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Nature and Law

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The relationship between nature and law has developed historically with the understanding of nature and with the forms of law. This article will show why and how nature and law are related to each other and how they are practically related to and differentiated from each other in human history. This will be sketched out in sequence by discussion of the relationship of law to the natural cosmos of antiquity, to the divine natural order of the Middle Ages, to the modern self-conscious intervention of human beings in the natural order, and to the modern rendering of nature wholly utilisable. The article cannot claim to be complete; instead it is intended to highlight a common thread of the systematic development of concepts in their historicity, using exemplary authors and problems.

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1. Introduction

Attempts to ground the content or validity of legal norms in nature are already known from antiquity (cf. Ilting 1978). In general, this is understood as follows: "Natural law is the totality of legal principles inherent in nature, timelessly valid, necessary for reason and not created by humans" (Köbler 1997: 392 f.). However, what was concretely understood by this in different epochs varied considerably (Tierney 1997: 1–3; Dreier 2007), depending on changes in the concept of nature and the concept of law (cf. Wolf 1984). It is therefore advisable to begin from the systematic relationship between these terms and to examine this relationship in its various contexts.

The conceptual relationship between nature and law contains two opposing elements. On the one hand, law and nature are thought of analogously, insofar as both concepts concern a lawful order.[1] On the other hand, law and nature are opposed to each other precisely as lawful orders: Nature is ordered by causal laws that apply imperatively. Legal laws also claim strict validity, but their observance is subject – in contrast to natural laws – to human volition (Dreier 2013).[2] In a strict sense, law is never a component of nature, but an institution of human society. Conversely, legal norms are also directed at people insofar as they are natural beings, because only as such are they finite beings and pursue interests that can collide in their realisation. Such collisions are then regulated by law. However, the conscious pursuit of interests, in contrast to the instinctive satisfaction of needs, presupposes at the same time a conception of interests and thus an intelligent being. Law is therefore a social institution among intelligent natural beings. Thus, on the one hand, the binding nature of law can be conceived, in analogy with nature, as strict, but on the other hand, in contrast to nature, it must be thought of as an order of free beings and thus not as a factual but an intended order.

[1] 'Analogy' here does not mean mere similarity, nor does it mean identity; rather, two definitions are analogous if they each refer to the same thing in a specific way. In the case of nature and law, the common term of reference is the lawful order.

[2] Volition and freedom are not the same. Volition is the ability to choose. Freedom (of the will) is the determination of volition by practical reason. The expression 'freedom of the will' is intended to emphasise that no free determination of the will in the sense of practical reason is required for law, but that freedom of choice, which can be arbitrary, is sufficient to establish positive law.

2. Antiquity

As soon as 'nature' appears as a philosophical concept, its subject area is distinguished as cosmos, meaningfully ordered totality, from chaos, the idea of disordered totality. This order is subject to general rules and is therefore recognisable. Human action, however, is voluntary, can turn out one way or another, and thus does not initially display a regular order. The coexistence of people, however, presupposes their purposeful interaction, cooperation. Otherwise, every community would destroy itself. For this, rules – criteria of order – must be established. The binding nature of these rules is, however, initially a mere demand upon actors. Law as a stable institution therefore presupposes that a community of people shares legal norms, that their fulfilment can somehow be bindingly decided upon and that this decision can also be enforced against opposing interests. In this respect, law initially bases its claim to validity on the natural order and then, precisely because it differs from the natural order, establishes the legitimacy to compensate for the lack of actual validity through institutions. The social order of human beings is supposed to run strictly according to rules, and because it does not do so by nature, institution may enforce the rule-conforming process.

In early ancient Greece, natural phenomena were perceived as expressions of the gods. The as yet incomprehensible compulsion of natural processes was regarded as the expression of a powerful divine will. This will is (natural) law. Human relations and natural relations are not yet distinguished in a definite way (Reichardt 2003: 53). Gradually, legal customs emerge, according to which disputes are decided. The law of the strongest, which is analogous to the force of nature, no longer corresponds to the needs of the developing civilisation, but custom is also still an analogy of nature: norms are established not through rational justification but through imitation, through the replication of the given. Around the year 621 BC, the first codifications of Greek law in statute form were made under Draco. Only the regulations of blood law have survived; what is decisive is that through law's codification, it is detached from custom. It becomes an independent institution.

