

LAW: LEX VS. IUS

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Abstract: Rather than seeing law as a vague “norm” or overly precise and possibly untenable “rights” this article argues for a simpler functionalist definition of law as a set of conditionals associated with imperatives. As such it hopes to bypass two fruitless parallel debates which however do not address each other: 1) the nature of “norms” 2) the nature of “rights”.

I. WHAT IS LAW?

One of the fundamental questions of legal theory is what is meant by the term “law”.¹ This essay proposes an

answer to that question. That answer will not be exclusive: other definitions of law than the one that will be presented here exist. The answer may even be incomplete. However the answer proposed will be internally consistent. It will also explain and permit prediction of what goes on in the field of law. Law is best understood as a term with many meanings. By distinguishing between natural law, positive law, law as a prescription and law as a description we can coerce the otherwise ambiguous term into tractable forms. Further distinguishing between law (lex) and justice (ius) allows us to focus on different aspects of both command and right.² Unlike Kelsen,³ I regard law as consisting of a conflicting set

¹ Definitions of law abound: E.g., the “bad man theory” (“The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.” Holmes, (1897) *Path of the Law* in David Kennedy & Fisher (2007) at 31.) but also Cicero (arguing law is inherently moral: “Est quidem vera lex, recta ratio, naturae congruens, diffusa in omnes, constans, sempiterna, quae vocet ad officium jubendo, vetando a fraude deterreat, quae tamen neque probos frustra jubet aut vetat, nec improbos jubendo aut vetando movet.” True law is right reason in accord with nature. Cicero, (51 b.c.) *De Republica*) and of course Kelsen who argues that the law is a “norm”

Hans Kelsen, *Théorie Générale du Droit et de l'Etat* Paris: Bruylant (1997) p. 166.

² Hobbes clearly makes the distinction between binding law (lex) and justice (ius) (see generally Hobbes, *Leviathan*). Hobbes, *Leviathan*, Richard Tuck ed., (1996) at 91. Aristotle in contrast seems to believe that law and justice are congruent sets.

³ Hans Kelsen, *Théorie Générale du Droit et de l'Etat* Paris: Bruylant (1997) p. 166.

of conditional statements and consequent imperatives rather than as a hierarchically harmonious set of norms.⁴ Further, I argue that

⁴ "A plurality of norms forms a unity, a system, an order, if the validity of the norms can be traced back to a single norms as the ultimate basis of validity. This basic norm qua common source constitutes the unity in the plurality of all norms forming a system. That a norm belongs to a certain system follows simply from the fact that the validity of the norm can be traced back to the basic norm constituting this system. Systems of norms can be distinguished into two different type according to type of basic norm constituting the system. Norms of the first type are 'valid' by virtue of their substance; that is, the human behavior specified by these norms is to be regarded as obligatory because the content of the norms has a directly evident quality that confers validity on it. And the content of these norms can be traced back to a basic norm under whose content the content of the norms forming the system is subsumed, as the particular under the general. Norms of this type are the norms of morality. For example, the norms 'you shall not lie', 'you shall not cheat', 'keep your promise', and so on are derived from a basic norm of truthfulness. From the basic norm 'love your neighbour', one can derive the norms 'you shall not harm others', 'you shall help those in need', and so on.

The basic norm of a given moral order is of no further concern here. What matters is knowing that the many norms of a moral order are already contained in its basic norm, just as the particular is contained in the general; thus, all particular moral norms can be derived from the general basic norm by way of an act of intellect, namely, by way of a deduction from the general to the particular. The basic norm of morality has a substantive, static character."

Hans Kelsen, *An Introduction to the Problems of Legal Theory* (RR1) Oxford: Oxford University Press, 1992 Page 55-56.

normative inference is not only possible, it is also necessary if law is to be something other than mere force -- and it is, or it would not be obeyed. The force behind law is not only physical violence it is also, and even more often, moral sanction.

II. METHODOLOGY

A. LEGAL SCIENCE

In order to determine what law is we must first understand what is meant by legal science.⁵ This is because if law cannot be the object of scientific inquiry then the question "what is law" could not be answered at all. This paper proposes that law can in fact be the object of scientific inquiry. However, legal science, like any of the human sciences, is not as exact (but hopefully as exacting) as any of the natural sciences.

In the natural sciences, e.g. physics, chemistry etc., science is nomothetic:⁶ that is, it poses

⁵ For an exposition and critique of competing ideas of legal science see Howard Schwber, *The "Science" of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education*, 17 *Law and History Review* (1999) 17.3 (1999): 94 pars. 29 May 2008 <<http://www.historycooperative.org/journals/lhr/17.3/schweber.html>>.

⁶ Christiane et Ota Weinberger *Logik Semantik Hermeneutik* München: Beck'sche Elementarbücher, (1979). Page 38.; Stanley

principles which themselves are laws strictu sensu.⁷ Nomotheses cannot be derogated from. For example, every time that water is heated it expands; if water is sufficiently heated at 1 atmosphere of pressure it will eventually boil and evaporate.⁸ The objects of natural sciences have no volition – they literally must react as they do.

