by natural law.

Fichte in *Grundlage des Naturrechts* argues that the rule of Right, or law, is deduced without the aid of morality, and yet without any surrender of the unity of law and morality which depends on the living self-consciousness of the Ego:

The Ego is one, but in the form of subjective instinct [Trieb] it produces morality, while in the form of force (as a fact of objective existence) it produces law.⁶⁷

In his later works, Fichte came to the conclusion that the existence of a legal community reflects an absolute law of reason and the necessity of thought. He still continued to hold the firm conviction that a state of law is never produced by mere nature without art and free will, or without a contract. The law of nature has no sanctions other than loyalty and good faith, which lie outside the bounds of law.⁶⁸

Denial of Natural Law in German Historicism and Romanticism

The metaphysics of the seventeenth century and the Enlightenment of the eighteenth century were under the tutelage of the natural science way of thinking. It was the physical sciences' mechanistic interpretation of *natural* which was made a general standard for measuring the value of every particular event or experience.

^{66.} J G Fichte, 1796-97, *Grundlage des Naturrechts nach Prinzipien der Wissenschaftslehre*, quoted in T Riha, 1985, "German Political Economy: The History of an Alternative Economics," 12 (3-5) *International Journal of Social Economics* 55.

^{67.} Gierke op cit, pp 292-293.

^{68.} Ibid at 292-293. It is noted that "*Recht*" in German usage is more than English "law" because, on its objective side, it has a connotation of something inherently "right" and because it implies, on its subjective side, the right of the individual.

This view of life was met in Germany by a body of ideas which sprang from history as well as romantic tradition.

The German historical school of jurisprudence headed by Friedrich Karl von Savigny (1779-1861) rejected natural right as a product of “ignorant dreamers, the didactics of ill digested pedantry, the attempt of a half-educated present to dictate to the future by means of codes”.⁶⁹

Law is but a part of a national culture and not the production of rational deliberation. This School revolted against both the classic and modern interpretations of natural. For German jurists, law became essentially the *Volksrecht*, the product of the national genius. The younger German historical school of jurisprudence under Otto von Gierke (1841-1921) argued for “that undying spirit of the natural law” to be incorporated in the modern conception of historical law:

For then the sovereign independence of the idea of Justice, secured before by the old conception of Natural Law, will still continue to be firmly secured by our new conception of Law as something thoroughly positive no matter whether the idea which opposes that conception be the idea of social utility, or the idea of collective power. If Natural and Positive Law thus coincide in their essence, the relation of Law and the State will no longer be conceived in two opposite ways, as it was in the older theory ... We shall no longer ask whether the State is prior to Law, or Law is prior to the State.⁷⁰

This reasoning, taken also by Max Weber, recognized a variety of immutable principles of goodness none of which, however, could be declared to be superior to others.⁷¹

The belief of the historical school of jurisprudence in a vitality of the organic whole was shared by bearers of romantic teaching. Romanticism argues that *Volksrecht* is the product of a *Volksgeist* which is an embodiment and *objectification* of the Eternal Mind. In this view, the law is associated with the spiritual and divine essence of the community. To what outcome this mixture of romanticism and historicism led is obvious from the following statement by Gierke:

⁶⁹. Riha op cit, p 70.

⁷⁰. Gierke op cit, pp 1, 224.

⁷¹. L Strauss, 1953, *Natural Right and History* (University of Chicago Press, Chicago) p 36.

A deep element in the spiritual nature of man longs for the union of Law and Power – of Right and Might. Division between them is always felt to be something wrong ... Right which cannot establish itself vanishes at last from the common conscience, and thereby ceases to be Right. Might which exists without Right, if it succeeds in maintaining itself, is felt at last by the general conscience to exist as of right, and is thus transformed into Right.⁷²

