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AN ELEMENTARY GRAMMAR OF RIGHTS AND THE LAW

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ABSTRACT. Rights are many and diverse. They are jural rather than material entities that subsist in a society of rational beings and relate essentially to property, in the limiting case, one’s property in oneself. Law is the product of social evolution and exists to vindicate rights. The conditions for the emergence of law are embodiment, scarcity, rationality and sociability. The context for the emergence of law is dispute resolution. The characteristics of such a customarily evolved law are its severely limited scope, its negativity, and its horizontality. A legal system (or systems) based on the principles of customarily evolved law could answer the needs of social order, namely, the vindication of rights, without permitting the paternalistic interferences with liberty characteristic of contemporary legal systems.

Keywords: rights, law, language, custom, legal system
Rights

The supply of some commodities is unequal to the demand for them. Food and clean water are in short supply to many, all too many, people living in some parts of the globe and, somewhat less crucially, high-performance sports cars are in short-supply to those subsisting on academic salaries in the affluent West. The two shortages are not, of course, the same in respect either of urgency or of importance but they are both shortages. Whatever about the relative lack of food, water or sports cars, rights appear to be in plentiful supply. I have in front of me a volume entitled Basic Documents on Human Rights. This volume of basic documents runs to 896 pages and the rights mentioned in these documents include the rights to life, to liberty, to security of person, to equality before the law, to freedom of movement, to asylum, to nationality, to marry and found a family, to freedom of thought, to conscience and religion, to opinion and expression, to peaceful assembly and association, to equal access to public service, to social security, to work, to free choice of employment, to protection against unemployment, to form and join trade unions, to rest and leisure, to an adequate standard of living, to education, to freely participate in the cultural life of the community and, if disabled, a right to medical, psychological and functional treatment, to medical and social rehabilitation, and so on.

Most people would find at least some items on this list difficult to reject—who could seriously deny that people have rights to life and liberty?—but there are other rights that are not so obviously unobjectionable, such as a right to social security or a right to medical treatment. The intuition behind our willingness to recognise some rights and our unwillingness to recognise others lies in the perception that the right to life and the right to liberty, for example, do not necessarily impose any positive obligations on other people whereas the right to social security and the right to medical treatment clearly do. One does not have to do much not to kill or enslave other people whereas the provision
of social security and medical treatment require that somebody actually does the providing. For that reason, the former kind of rights is sometimes described as ‘negative’, while the latter kind of rights is described as ‘positive’.

If we take our list as indicative, rights are many and diverse but just what are these rights of which there are so many and of such different kinds? Where do they come from? How are they to be justified, if indeed they require justification? These questions may appear obvious but it is far from obvious that they have answers. Some, such as Garrett Barden and Tim Murphy in their recent book *Justice and Law in Community*, are sceptical about the possibility of uncovering a generally acceptable theoretical foundation for rights, asserting that “it [is] incontrovertible that no agreed normative justification for human rights has ever been proffered by anyone, irrespective of the extent to which they have been adopted in positive law.” (Barden & Murphy, 216)

Let us start with a favourite scenario for social thought experiments, Adam alone on his desert island. What rights does Adam have in this context? To ask this question is to answer it. The notion of rights can have no purchase in this situation. Whatever else it may be, a right is some kind of entitlement and there is no one else on the island to observe or supply that entitlement to Adam. Rights, then would appear to be inherently social; to assert a right is to claim an entitlement that others are bound to observe and respect. Let us introduce Felix the goat to the island. Does Adam thereby acquire some rights? No, for Felix is not a rational being and so cannot recognise entitlement claims. If Felix were to raid Adam’s vegetable patch and eats his carrots it would be pointless sense for Adam to remonstrate with him about his misconduct.