This is not the case in the human sciences generally, including legal science. It is not possible to state that every time event X occurs outcome Y will follow when the object of event X is a human or a group of humans. The objects of human sciences, unlike the objects of natural sciences, are people and groups of people. People as individuals definitely have will (volition), the capacity to act upon

and interact with their environment. Because of this capacity it is impossible to propose nomotheses about human behaviour. Even if most people will react in a given way to a certain stimulus some may not and all can at least claim to have been able to have reacted otherwise. Human science cannot discover “laws” but only general trends and tendencies – which nonetheless is knowledge.

This is not to say that there can be no human science. Many human activities are quantifiable. Some are verifiable. That is why it is possible to make statements regarding human tendencies and trends, albeit with less exactitude than in the natural sciences. It is even possible for the human sciences to make general predictions. By a comparison of the differing scientific opinions about a certain human activity it is possible to develop a well informed viewpoint and to make generalizations and predictions thereon. However, though the dialectical method can determine which opinions are roughly correct, that determination is still only approximate. One must both recognize the possibility and limitations of human sciences.

L. Paulson (1990) Kelsen on legal interpretation

Legal Studies 10 (2), 136–152

⁷ For an argument that law is in fact nomothetic (or at least distinguished from social science in that it must appear nomothetic...) see Jeremy A. Blumenthal, Law and Social Science in the Twenty-First Century, 12 S. CAL. INTERDISC. L.J. 1, 47 (2002).

⁸ For a good recapitulation of Popper’s views on facticity in science see: Eric Dodson Greenberg, *FALSIFICATION AS FUNCTIONALISM: CREATING A NEW MODEL OF SEPARATION OF POWERS*, 4 Seton Hall Const. L.J. 467, 479-480. (1994).

B. THE EMPIRICAL METHOD⁹

This paper has already hinted that one test to determine whether a position is scientifically known is to determine whether a prediction can be made based upon it. If a fact is known then we may be able to make a prediction based upon it. Further, though a fact be unknown it may nonetheless be knowable, though at present unknown. An unknown fact may of course also be unknowable. But an unknown fact cannot be the basis of science – although it can be the basis of speculation and hypotheses. Ideas may be true, false, unknown and possibly also unknowable.

Facts are knowable if they can be verified. Facts are verified through empirical testing. By empirical verification it is possible to know that in every observed instance of X, Y occurs, and from which we may infer that in future instances of X, Y will recur. Thus the material basis of science explains why and to what extent knowledge is possible – and

also where knowledge is not possible.

Although empirical verification in human sciences is less exact than in natural science it is still possible. A theory can be said to be verified if there is a correspondence between material reality and the predicted outcome.¹⁰ What are the predicted outcomes in law?

When we look at the law we see law books, courts, police, lawyers, legislators and citizens. We see the predictions of a legislator or judge as to what will happen if a person does a certain act (conditionals) or what will happen to person X (commands). However, sometimes what is written in the law books, i.e. what is predicted, is not at all an accurate prediction of what actually happens. And many times events occur which are not addressed in the law books. What are we to make of the absence of correlation between law in the books and life?

⁹ See, generally, Bacon, Francis, *Novum Organon* (1620). Bacon correctly emphasizes the experimental method but wrongly rejects the dialectic and is for that reason the source of the limitations in Anglo-Saxon thinking to empiricism.

¹⁰ Popper, (1957) *Science: Conjectures and Refutations* <http://cla.calpoly.edu/~fotoole/321.1/popper.html> Also see: Popper, (1963) "Science as Falsification" in *Conjectures and Refutations* (1963); Karl Popper, *Objective Knowledge: An Evolutionary Approach* (1972).

C. SCHOLARLY LAW VERSUS PRACTICAL LAW

There are two methods by which we could attempt to answer the question “how are we to explain and define the absence of correlation between law in the books and life?”. The idealist approach (i.e. scholasticism or neo-platonism) would divorce itself completely from the imperfect material reality.¹¹ It would argue that material reality is but an imperfect reflection of ideas and that failure of persons to conform to the law and of the law to punish them would imply that either the law and justice or the person and justice were not in a correct relation to each other.¹² This might in theory be accurate. However it is empirically incapable of verification. Because the idealist

method does not lead to the development of empirically verifiable positions it is not in fact be scientific. It could be mythology. It could be pure formal representation. But it could not be science and certainly not applied science. This paper specifically rejects the idealist perspective and acknowledges it in order to be properly distinguished from it.