As soon as the relationship between nature and law is also reflected upon philosophically, a difference between the two is inescapable. Heraclitus' (535–475 BC) demand that action be adapted to nature presupposes the possibility of disregarding this demand. The call implicit in this, to abolish the difference between law and nature, paradoxically presupposes exactly this difference. Nature still remains the source of law's content and its binding character, but humans are already understood as the originators of action, who have stepped out of the inscrutable, deified, context of nature and now become themselves the source of norms and their binding character. This is connected with the (initially medical) transfer of the concept of nature from the cosmic order to the human physique.

The Sophist Antiphon (5th century BC) already noted that human legislation is based merely on convention. Because it is associated with the power to impose sanctions, it makes sense to obey it in front of witnesses. But: where there is no plaintiff, there is no judge. So if no one sees it, it makes more sense to follow nature, even if that goes against the law. This is also how the sophist Callicles sees it in Plato's (428/427–348/347 BC) dialogue *Gorgias*: justice is by nature that the stronger have the advantage. This 'natural' order is 'unnaturally' restricted by human laws, in the interest of the weak. This strand of natural law takes human nature to be determined by drives or urges. In classical Greek antiquity, such attempts to give theoretical justification to natural law are countered by a tradition that seeks to rationally restrict law-making by the stronger (Dreier 2013).

Aristotle transfers this naturalness of the elementary human community to all the increasingly complex forms of living together – marriage, household (*oikos*), village, city (*polis*); as a result, the *polis* emerges as the way of life best suited to human nature; it is therefore 'by nature', i.e. in substance, superior to the village, the *oikos*, marriage and even the individual. From the *polis*, the other social forms receive their natural meaning, the individual can only develop according to its human nature in these forms, and in the perfect sense he can only do so in the polis. As an institution of rule, the polis ensures reproduction through slavery in the *oikos*, and as an economic association it ensures the supply of handicraft and agricultural products both internally and through foreign trade, that is, it guarantees the free man his independence from nature. It thus opens up the possibility of the scientific and cultural development of human potential. The human being is defined as *zoon politikon*, as the living being that gives itself a constitution in community (cf. Dunshirn 2019: 4). Self-preservation,

the claim to life, freedom and integrity also appear as natural in this sense. But even this is time-bound, because Aristotle is convinced that nature has produced two kinds of human beings: free and slaves. The former are intelligent but weak, the latter are strong but stupid. The relationship of domination between them is therefore justified by nature, since it helps both to survive. In general, Aristotle regards the natural order as an inherently purposeful order (teleology) within which human action must be arranged; the ancient concepts of freedom are subject to this proviso.

In contrast to Aristotle, who seeks to establish the normativity of action not from pre-ordered concepts but from reflection on the experience of action, Plato had established norms on the basis of the idea of the good. This also owes much to analogies with nature, since the good order of the state is defined by Plato in analogy to a biological organism. Just as the organism is organically ordered by the soul, the state also has a purposeful organic order if it is determined by the idea of the good. While Aristotle defines action as a field systematically separated from theoretical cognition, for Plato the order of action follows from an order of theoretically recognisable ideas. These ideas, of course, are not phantoms but products of philosophical reflection. For Aristotle, however, they are abstract concepts whose relationship to empirical actions cannot be clearly defined. For this reason, Aristotle only discusses the best possible legal constitution under the given circumstances, whereas Plato had designed a relatively detailed ideal constitution.

As a result of the Peloponnesian War, the *polis*, the federation of states of ancient Greece, falls under the domination of the Macedonian and then the Roman Empire. The polis thus loses its political significance and the individual loses his direct power of participation and is confronted with foreign political powers. In the universal order of nature, the Stoics now see the basis of the freedom in the individual and, through the teachings of Roman legal theorists such as Cicero (107–43 BC), Seneca (4–65 AD) or Emperor Marcus Aurelius (121–180 AD), lay the philosophical foundation for the Christian concept of the individual. Concepts such as eternal, natural and temporal law, along with the idea of a universal humanity, also originate from this era. These concepts help Christian doctrine to justify freedom of conscience in the face of political powers to which the early communities are exposed.