Might it not be argued that, whatever about the futility of appeals to Felix’s non-existent moral sense, surely, even on a desert island, if Adam has domesticated Felix he thereby owns Felix and that ownership is itself a matter of right. Again, I think not. Adam clearly possesses Felix but ownership is a jural entity, differing sharply from
possession which is a factual matter. One can discover empirically who possesses what, or at least one can do so in many cases, but one can never tell just by the evidence of one’s senses who owns what. One can own something and not possess it, possess it and not own it. Ownership is evident only to the possessor of a mind so that only when Adam is joined by other human beings, capable of appreciating his entitlement claims (and he theirs) and, in fact, recognizing and accepting one another’s entitlement claims, do we have rights. Rights, then, emerge from and are sustained in a social matrix and are covalent with society.

A right is an entitlement claim in relation to one’s property, a claim that is and must be acknowledged by others in society if for no other reason that they must make similar claims and so cannot, except at the cost of practical incoherence or special pleading, reject the very possibility of another’s claims. Adam’s entitlements claims are all of them property rights, most basically, his right to himself, derivatively, his right to that which he has legitimately appropriated or had legitimately assigned to him. It follows than that all rights are human rights, which is to say that they concern and bear only on human beings, that all human rights are property rights, which is to say that they pertain to some subject matter or other, in the limiting case, oneself. There is not, nor can there be, a society without some functioning notion of property. Of course, the specifics of that notion may vary from one society to another—what is or can be property, who may or may not own it, what manner of alienability is permitted—but some notion or other of property any given society must have.

A right, then, is a three-part relation. It is an entitlement claim made by a rational being A in respect of some property, P addressed to other rational beings B, C or D and recognised as such by those to whom it is addressed. All rights must be compossible inasmuch as it is a condition of a person’s having a right that its possession or exercise does not violate the rights of another. Rights emerge from and have purchase only in the
context of human society. Law, too, emerges from and has purchase only in the context of society; in fact, law comes into existence for the protection of property.

**Law**

At the stage at which it enters history, law is already the product of a long period of social evolution. Law, in the sense of fundamental social regulative norms, is coeval with language and culture and, like language and culture, is not, in its origin, the product of deliberate design. “Law in the sense of enforced rules of conduct is undoubtedly coeval with society; only the observance of common rules makes the peaceful existence of individuals in society possible. Long before man had developed language to the point where it enabled him to issue general commands, an individual would be accepted as a member of a group only so long as he conformed to its rules.” (Hayek 1982: I, p. 72).

Nonetheless, whatever the evolutionary processes involved and however shrouded in the mists of history they may be, it should still be possible to articulate the conditions for the emergence of law. The following reconstruction must be speculative and is not intended as an historical description but rather as a rational construction.

There are a number of conditions that must be met for law to emerge. The first is that the members of the society in which law is to emerge be embodied. Human beings are essentially embodied beings and the first and inalienable property that each person has is in his own body. As embodied beings, we necessarily occupy space. While we don’t have to be anywhere in particular, we have to be somewhere. As embodied beings, our existence unrolls over time and since we are mortal, time is, for each of us, the ultimate non-renewable resource.

The second condition for the emergence of law is scarcity. As I use the term here, ‘scarcity’ refers not to some absolute quantity or amount of goods but to relative or subjective scarcity in which two or more human beings require the use or possession of
one good in physically incompatible ways. Our bodies are our first and most fundamental properties but they are far from being our only properties. As embodied beings we cannot but stake a claim to the use of a portion of the earth’s resources and that requires the development of the notion of property in external objects. If we lived in a magic world in which we could have anything we wanted simply by desiring it then it is difficult to see how the concept of external property could develop at all. In a magical world, one could have possessions but since scarcity has no meaning in such a world, the notion of property in external objects would have no purchase and without such property the need for law disappears. Even the wizarding world of Harry Potter requires some limits on the use of magic (rather arbitrary limits, one must say) otherwise, a wizard could always conjure up some Galleons at will.

A third condition is rationality. As we have already seen in noting the futility of remonstrating with Felix, irrational animals can possess things but not own them, so that a dog may possess a particular bone or dispute the occupation of a kennel but no sense could be given to a dog’s having the concept of ownership. Ownership is a normative concept—it is not just possession but rightful or lawful possession. While two dogs may squabble over the possession of a bone one or the other will end up possessing it but it makes no sense to say that the victorious canine owns the bone.