The other response to the question “what should be the reaction of a legal scientist to the fact that statements of legislators and even judges and the actions of persons do not always strongly correlated (and sometimes do not correlate at all)?” is to regard “law” as commonly understood, critically. “Scholarly Law” – law in the books, i.e. the statements of legislators and judges, is a description of what a ruling class thinks should happen. However, the daily material reality is what in fact happens. The first can be called “scholarly law” -- law in the books. This paper will call the second “practical law” - law in the streets. When the two are closely correlated that is evidence either of a very just regime or of a highly efficient tyranny. When the representation of what a ruling class believes should happen (“scholarly law”) and of what

¹¹ See, Plato *Phaedo*, available at: <http://classics.mit.edu/Plato/phaedo.1b.txt>

¹² Plato, *Republic* especially book VI (e.g., “And do you not know also that although they make use of the visible forms and reason about them, they are thinking not of these, but of the ideals which they resemble; not of the figures which they draw, but of the absolute square and the absolute diameter, and so on –the forms which they draw or make, and which have shadows and reflections in water of their own, are converted by them into images, but they are really seeking to behold the things themselves, which can only be seen with the eye of the mind?”). Available at: <http://classics.mit.edu/Plato/republic.mb.txt>

does in fact happen (“practical law”) is too far out of balance a revolution occurs and a new ruling class takes control. The differing possible relations between law in the books and law in the streets are discussed further below.

III. LAWS ARE CONDITIONALS AND IMPERATIVES

When we look at law in the books we see that all laws are stated as conditionals which if actuated will trigger imperatives. That is, all laws are of the form “if... then”. If the conditional is fulfilled then the imperative, reward or punishment, should be imputed to the subject of the conditional statement. The degree of correspondence between these conditionals and their outcomes is the measure of the efficacy of the regime promulgating law.

The fact that a direct correspondence between the conditional and imperative commands of law is in fact impossible due to free will explains why legal science cannot be considered nomothetical. A nomothetical science, e.g., natural sciences, makes statements which are laws in the sense that on every

occurrence of X, outcome Y will follow. The laws of any legal system are almost always imperfectly enforced. Thus, legal science is not nomothetical. To speak of legal science as a nomothetical science like the natural sciences would require that every law be enforced at all times and in all places and that humans behave invariably. That is clearly not the case.¹³

However, while it is clearly true that law is but imperfectly enforced it is also clear that law is generally enforced¹⁴ and perhaps even more often than not just. So we can speak of a legal science which makes generalized predictions as to the probability of event Y following event X. Although legal science is not nomothetical, it *is* dialectical and

¹³ H. Kelsen; "L'efficacité n'est pas une <<condition per quam>> de la validité" in Le Positivisme Juridique, M. Troper, C. Grzegorzczuk, (editeurs) Paris: LGDJ (1992) page 326.

¹⁴ "L'efficacité de l'ordre juridique tout entier est la condition nécessaire de la validité de chacune des normes particulières de cet ordre. C'est une condition sine qua non mais non une condition per quam. L'efficacité de l'ordre juridique global est la condition, mais non la raison de la validité des normes qui le constituent." H. Kelsen; "L'efficacité n'est pas une <<condition per quam>> de la validité" en Le Positivisme Juridique, M. Troper, C. Grzegorzczuk, (editeurs) Paris: LGDJ (1992). Page 326.

is in that sense scientific.¹⁵ Legal science is dialectical, first, in the Aristotelian sense of dialogos, that is as the object of discourse.¹⁶ Through comparison of differing legal opinions we arrive at a better sense of the best approximation of the laws which govern human behavior.¹⁷ But legal science is also dialectical in the Marxist sense:¹⁸ law

is one element of the superstructure of a particular mode of production which justifies and defends a particular mode of production, i.e. a given productive base¹⁹ (also known as infrastructure) at a particular point in history. However, historical development is dialectical:²⁰ it is the outcome of competition between differing modes of production. Thus, legal science, as one element of the superstructure of a mode of production, is subject to the historical dialectic which determines whether that mode of production will replace a less developed mode of

¹⁵ "The law is dialectic in a deeper sense than its adversary process. It mediates most significantly between right and right.' ... The only questions that matter for the law are those in which there is something 'right,' or good, on both or all sides of the controversy.... When right exists on both sides of an issue, the job of the law is to mediate between the 'rights,' to accommodate, to adjust, to attempt to sacrifice as little as possible of what is 'right' on both sides." Paul Freund cited in Roger B. Dworkin, *Limits: The Role of Law in Bioethical Decision Making* 6-7 (1996):

¹⁶ Aristotle, *Posterior Analytics* (ca. 350 B.C.) Translated by G. R. G. Mure, Book I, Part 1. Available at: <http://classics.mit.edu/Aristotle/posterior.1.i.html> and at: <http://www.rbjones.com/rbjpub/philos/classics/aristotl/o4219c.htm>

¹⁷ Aristotle, *Topics*, in Aristotle, 1 Great Books 143 (W.A. Pickarel trans., Cambridge 1994) (1952).

¹⁸ E.g., "Any development, whatever its substance may be, can be represented as a series of different stages of development that are connected in such a way that one forms the negation of the other...In no sphere can one undergo a development without negating one's previous mode of existence." Marx, *Moralizing Criticism & Critical Morality*, Oct. 1847, in Marx Engels Collected Works, Vol.6, p.317 (1847) from Deutsche-Brüsseler-Zeitung No. 86, October 28, 1847. Available at:

<http://www.marxists.org/archive/marx/works/1847/10/31.htm>

¹⁹ Stuart Bonner "Conquest by Contract: Wealth Transfer and Land Market Structure in Colonial New Zealand" Law and Society, Vol. 31, No. 1 2000. p. 47.