Starting from the Apostle Paul (5–64 AD) and the Church Fathers, in particular Augustine (354–430), Christian legal doctrine initially takes up the Platonic tradition along with the Stoa, and this also applies to the concept of nature (cf. Dunshirn 2019: 6). However, the organic-teleological order of the natural whole is now associated with the divine will to create. God had intentionally given the world a meaningful and recognisable form, the *ordo naturae*. Placing human action within this order then represents obedience to God and thus acquires an emphatic moral significance. A violation of the law is not only a disturbance of the natural order, but a sin. Within the divine-natural order, humans are directed towards salvation in eternal life and the value of their actions is measured against this goal. Action is thereby freed from the teleology of nature, but only at the price of being integrated in a religious-moral teleology (eschatology).

3. The Middle Ages

If God is simultaneously the legislator of the natural order and the moral order, the compatibility of nature and action can at least theoretically be maintained. Thomas Aquinas (1225–1274) captured this idea in his model of a hierarchy of laws: At the apex stands the *eternal law*. This is the idea of the totality of the world order in the divine spirit. This idea is the normative and at the same time causal ground of all order in the world. The eternal law is revealed in *natural law*, i.e. the lawful order of nature. And at the lowest rung of the ladder is *human law*, the law that people give to themselves. So that it does not stray from the divine order, the human lawgiver must orient him- or herself to the eternal law. But he or she can only recognise this law indirectly, insofar as it is revealed in nature – as the natural order. Ultimately, therefore, the legislator must fit his or her legislation into the natural order. In this context, the concept of revelation has a double meaning: God reveals himself in a normatively binding way in the natural order; but under certain conditions it made sense that God also explicitly revealed his norms by giving the Ten Commandments as a positive divine law. The Ten Commandments do not deviate from natural revelation but make it explicit in a positive legislative act.

Theologically interpreted Platonism, however, offers an additional natural principle of law: all natural processes

aim at a good. The good is thus to be striven for, while the bad or evil is to be avoided. This should be the natural guideline of legislation: it should be directed towards the *bonum commune*, the common good. In the legal practice of the pagan tribes of Europe, this principle is what was referred to as the traditional good old law. The authority of the traditional does not refer directly to the natural order, but it treats what has been handed down as an order of second nature that has solidified over time and can now no longer be broken without consequences. For a long time, ecclesiastical law (canon law), which is based on natural law, has been the model for the integration of these practices into state law. For example, the principle that contracts must be honoured (*pacta sunt servanda*) was first formulated in canon law, as was the concept of marriage as a consensus. From the 12th century onwards – due to changes in economic and social structures, the gradual assertion of bourgeois actors, particularly in the cities, and the corresponding need for new regulations – a reception of Roman law begins. Different legal practices and legal circles coexist until the foundation of the Imperial Chamber Court (1495) as a uniform supreme authority in the Holy Roman Empire (cf. Oestmann 2002).

In the course of the Middle Ages, there are profound changes in the social structure. Ancient ideas are overcome, above all human work was understood less and less as a punishment for original sin and increasingly as an independent effort to find one's way in the world and to master nature. Related to this is the development of cities, which become centres of trade and commerce. The change in demand brings about changes in agriculture. These economic changes require new forms of law. The aforementioned intensive reception of Roman law occurs, which roughly coincides with the rediscovery of Aristotle's work, which had long been forgotten. In particular, the Aristotelian focus on the knowledge of the individual, the object of experience, has a subversive effect on the neo-Platonic concept of nature in the Middle Ages. If one begins with the individual, an absolute rational order cannot necessarily be discerned. Such an order is in fact a general concept which, according to William of Ockham (1285–1347), designates no real object. Above all, God as an absolute being cannot be immutably bound to any particular concept of natural order. Ockham's predecessor John Duns Scotus (1265/66–1308) had already defined the divine will as absolutely free. God could, if he wanted, replace the existing order with another at any time. With this thesis, on the one hand, the entire certainty of order of the Middle Ages collapses; on the other hand, it creates the prerequisites for the modern individual concept of the subject and for the changeability of social norms. As a result of the modern reception of Roman law, the individual also becomes a legal subject. The *ius civile* is then no longer directed at ancient co-citizens (*civis*), but at the individual in bourgeois society, as the actor interested in private enterprise.