Natural Law of Physiocrats and Classical Economists

Physiocrats

At the outset of the economic thought of the Physiocrats was the concept of natural order. The founder of *physiocracy* (the government of nature), François Quesnay (1694-1774), understood under the term *natural* both *given* by nature, as well as *commanded* by nature. Social and moral phenomena as well as physical phenomena were considered natural and subject to the mechanical laws of nature. The word *natural* thus concealed a positive concept of *mere being* and a normative concept of law, each addressing and shaping what constitutes nature. The idea of natural economic laws, which Smith later called “the obvious and simple system of natural liberty”, were believed to produce greatest prosperity and harmony when they were not interfered with.⁷³ Whatever was in conformity with nature was considered *good* and therefore, a norm. The purposeful execution of the laws of nature was the task of a positive order created by the state.⁷⁴ This positive order, by preserving for each and every individual the natural right of sustenance and the natural right of individual freedom, was supposed to bring about lasting welfare. Human society is thus taken to be subject to both *natural* laws (similar to those governing the physical world) governed by causal relations, and *moral* laws where the causal mechanism does not apply. Physiocracy represents a confusion of two different meanings of the natural law; that is, the classic interpretation of it as setting up a standard of justice and right reason, and the modern meaning of it as an agent to

⁷² Gierke op cit, pp 224-225.

⁷³ Sabine op cit, p 479.

⁷⁴ According to Helvetius, self-interest in social sciences has the same place as motion in physics. Thus the problem of morality becomes a problem of the legislator who is charged with making the individual interest consonant with the general interest. Helvetius ignored that this notion was contrary even to the new version of the Natural Law which implied that men’s interests were naturally harmonious if they were left free from external interference.

secure individual goals in society and in human nature merely a capacity to calculate advantages (utility).

The banishment of God from nature transformed nature into a medium containing nothing which could not be understood by the appropriate application of causal reasoning. It was held that in the primal state of nature there was already the right to property. This in turn implied the right to a self-provided existence. Inherent in this right was another natural right – the right to foster one’s own economic interest.

The doctrine of the natural order thus established the pursuit of self-interest as in accordance with the theory of natural law, and thus a system of economic individualism. Also, individual actions guided by the motive of self-interest together with the resulting institutions are thought of as being mechanistically determined and governed by natural laws and thus culminating in a harmonious development of economic life. The end of economic activity is to secure the greatest amount of pleasure with the least possible outlay, and when everyone follows this maxim, the natural order would be assured all the better. Affirming that only free competition properly objectifies natural laws in economy and in human nature, physiocrats favoured economic freedom and fought against the policy of protectionism, guild restrictions and the state’s interference in economics. *Laissez faire, laissez passer, le monde va de lui-même!* And so:

We assert that these natural laws govern the production and distribution of wealth in the manner that is most useful, ie most conformable to the general good of the human species. Observation of these laws, together with the smoothing away of natural obstacles which impede their action, and especially the prevention of any artificial obstacles, is sufficient to render the condition of man as good as is consistent with his acquirements and his industry. Our gospel, therefore, is summed up in these four words, *laissez faire, laissez passer*.⁷⁵

It must be noted that the new ethics of utility and the new economics were logically incoherent. They professed to rest on the empirical theory of human motives but they assumed a harmony of nature for which no scientific proof could ever have been given.

While physiocrats might have preached unselfish hedonism, they prepared the ground for the selfish hedonism of utilitarianism which substituted the happiness

⁷⁵. C Gide, 1914, *Principles of Political Economy*, translated by C William A Veditz (2nd American ed, D C Heath & Company, London) p 25.

of the individual for the welfare of mankind or for what the ancient Greeks called “the good”.⁷⁶

Adam Smith and Classical Economists

It was Adam Smith (1723-1790) who developed the tenets of the physiocrats, the existence of natural economic laws, and the “let things alone” policy as a rule of practical conduct. He adhered to the ancient concept of nature as *physis*. There is a nature of things that has its own natural law character independent of human activity or power and that persists and continually reproduces itself through all disturbances. The application of this concept of nature and natural law to economics became decisive for its development.

The doctrine claims that human society is governed by unalterable natural laws which are the best possible. It is for the economist to discover them while the duty of individuals and governments is to follow these laws. These laws are the expression of relations which arise spontaneously wherever men are left to act according to their own interests. When this is the case, a harmony of apparently antagonistic interests is established and this harmony is precisely the natural order of things and a far superior arrangement than that which could artificially be devised. Therefore, it is for the legislator to promote individual initiative by removing intervention into individuals’ affairs with the exception of a necessary security:⁷⁷

The natural effort of every individual to better his own condition, when suffered to exert itself with freedom and security, is so powerful a principle, that it is alone, and without any assistance, not only capable of carrying on the society to wealth and prosperity, but of surmounting a hundred impertinent obstructions with which the folly of human laws too often encumbers its operations; though the effect of these obstructions is