²⁰ "En vertu de la loi dialectique, chaque mode de production ou infrastructure en place renferme, dès le début de son instauration, sa négation interne, qui, plus tard, se déclare ouvertement, par l'apparition au sein de ce mode ou de cette infrastructure, de nouvelles forces productives (outillage, mains d'oeuvre, etc.); celles-ci réclament pour s'affirmer un nouveau mode de production, une nouvelle infrastructure économique, de nouveaux rapports sociaux, une nouvelle superstructure. Le règle de droit, qui fait partie de cette dernière, se trouve, du même coup, elle même niée par ces nouvelles forces productives: son remplacement par une règle de droit nouvelle se fait alors sentir, mais comme l'effet, et non comme la cause du changement d'infrastructure." Stoyanovitch, *La Philosophie du Droit en URSS*, page 6. Paris: LGDJ (1965).

production or whether it will itself be replaced by one which is more developed.

The theoretical abstractions can be quickly and clearly illustrated in a concrete example: law is dialectical in the Aristotelian sense²¹ in that every judge faces at least two competing monologues – antithetical positions – which are presented by the plaintiff and defendant. The arguments of the plaintiff are one pole of the dialectic and the arguments of the defendant are the opposite pole. The decision of the judge is the dialectical synthesis which arises out of the conflict of the competing positions. Thesis: plaintiff. Antithesis: Defendant. Synthesis: judge. But this dialectic is Aristotelian in that it is a synthesis of competing ideas of individuals – it is not a dialectic of competing classes. The judge, by comparing the competing ideas of the plaintiff and defendant (expert opinion) arrives at a best possible view synthesizing the correct points of each competing thesis and rejecting the incorrect points.

²¹ See generally, Stanford Encyclopedia of Philo., *Aristotle's Logic* (2004) <http://plato.stanford.edu/entries/aristotle-logic>

Although our understanding of facts is based on the material base that does not mean that we can ignore the ideology, i.e. the superstructure, which grows out of and justifies that base²² – one element of which is “scholarly law”. We now turn our attention to an analysis of the machinations of the legal system within a given mode of production and more specifically to an analysis of the superstructure of a given mode of production. What is scholarly law?

Scholarly law - law in the books - is law understood as the (supposedly) authoritative statements of legislators and judges and can be analyzed syntactically as consisting at least, and perhaps exclusively, of conditional statements and imperative commands. Most conditionals imply an imperative command activated by occurrence of the condition(s). Similarly, many, but not all, imperative commands are actuated by the occurrence of a conditional of “scholarly law” (law in the books). It is of course possible for a law giver to issue a purely imperative statement or for a

²² Raymond Williams, [Base](#) and [Superstructure](#) in Marxist Cultural Theory, in *Rethinking Popular Culture: Contemporary Perspectives* 407 (Chandra Mukerji & Michael Schudson eds.) (1984).

lawgiver to issue a hortatory conditional statement which in fact triggers no imperative. But the majority of laws invoke imperatives upon occurrence of a condition.

Conditional statements can be further analyzed as consisting of rules and of exceptions to the rule, and even of exceptions to the exception. This process of rule, exclusive exception, and inclusive exception could in theory continue indefinitely.

The conditional statements of the law may be either procedural rules of positive law or substantive rules which may (or may not) reflect principles of natural law and/or natural justice. Substantive rules of law are determined either by procedural elements of positive law (framework questions which influence practical outcomes) or by substantive aspects of natural law, natural justice or a combination thereof. The conditional statements of substantive law are themselves conditioned and in part determined by procedural rules and by general principles of law and/or fundamental rights. This paper refers to these over-arching guiding principles and rules about rule

creation and enforcement as meta-rules.

IV. META RULES

A. GENERAL PRINCIPLES

To understand meta-rules we must distinguish them structurally and then compare them because of asymmetries in the common law and civil law.

The idea of “general principles of law”, a source of meta-rules, is a central concept of civilianist law. General principles of law are a source of international law worldwide²³ but they are also a source of persuasive authority as to the domestic law in civilianist jurisdictions.²⁴ General principles of law are not however a source of domestic law in the common law,²⁵

²³ See, e.g. Legal Information Institute, WEX, General Principles of Law available at: http://topics.law.cornell.edu/wex/international_law (last visited May 28, 2008).

²⁴ "Il existe par ailleurs de nombreuses règles non écrites qui sont admises par la conscience collective et qui semble tellement évidentes que le législateur n'a pas estimé devoir les préciser dans un texte de loi : ce sont les principes généraux du droit (exemple : les droits de la défense)." Thierry Smets, "Les sources du Droit", <http://users.skynet.be/sky19192/lessourc.htm>

²⁵ Blackstone analyzes the common law as consisting of written law (statutes) and

generally speaking, though perhaps they are dimly reflected in the general principles of equity, embodied as maxims of law.²⁶

unwritten law (the common law). See 1 William Blackstone, *Commentaries*, 69. Common law is customary law, whether local or national.