4. The Early Modern Period

The principle of modern times is no longer the universal (divine) order but the individual subject. This also applies to the natural order: people no longer recognise nature primarily through conceptual deductions, but through experimental interventions. In terms of law, the *bonum commune* recedes into the background: if subjects are not bound a priori by a universal (divine) order, they potentially become competitors in their pursuit of interests. Since they also pose a threat to each other as such, the political principle of the modern era becomes security and, as its complement, freedom. Security involves first of all legally guaranteeing the ability of modern subjects to act: In order for them to be able to act civically, their property must be protected. In the interest of the free use of property, their life, integrity and freedom of movement must also be protected. To understand this in its functional chronology one can point, on the one hand, to so-called 'land peace' – efforts to pacify Europe (which at the time was largely covered by forests and ruled by predatory knights) and thereby secure trade; on the other hand, the Habeas Corpus Acts (1679), which were intended to protect citizens from arbitrary arrests and extortion, are to be understood as being in the interest of economic freedom of movement. Increasing contact with foreign peoples of different cultures and civilisations intensified the problem: late Spanish scholastic thought of the 16th century reasons from the universal nature of human beings that, for example, the freedom and property of the indigenous are also protected by law.

The legitimacy of law is now based on the idea that people are inherently entitled to certain rights, now understood as subjective claims. However, when individual volition becomes a principle, people enter into

competition with each other. The experience of the early modern period shows this very clearly. It creates a problem for any programme of a rational justification of law, since the stakeholders are in dispute over the authority to interpret what is rational.

The political theories of law of this time are therefore interested on the one hand in securing individual rights and on the other hand in the stability of rule in order to keep the collisions of individuals under control. These two facets are decisive for the political development of the modern era (Neumann [1937] 1967). This can be seen prototypically in the relationship between Thomas Hobbes (1588–1679) and John Locke (1632–1704). Hobbes draws from the conflict of interests the pragmatic consequence of making interest itself the natural source of law, as the Sophists once did. Individuals have an unconditional right to self-preservation, which entitles them to all encroachments upon everything and everyone. At the same time, however, the social nature of human beings means that it is advisable to make as little use as possible of this right and instead come to an understanding with others. This understanding amounts to a contract in which all give up their natural rights and transfer them to a single sovereign who thus holds all the power. This overcomes the insecurity of the state of nature, in which everyone potentially fights against everyone else (*bellum omnium contra omnes*) and transforms it into a stable form of rule. Hobbes thus exemplifies the absolutist tendency of early modern natural law (Tuck 1979). According to him, law is based on power, not on truth (*auctoritas, non veritas facit legem*). Methodologically, Hobbes follows modern natural science in breaking down the object of investigation into its elements in order to understand the form of the whole from its nature. This is also the systematic function of speculation about humans in the pre-social state of nature in modern natural law, although the various authors arrive at fundamentally different ideas on this subject.

Thus Locke deduces from the nature of humans that they can never surrender their freedom and that any political rule can therefore only be instituted by general or majority consent and remains dependent on this consent. It follows that citizens retain a number of rights which, for Hobbes, they had to surrender and could only exercise within the framework of the sovereign's permission. In addition to the protection of property and the consequent legitimation of sovereign power, Locke also includes protection against the abuse of power (right of resistance) among the natural rights. In addition, Locke opposes the possibility of selling oneself into slavery; however, he upholds slavery as such, which is established through captivity in war: the relationship between masters and slaves is conceived as a continuing particular state of war within the general peace.

In general, Hobbes bases his 'existential' natural law on a rather pragmatic concept of the individual, while Locke 'ideally' draws on motifs from theological legal doctrine: man is created by God as a free being. In both cases, however, the essential point of natural law is the doctrine that human beings have natural and therefore inalienable rights. This is the basic idea of human rights. It is in this way that Locke influences the American Declaration of Independence (1776), which serves as a model for the French Declaration of Human Rights (1789).