The final condition for the emergence of law is the existence of society itself. Let us go back to Adam alone on his island. What possible point could law have in this context? Adam is an embodied rational being and the resources of the island, including those of his own bodily being and its temporal conditions, are scarce but what would be the point of law given that there are no social relations to regulate. If he found time hang heavy on his hands, Adam could work out an elaborate law code but, since this code could have no possible application, its elaboration would be as pointless as playing chess against
oneself: “...human law is framed for a number of human beings, the majority of whom are not perfect in virtue.” (Aquinas, *Summa Theologiae*: I-II, q. 96, a. 2, c.)

We have seen the arrival of Felix the goat makes no significant difference to Adam’s rights. Now, let Bethany wash up on the island so that she and Adam relate to each other. Do we not now have the appropriate material circumstances in which law can arise? Again, however, the answer is no. With just two people in relation to each other, there can be no law, only agreement or disagreement, because another essential element of law, the possibility of an unbiased resolution of disputes will not obtain. For the unbiased resolution of disputes, we need a third party in communication with both Adam and Bethany. In summary, then, the conditions for the emergence of law are a plurality of embodied rational beings, minimally three, existing in relation to each another, in the context of scarce resources.¹

Imagine a dispute to arise between Adam and Bethany, two members of our little island community. All disputes involve contested rights claims and can be resolved in only three possible ways: by agreement, by violence, or by adjudication. Agreement is often possible. Many potential disputes are resolved by the willingness of both parties to compromise or the willingness of one or other simply to yield. However, agreement is not always possible. What then? When both parties maintain their claims and agreement is not possible the matter can be resolved only by violence or by adjudication.

Violence is expensive and dangerous. Violence is expensive in that, apart from the opportunity costs involved and the diversion of resources from productive to unproductive uses, the increase in overall wealth that would have resulted from the division of labour will diminish or disappear and that is mutually non-beneficial.² Both parties to the dispute therefore have an interest in its peaceful resolution. Violence is dangerous inasmuch as one or other of the disputants could be killed or injured in the conflict.³
If agreement is unattainable and the parties desire to avoid violence, only adjudication remains. While dispute resolution is more efficient than violence, dispute avoidance is yet more efficient than resolution and that cannot be had by bare unreasoned judgements. In the long term, it will not do for the adjudicator simply to say that the dispute is to be resolved in one party’s favour and leave it at that. He has to say why this should be so. Disputes are to be resolved via judgements which have the form: decision + reason (rule); only in this form can they provide guidance for future conduct and so facilitate dispute avoidance.4

Why couldn’t Adam simply ignore an unfavourable judgement? He could, but only at a cost. The loser in a dispute can refuse to accept judgement only if prepared to accept a return to violence and while this is possible, the reasons violence was rejected initially, namely, its danger and its high cost, still remain valid as a disincentive. It is therefore in the long-term interests of all to accept judgements, even when these go against their short term interests.5

Rules are inherently general even though educed from and applied to specific cases. But rules must not only be general, they must also be impartial. The rule educed from Adam and Bethany’s dispute can hardly be “Whenever Adam and Bethany have a dispute over a pig, the decision is to go in favour of Bethany”; it must be something like: “whenever a person’s animal destroys another’s crops, then that animal is forfeit.” Rules, then, are abstract and impersonal though, of course, when applied, they are applied to concrete circumstances and particular individuals.