²⁶ Blackstone specifically considers the maxims of law, which, in civil law, are expressions of general principles of law, as a possible source of the common law. *Id.* However, he rejects the maxims as a source of law, arguing that they are but expressions of custom and that maxims are vague and inchoate and must be proven via inquiry into custom. *Id.* These maxims of law, however, persist in the common law in equity and it may be argued that maxims are in fact expressions of general principles of law, as is the case in the civil legal systems. Examples of such maxims include: *sic utero tuo ut alienum non laedes*. See *Bassett v. Company*, 43 N.H. 569, 577 (1862); *Swett v. Cutts*, 50 N.H. 439, 442 (1870). *Pacta quae contra leges et constitutiones, vel contra bonos mores sunt nullam vim habere indubitati Juris est --* "Good morals"--contracts against the constitution or good morals are void. *Austin's Adm'x v. Winston's Ex'x*, 11 Va. 33, 36 (1806). Because the common law, as opposed to statutory law, is induced from specific cases and not deduced from general principles, the simpler and better view is Blackstone's. Maxims and general principles continue to haunt the common law due to methodological incomprehension of the role of general principles as deductive instruments in a system of written law (i.e., the European civilian legal system). Thus in *The Harrisburg*, the U.S. Supreme Court quite correctly links the ideas of "natural equity and the general principles of law." 119 U.S. 199, 206 (1886). Blackstone appears to be the source of the split on the role of maxims and, by extension, general principles of law in the common law and civil law. One could accuse Blackstone of

B. FUNDAMENTAL RIGHTS AND RULES OF PROCEDURE

That asymmetry mirrors another one. Unlike many civil law jurisdictions, most common law countries have adopted constitutionally binding charters of rights and given their highest courts the power to review the constitutionality of ordinary legislation. Constitutional charters of fundamental rights are seen either as a reflection of fundamental rights and freedoms found in natural law and natural justice or are themselves taken as the source of fundamental rights and freedoms. In functionalist terms, the common law charters of rights and freedoms operate similarly to the civilianist general principles of law. Though fundamental rights, especially in the United States, are generally limited to individual freedoms (negatives "freedoms from" rather than positive "rights to") they sometimes contain collective rights as well. General principles of law / fundamental rights can thus be seen as

misapprehending the role of general principles in legal deduction. This may be because he assigns the role of general principles to ecclesiastical courts, where the general principles atrophied. See Blackstone, *Commentaries* *83.

conceptually similar. They can be seen structurally as:

- Binding or non-binding
- Independent sources of law or reflections of natural law and/or as reflections of natural justice
- Collective or individual
- Negative “freedoms from” or positive “rights to”.²⁷

In whatever form these rules are constituted, general principles of law and the concepts of fundamental rights and freedoms are, like procedural rules, meta-rules of any legal system. They are rules which determine how to form other rules. This implies the “substance versus procedure” distinction is somewhat spurious.²⁸

Fundamental rights are essentially “substantive” and so are a more limited concept than general principles of law, which are both “substantive” and “procedural”. But both fundamental rights and general principles of law are generally binding rules and thus they are similar. Because of the similarities

between general principles of law and fundamental rights and because of the increasing integration of common law and civil law in the European Union, and for simplicity in our discussion of meta-rules this paper links them – though in legal practice general principles of law are both more abstract and wide ranging than fundamental rights and freedoms. They may be able to be invoked more often, in theory, but have less effect in practice because of their generality and ambiguity.

What difference, if any, exists between fundamental rights and fundamental freedoms? The bourgeois revolutions generally presented and defended negative human freedoms from government intrusion into the private sphere.²⁹ Those freedoms were asserted by the rising middle class of merchants and proto-industrialists as a limitation upon the power of the receding aristocracy.³⁰ The rights which they proposed were negative in the sense of being “freedoms from”. Those were “first generation rights” –

²⁷ See generally, Eric Engle, *Universal Rights: A Generational History*, 12 *Ann. Surv. Int'l & Comp. L.* 219 (2006).

²⁸ See generally, Kennedy, Duncan. "Form & Substance in Private Law Adjudication," 89 *Harvard Law Review* 1685 (1976).

²⁹ See generally, Eric Engle, *Universal Rights: A Generational History*, 12 *Ann. Surv. Int'l & Comp. L.* 219 (2006).