⁷⁶. Empirically conceived morality is determined by pleasure and pain or broadly by utility – sometimes individual, sometimes social utility (society conceived as a necessary detour towards individuality). This utilitarian *good*, depending on psychological and historical circumstances, must be relative. Therefore, moral ethical relativism. Non-empirically, morality can either be a formally-aprioristic conception (Kant – moral law stems from the activity of pure reason, is propounded and fulfilled solely for its own sake and against the empirical motives of will and action), or metaphysical conception (followers of objectivist idealism from Plato-Aristotle to Hegel – supersensuous reality, the world of ideas, the perfection, determine what is *good* and what *evil*).

⁷⁷. Gide op cit, pp 23-25.

always more or less either to encroach upon its freedom, or to diminish its security.⁷⁸

By presenting economic activity as founded on the principle of individual pursuit to one's own advantage, Smith forged the necessary link between political economy and natural sciences. The market mechanism, with its interplay of demand and supply, is expected to automatically bring market price and the natural price into an equilibrium because self-interest would naturally move required resources where they could be most profitably employed (thus "the natural rate of unemployment"). The phenomenon of price determined solely by self-interest resembles the operation of a physical law.

The rest of Deism appears in Smith's notion of pre-established natural harmony, which he evolved from the moral philosophy of Shaftesbury. In the course of pursuing self-interest, *homo oeconomicus* led by an *invisible hand* promotes an end which was not part of his intention – the maximization of public good.⁷⁹ In this euphemistic appeal to the invisible hand, which must have been the Hand of God, Smith had sought to explain how private vices become public benefits, seventeen years before the publication of the *Wealth of Nations*:

The rich ... in spite of their natural selfishness and rapacity, though they mean only their own conveniency, though the sole end which they propose from the labours of all the thousands whom they employ be the gratification of their own vain and insatiable desires, they divide with the poor the produce of all their improvements. They are led by an invisible hand to make nearly the same distribution of the necessaries of life which would have been made had the earth been divided into equal portions among all its inhabitants; and thus, without intending it, without knowing

⁷⁸. A Smith, 1892, *An Inquiry into the Nature and Causes of the Wealth of Nations*, Book IV, Ch V (George Routledge & Sons, London) [Sir John Lubbock's Hundred Books Ed] pp 415-416.

⁷⁹. Shaftesbury portrays the order of things, the purposefulness of their inter-play, the harmony of their life, and shows that there is nothing which in itself is evil, nothing which entirely misses its mark; every discord is lost in the harmony of the world. In as much as each and every individual lives out his own nature, they all harmonize completely with each other at every moment by virtue of the sameness of their content (given to them by God), and from this arises the appearance of the action of one upon others: Windelband op cit, pp 487-489.

it, advance the interest of the society, and afford means to the multiplication of the species.⁸⁰

Like the Physiocrats, Smith considered the individual's pursuit of self-interest to be the motive force of economic life and the mechanism of the natural order. Therefore, any result of the pursuit of self-love must lead ultimately to social harmony and to what is best for all:

Had human institutions never disturbed the natural course of things, the progressive wealth and increase of the towns would in every political society be consequential, and in proportion to the improvement and cultivation of the territory or of the country.⁸¹

It is thus nature that, if left without interference, is to perform the harmonizing function. The existing socioeconomic inequalities can thus be ascribed to activities contrary to natural laws. It should be noted that this theory contains fundamental features of irrationalism.

In the end, the rationality of economic actions is supposed to demonstrate itself in the all encompassing harmony of the whole. However, this whole (society at large) is beyond rationalization. The construction of society, tied to the rational practice of individuals, is deprived of the end or *telos* which is supposed to provide its goal. The structure and order of the whole are left to irrational forces, such as natural harmony or a natural balance, as opposed to human will or reason.