If the rule originally adduced is rationally adequate, then it will fit other disputes with similar fact patterns. Human beings require reasonable certainty as to which kinds of acts are legally permissible and which are not. Certainty, in turn, demands consistency. Consistency requires that the adjudicator give the same or similar judgments in similar circumstances; it also requires that those who have benefitted from one judgement
accept other judgements, even if made against them, if they accept the essential similarity of the circumstances. Decisions, to have persuasive force, must be generally acceptable and over time, as society develops, there will be a convergence of rational judgements into a set of principles and rules, much as language develops spontaneously in accordance with rules. The difference is that law will have to be at least partially reflectively appropriated by at least some in the community whereas language can quite well be spoken by all without any reflective appropriation of its rules. The fundamental cultural institutions of human society—language, law, logic and morals—are all of them the outcome of a spontaneous evolutionary process. They are the creation of no one or no group’s design but are nonetheless rational albeit not, to use Hayek’s term, ‘constructively’ rational, that is, not the product of a pre-practical design.

The picture of law I have just sketched is that of the law emerging from the processes of adjudication as an endogenous growth as distinct from the law being exogenously constructed and imposed on a society from the outside. Nor is such law a command of a superior authority, backed by force or the threat of force; it is, rather, the delimitation of customarily permissible and impermissible actions, adhered to by members of the community because they accept them as right and natural, and enforced by social disapproval and, ultimately, social exclusion.

Thus we have three essential elements of law: (i) an adjudicative procedure, (ii) a body of rules, and (iii) a means of enforcement. There is a dialectical relationship between adjudication and rules: rules emerge from adjudication and, in turn, feed into and constrain future adjudications. We start ex post, continue ex ante: “Even a vintage ex ante precept, however, had to be devised and imposed ex post for the first time in some case.”

(Barnett 1998: 127)
The extent of law thus construed is severely limited—it ranges over only those aspects of human action that infringe or are capable of infringing on our rights, in the first instance, our negative (or natural) rights, those rights deriving from our self-ownership, and later, on our positive or conventional rights deriving from our uncoerced agreements with others. All other matters are outside the scope of the law but not, alas, outside the scope of legislation which becomes daily ever more arbitrary and intrusive.\(^7\)

The first characteristic of law whose material elements are constrained by a theory of rights is that it is almost uniformly negative. It does not consist of injunctions to do this or to do that but, rather, not to do this and to refrain from doing that. It thus concerns itself with matters relating to the peaceful co-existence of those who live in close proximity and tends to be limited rather than expansive in its operation.

The second characteristic is that it is horizontal; it concerns the adjudication of disputes between two parties, neither of whom stands in a hegemonic relation to the other. This is what is meant by equality before the law. Crime is not a matter of offending a state or a superior but of violating the rights of another. Punishment is primarily a matter of attempting, so far as possible, to restore the status quo ante or, where that is not possible (as in cases of homicide), making a mutually acceptable substitute restitution. Positive injunctions result from adjudication as judgements that restitution is owed by A to B as a matter of justice or in satisfaction of a properly constituted agreement—also a matter of justice, albeit not a primary case.

The third characteristic of such an endogenously evolved law is that its enforcement is not achieved by a particular social institution but by the community as a whole by means of disapproval or exclusion, in extreme cases, outlawry.

Conclusion
Our imaginations are limited by the tyranny of the present. We tend to believe, unreflectively, that the way things are is the ways things always have been and always have to be. Our contemporary legal systems, dominated by legislation, are historically contingent. The function of law is the vindication of rights. A non-hegemonic legal system (better still, a plurality of legal systems) based on the principles of customary evolved law (shorn of its irrational elements) could well answer the needs of social order, namely, the vindication of rights, without permitting the paternalistic interference with liberty that is characteristic of contemporary legal systems.

NOTES

1 See in this context, Hart’s ‘minimum content of Natural Law’. (Hart 1994: 193-200).

2 Recent work in game theory has shown that “responsive cooperation is an effective strategy for maximising self-interest.” (Skoble 2008: 95).

3 “One of the first causes of a legal system is the desire to prevent or discourage feuding and private warfare…” (Baker: 4).

4 This is still so even in the process of the ‘ordeal’ which, according to Baker, “was calculated to avoid reasoned decision-making.” (Baker 2002: 4).


6 “The basis of Roman law, as of any law, was customary.” (Leage 1961: 14).

7 Only adjudications concerned with assertions of rights will give rise to law. (See Fuller 1978: 353).

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