³⁰ See, e.g., Stephen P. Marks, *Emerging Human Rights: A New Generation for the 1980s?*, 33 *RUTGERS L. REV.* 435, 437 (1981).

negative “freedoms from” rather than positive “rights to”.³¹

The socialist revolutions which have occurred since 1848 have increasingly inaugurated not negative “freedoms from” but positive “rights to”. The rising working classes asserted a right to minimal standards of living – maximum hours, minimum wages, and a variety of insurance systems against accident, unemployment, and ill health. Thus the positive “rights to” expressed not only as fundamental constitutional rights but also as often as not in secondary legislative administrative law social insurance systems.³²

What these waves of revolutions and the freedoms and rights they inaugurated have in common is a reordering of the principle of distributive justice.³³ Under aristocratic rule the principle of distribution was unequal and based on heredity. The bourgeois revolutions inaugurated an era of distribution based, supposedly, on

merit.³⁴ And the socialist revolutions introduced a principle of distribution according to need.³⁵

This historical evolution from negative individual freedoms, i.e. guaranties against coercion, to the affirmative rights of all classes to a decent life demonstrates the historical dialectical character of the elaboration of rights. This dialectic expresses itself in a taxonomy which in turn reflects a theory of justice. General principles, fundamental rights, fundamental freedoms, and rules of procedure are all examples of meta rules: they are rules about making rules. However, procedural rules are purely technical constraints. They do not touch upon substantive justice. As such they are creations of positive law. General principles/fundamental rights in contrast are reflections of the ruling class’s notion of natural justice. They determine – or at least so holds a ruling class – how substantive justice is to be achieved. General principles themselves may express either distributive or corrective justice. This

³¹ See generally, Eric Engle, *Universal Rights: A Generational History*, 12 *Ann. Surv. Int'l & Comp. L.* 219, 257 (2006).

³² Eric Engle, *Universal Rights: A Generational History*, 12 *Ann. Surv. Int'l & Comp. L.* 219, 259 et seq. (2006).

³³ Aristotle *Nicomachean Ethics*, 1131 a 24-28.

³⁴ Schiller *An die Freude* “crowns but to those who have earned them”.

³⁵ Karl Marx, *Critique of the Gotha Programme* 1875 Available at: <http://www.marxists.org/archive/marx/works/1875/gotha/index.htm>

is the interplay of history, law, and justice.

V. LAW AND JUSTICE

A. "LAW" AS DESCRIPTION AND "LAW" AS PRESCRIPTION

Our understanding of the law must also consider the relationship between law and justice. Some assert that there is a necessary connection between law and justice, and thus that a bad law is not a law at all but merely a sham pretending to be law.³⁶ This is true in the sense that one is justified in breaking an unjust law -- there is no crime in breaking a law itself criminal. But it is not true in the sense of law as conditional predictive statements. This is the difference between law as description and law as a prescription. The prescriptive power of law -- it's normative character -- arises from the idea that law does or should

reflects and express of morality. But the description of a conditional or command of law as law is merely positive. Unjust laws have no moral prescriptive force but can have a practical descriptive validity.

B. LEGAL SCIENCE IS NOT STRICTLY NOMOTHETICAL

The dual character of law as prescription and law as description can also be seen from the fact that legal science is not strictly nomothetic because both ruler and ruled have volition. Since legal science is not nomothetic we account for the variance between what is prescribed (scholarly law) and what actually happens (practical law) as the difference between prescription and description. The dual character of law as prescription and law as description can be seen from the

empirical method which shows the positive validity of a law is not dependant on its moral character or degree of enforcement.³⁷ Empirically we know those who break unjust laws do so at their own peril and that a truly unjust law can well be

³⁶ "What of the many deadly, the many pestilential statutes which nations put in force? These no more deserve to be called laws than the rules a band of robbers might pass in their assembly.... [T]herefore Law is the distinction between things just and unjust, made in agreement with that primal and most ancient of all things, Nature; and in conformity to Nature's standard are framed those human laws which inflict punishment upon the wicked but defend and protect the good." See, Cicero, "Laws" in: Clarence Morris, (ed.), *Great Legal Philosophers: Selected Readings in Jurisprudence* 51 (1997).

³⁷ H. Kelsen; "L'efficacité n'est pas une <<condition per quam>> de la validité" en *La Positivisme Juridique*, M. Troper, C. Grzegorzczuk, (editeurs) Paris: LGDJ (1992) page 326.

generally enforced. Likewise we know the legislator cannot always enforce its will.

C. LAW AS PREDICTION

As well as being a description of what is and a prescription of what should be law is also a prediction of what will happen in the real world when a condition occurs.³⁸ When we examine the facts it is clear that law is not in practice inevitably just. The laws of a tyrant are certainly bad laws but they are none the less positive laws because the tyrant -- unlike the thief -- has state power. However, when law is immoral then one is justified in breaking it. It is not criminal to violate a law which itself is a crime. Unjust laws eventually provoke a backlash and ultimately become unenforceable -- in that sense, natural justice is self enforcing i.e. quasi-nomothetic. We cannot say with certainty whether or when any particular unjust law will become unenforceable however we can say they generally do and are more likely to become so as time goes one.

³⁸ O. W. Holmes, Justice, Supreme Judicial Court of Mass., *The Path of the Law*, Address at the Dedication of the New Hall of the Boston University School of Law (Jan. 8, 1897), in 10 *Harv. L. Rev.* 457, 461 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.").