Smith's natural harmony of interests is a teleological concept. It is to be re-established by means of a free pursuit of individual self-interest, which *on its own*, however, cannot lead to the union of men. This confused conception of the natural law calls on the "natural" moral sentiment of mankind to help correct the unwanted outcomes of natural law:

The industrious knave cultivates the soil; the indolent good man leaves it uncultivated. Who ought to reap the harvest? Who starve, and who live in plenty? The natural course of things decides it in favour of the knave: the natural sentiments of mankind in favour of the man of virtue. ... [Man] is by nature directed to correct, in some measure, that distribution of things which she herself would otherwise have made. The rules which

⁸⁰. A Smith, 1966, *The Theory of Moral Sentiments*, (Augustus M Kelley, New York) [Adam Smith Library, Reprints of Economic Classics] pp 264-265.

⁸¹. Smith, 1892 op cit, p 292.

for this purpose she prompts him to follow, are different from those which she herself observes.⁸²

Despite the criticism of Smith's dualism, his society was one based on justice and his concept of individual freedom was a qualified freedom. He even displays a preference in the preservation of the whole to that of an individual:

[Individual's] own interest is connected with the prosperity of society, and that the happiness, perhaps the preservation of his existence, depends upon its preservation. ... When the preservation of an individual is inconsistent with the safety of a multitude, nothing can be more just than that the many should be preferred to the one.⁸³

Classical economics, which was given its most important statement by David Ricardo (1772-1823), is usually presented as a logical and systematic whole. In fact, it includes two different points of view implying two diverse ideas of economic society. Firstly, there is a theory of exchange which assumes a free competitive market where there are no individual price makers and where prices are determined by the interplay of supply and demand. Under these conditions, the natural price or value would be also a just price. On the whole, everyone would keep a value equivalent to the labour which he had himself put into the goods he had to sell. Thus natural justice is realized in the economic system as far as legislation abstains from introducing obstructions into it. Here, the pursuit of self-interest is expected to work out to the greatest good of the whole and provides the nearest practicable approach to justice for all its members. Secondly, there is a theory of distribution under the condition of a free competitive market including theories of rent, profits and wages. From this point of view there must be a society composed of three major economic classes or owners of the several factors of production. A class society where the natural laws of distribution do not prevent a continuous struggle over the distribution shares in the total product could hardly be called a system of natural justice. This conflict was already detected by J S Mill, who attempted to solve it by excluding natural law from the sphere of distribution:

But howsoever we may succeed in making for ourselves more space within the limits set by the constitution of things, those limits exist; there are ultimate laws which we did not make, which we cannot alter, and to which we can only conform. It is not so with the Distribution of wealth. That is a matter of human institution solely ... the rules by which it is determined are what the opinions and feelings of the ruling portion of the community make them, and are very different in different ages and

⁸². Ibid at 238.

⁸³. Ibid at 127, 131.

countries; and might be still more different, if mankind so chose. ... they are consequences of the fundamental laws of human nature, combined with the existing condition of social institutions and intellectual and moral culture.⁸⁴

While the system of classical economics contained logically incompatible ideas of natural harmony and natural conflict, it has nevertheless been held together (and resurrected) in the practical policies of free trade. This situation has prevailed to the present when, on the one hand arguments in favour of a natural economic system imply *laissez faire* under all circumstance, while on the other hand, in order to “increase happiness” or placate conflicts arising from the distribution of wealth, the state has to resort to legislative coercion.

Heirs of classical economics rely on natural rights in economics while at the same time they are not prepared to support and advance natural rights in ethics and politics, conveniently neglecting the fact that while both right to wages and right to property are natural, the latter have been the result of historical and institutional circumstances or accidents.⁸⁵

Conclusion

At this moment we are experiencing the consequences of economic science’s attempts to devise a workable social system on premises of naturalistic individualism in the philosophy of the seventeenth century and the rationalism of the eighteenth century.

Today, a doctrinaire supremacy of the rational individual utility maximizer as the hub of the political and economic universe has been maintained amidst the real deconstruction of the self by large and complex economic systems, with expanding populations, environmental problems, growing scarcity of resources and bureaucratic democracies, amidst the distorted and soiled form of market economy:

⁸⁴ J S Mill, 1909, *Principles of Political Economy with Some of their Applications to Social Philosophy*, Sir William Ashley (ed) (Augustus M Kelley, Fairfield [1976]) pp 199-200.

⁸⁵ Socialism also dresses its demands in the terminology of Natural Law. It extends the demands for equality to the economic sphere and it expects the coming of an ideal condition of all mankind from the operation of the general economic laws which express the essential nature of economic phenomena and processes and which arise and operate independently of man’s will.