D. POSITIVE LAW AND NATURAL JUSTICE

The connection between law and justice is not a necessary one -- there can indeed be just laws. When a law is just it may be said to partake of natural justice. But a law may partake of natural justice without having the needed force to make it effective. So a just state must exhibit a tempered union of natural law (force) and natural justice (morality).³⁹ There are at least two types of unjust states: states which are powerless and lack the capacity to enforce what appear

³⁹ See, Hobbes, *Leviathan*, where he explains the relation between natural justice and natural law. I combine Hobbes and Aristotle; Aristotle rightly argues that laws are natural and positive and argues, I think correctly, that the natural justice is inherent in the human condition. Hobbes attempts to refine Aristotle by distinguishing further between natural law and natural justice. However, Hobbes's natural law is merely the law of the jungle - the law of the strongest. Hobbes natural justice is merely conventional. I do not see natural justice as merely conventional because I don't believe any state of nature ever existed: Aristotle was correct that political (social) life is inherent to the human condition. However, because natural justice may be temporarily ignored by positive law (an unjust state and unjust laws can exist) it is useful to distinguish between natural law and natural justice. Natural law is the practical material realization of natural justice; natural justice is the theoretical concept which arises out of empirical observation.

to be just laws, and states which are powerful but enforce unjust laws.

E. DISTRIBUTIVE AND CORRECTIVE JUSTICE

Justice may, as Aristotle teaches, be considered either distributive or corrective.⁴⁰ Distributive justice, sometimes known as geometric or social justice, determines the general principle according to which (public) goods are to be distributed: merit, need, equality, or inequality.⁴¹ Distributive justice also determines which goods are public. The fact that the choice of distributional principle can be different in different states indicates that the choice of which system of distribution to take up is positive and conventional rather than natural and inevitable.⁴² Distributive justice is positive not natural. Corrective (transactional) justice in contrast sees to it that (private) exchanges are fair and equal⁴³ – that contracting parties are not cheated, that victims of other's negligence are compensated (restitution).⁴⁴ As such it appears to be universal, i.e. natural. However, corrective justice may not

be translated into practice: natural justice is not inevitably translated into natural law. An unjust regime could in fact enact positive laws of corrective (in)justice.

F. EX ANTE LEGISLATION AND EX POST JUDGEMENT

From a temporal perspective, legal decision making is of two kinds: ex ante, that is prior to the act being adjudicated or ex post, that is, a decision made after the act. Statute laws are almost always enacted ex ante. Judicial decisions are, as to the parties, ex post – though they may (common law) or may not (civilianist law) also have ex ante effect as to future litigants.

For example, the crime of genocide was, in terms of positive law, ex post – there were no treaties against genocide until after World War II.⁴⁵ Very few people would argue that it is substantively unjust to arrest mass murderers. Nevertheless, the statute laws against genocide were in fact laws ex post: the mass murder of

⁴⁰ Aristotle *Nicomachean Ethics*, 1131 b 30-34.

⁴¹ *Ibid.*, 1131 a 24-28.

⁴² *Ibid.*, 1131 b 30.

⁴³ *Ibid.*, 1131b 24 - 1132a 2.

⁴⁴ *Ibid.*, 1132a 24, 1132b 18-20.

⁴⁵ See generally, Sévane Garibian, « Génocide arménien et conceptualisation du crime contre l'humanité. De l'intervention pour cause d'humanité à l'intervention pour violation des lois de l'humanité », *Revue d'Histoire de la Shoah*, n° 177-178, 2003, pp. 274-294.

Armenians by the Ottoman Empire⁴⁶ was a violation of natural justice - but it was not a violation of any then existing treaties of positive law.⁴⁷

One of the objectives and achievements of the bourgeois revolutions was to replace arbitrary tyrannical rule with decision based upon merit. As such, the bourgeois revolutions represented a change between one principle of distributive justice (merit reflected in birth) to another (merit reflected in action). One way in which the arbitrary character of (ossified) aristocratic rule was to be replaced was by the elimination of ex post facto laws⁴⁸ That is, no crime would be made after the fact (nul crimen sine lege). Statutes could only prospectively ordain behavior. Likewise, merit rather than birth would become key by eliminating hereditary privileges

(titles)⁴⁹ and disabilities (“corruption of blood”).⁵⁰

One of the features of bourgeois liberal government and of socialist governments is the specialization of the different organs of state. The role of a legislator is to establish, ex ante, rules which will prospectively bind members of society. As such the pronouncements of the legislator are general – though admittedly not as general as fundamental rights or the general principles of law. In contrast, the role of the judiciary is to make decisions ex post, relying (supposedly) upon rules promulgated by the legislator ex ante. As such the decrees of courts are highly specific and much of courts’ reasoning is dedicated to developing the linkage between the specific facts of the case before the court and the law as it is promulgated by the legislator.

G. COLLECTIVE JUDGMENTS⁵¹

⁴⁶ *Ibid.*

⁴⁷ See generally, Reservations to the convention on the prevention and punishment of the crime of genocide, Advisory Opinion of 28 May 1951, ICJ Reports (1951), p.15-58.

⁴⁸ E.g. U.S. Const., Art I. Sec. 9 (no federal ex post facto laws), Sec. 10 (no state ex post facto laws).

⁴⁹ U.S. Const., Art. I, Sec. 9 “No title of nobility shall be granted by the United States”

⁵⁰ U.S. Const., Art. III Sec. 3 “The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood” – no hereditary status as criminal. This was not so in the USSR where SS officers children would also be considered as enemies of the state and subject to particular control.

⁵¹ On the rise and fall and rise of collective responsibility see George P. Fletcher, *The*

Another achievement of the bourgeois revolutions was the replacement of collective judgment by a strict principle of individual accountability. Rather than being judged based on social class, i.e. membership in the nobility, the bourgeoisie insisted on judgment of individuals as individuals and appropriate condemnation. Thus for example a criminal's descendants would not be judged for the crimes of their ascendant.⁵² Again these freedoms were however generally negative, i.e. freedoms from the state's interference with the life liberty or property of the individual.

The socialist revolutions partially reverted to or advocated a return to collective judgment and accountability.⁵³ Thus, historically

dominant classes would be held liable for exploitation of historically dominated classes and forced as a class to pay reparations. At the same time however the socialist governments would not impose disabilities on the offspring of a criminal.

VII. CONCLUSION

This essay has presented a structure for decomposing the ambiguous term law into determinable parts. Law is a term with a several competing meanings. Thus the term must be complemented and contextualized. Natural law, positive law, law as a prescription and law as a description coerce the otherwise ambiguous term into tractable forms. By distinguishing between law (*lex*) and justice (*ius*) we are able to focus on different aspects of both command and right. Thus, unlike Kelsen,⁵⁴ I see the fundamental element of law not as hierarchically ordered "norms". Instead I see potentially conflicting conditional statements with contingent enforcement imperatives as two atoms of law. However those conditional and imperative statements are only scholarly law -

Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt, 111 Yale L.J. 1499, 1539 (2002).

⁵² U.S. Const., Art. III Sec. 3 "The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood" – no hereditary status as criminal. This was not so in the USSR where SS officers children would also be considered as enemies of the state and subject to particular control.

⁵³ Beate Sibylle Pfeil, *Kollektivschuld und Völkerrecht. Eine Initiative aus der Parlamentarischen Versammlung des Europarats*, Europäisches Journal für Minderheitenfragen, EJM 1, (2008), 73–77 <http://www.springerlink.com/content/4855501631j80704/>

⁵⁴ Hans Kelsen, *Théorie Générale du Droit et de l'Etat* Paris: Bruylant (1997) p. 166.

law in the books. They are theoretical predictions. To be considered “practical law” -- effective positive law -- they must be enforced. This highlights the distinction between natural law, which is nothing more or less than the law of the strongest, and positive law, which is the arbitrary statements of a legislator. Hobbes was right to distinguish natural law from natural justice but was incorrect in seeing propositions of natural justice as conventional rather than natural. The mediation between force and morality is natural justice.

The first portion of this essay raised the concept of natural law and supplied the Aristotelian and Hobbesian definitions of that term. The second portion turned its attention to the relationship between law and justice. This paper is founded on the premise that there are indeed universal moral principles: thus, there can be a natural justice; however, it also takes the view that there is nonetheless no inevitable connection between natural law and natural justice – principles of natural justice are normative, not nomothetic. In analysing both law and justice the paper has revealed how dialectical reasoning allows us to speak with reasonable exactitude

of legal science. We thus apply historical materialism⁵⁵ to understand the evolution of the relation between law and justice, to illustrate distinctions between corrective and distributive justice and to explain the changing relationship between natural law and natural justice as exchanged via alterations in the conception of the correct measure of distributive justice which must inevitably touch upon aspects of corrective justice.

How can differing societies have differing rules which nonetheless reflect a universal morality? While differing societies have different standards of justice those differences are functions of their mode of production which, due to technological advances, is constantly improving. Within a given mode of production however the moral standards of society are generally accepted and are intersubjective. They reflect the moral judgment and capacity of judgment of the society depending upon the society’s state of economic development. So the standards are universal in the sense

⁵⁵ Josef Stalin, *Dialectical And Historical Materialism, (1938)* From Josef Stalin, *Problems of Leninism*, Foreign Languages Press, Peking, (1976). Available at: <http://www.marx2mao.org/Stalin/DHM38.html>

that we cannot condemn a poor society for its poverty when there was no alternative to that poverty. At the same time that fact implies that an economically developed society will be held to higher standards than one which is less well off. In this sense, fundamental human rights are like a ratchet, ever moving forward. Even outside of the intersubjective sense, there are universal moral standards in that some standards, such as the prohibition of unlawful killing, are timeless and universal. Further, the moral principles of a society at one phase of development tend to survive its transition as it enters into its next developmental phase. Thus the sphere of protected conduct in fact expands with increasing economic well being consequent to progress in the mode of production of society. Universal moral principles do exist – but they are not inevitably or necessarily enforced. The naturalist theories of law, like the positivists, only have half of the answer to the question “what is the relation between law and justice”. Each should reexamine the other, preferably from the perspective of historical materialism, to understand its own flaws and the contributions that the other perspective might bring.