The conflict between security and freedom, between existential and ideal natural law is overcome in Jean-Jacques Rousseau (1712–1778) in that he redefines the concept of the state of nature and thus that of human nature: Humans are not hostile and selfish, but helpful and compassionate. Enmity only arises through civilisation. Because human nature is good in itself, an objectively general will (*volonté générale*) only becomes conceivable in contrast to the de facto collective will (*volonté de tous*). From this, Immanuel Kant (1724–1804) later develops the concept of the lawfulness of the will in the categorical imperative. Kant, for whom reason takes the place of nature as the source of law, is also concerned with the connection between felicity and morality, i.e. the connection between the existential and the ideal side of human nature, although this connection remains problematic for him. As long as morality remains ideal, enforceable law is supposed to bring reason into real situations. Johann Gottlieb Fichte (1762–1814) and Georg W. F. Hegel (1770–1831) want to overcome this opposition between morality and law with the concept of ethical life, in which individual and objective rational determinations of action coincide with each other and also with the material conditions of action. Law then no longer requires coercion and is indistinguishable from morality.

Although in the early modern period and the Enlightenment, human beings became more and more central to the thinking of natural law, their embeddedness in a divine order of creation remained the ultimate anchor of law's legitimacy (Haakonssen 1996). This is because

the normativity of law demands a state of affairs that is not real: the rational, just state of affairs is an ideal towards which humanity can only gradually develop. This is why the philosophy of the Enlightenment ties law to history, to progress. However, the concept of historical progress is only a binding concept if its fulfilment is guaranteed, if history cannot fail. For materialists, this guarantee is provided by a deterministic natural order (also of action) and for rationalists by divine providence. This assumption is still found in Kant, who instead of providence speaks of an intention of nature in history, and in Hegel, who presents history as the purposeful self-unfolding of reason in the world.

Hugo Grotius (1583–1645) had already claimed that natural law applied to all human beings, insofar as they were human beings, even if there was no God, and had thereby transferred the concept of natural law from the moral theology of late scholasticism to legal doctrine; nevertheless, God remained an important reference point for the validity of law in his and subsequent legal thought. However, human relations increasingly became the source of legal content. From the natural order as the general principle of law, concrete individual rights are derived with the help of middle terms. These middle terms concern the aforementioned political-social nature of human beings. Because human beings are finite, needy rational beings, they can only survive together. For this, they must form societies, and these societies require legal rules. Thus, political institutions are created that are responsible for law. The social nature of the individual thereby becomes the basis of law too.

The initially strictly Aristotelian view that human beings are political beings becomes in Samuel Pufendorf (1632–1694) the idea that humans' natural neediness is the reason for socialisation. Thus, the individual is no longer defined by society, but rather the converse applies: the purpose of society is derived from the neediness of the individual. The universal right of human beings as an element of the divine natural order is spelled out as a body of rights for the satisfaction of natural neediness in society: guarantees of life, integrity and property, specific forms of political power and their limits.

Gradually, it is recognised that law's claim to universality can only be guaranteed by reason, in which all people participate. Reason becomes the source and addressee of law. Pufendorf, by 1661 the holder of the first German Chair of *Naturrecht*, undertook a systematic ordering of natural law. Christian Wolff (1679–1754) surpassed this achievement by claiming to deduce the legal system from a handful of principles. This procedure, which in philosophical terms exposes itself to the suspicion of deductive determinism and, moreover, appears overly complex in terms of the requirements of legal practice, is not pursued further in classical German philosophy. But even in Kant and Hegel, there is hardly any talk of 'nature' in the context of law, but much of 'reason'. The legal order forms a 'second nature' (on this term see Testa 2008), which emerges from rational human freedom. Law then serves to secure and shape human freedom under the condition of equality.

Freedom and equality are, as mentioned, central concepts of bourgeois society from the outset, which sets it apart from feudalism. Law is the decisive instrument in this. In Kant and also in Hegel, however, the concept of freedom is no longer that of volition but that of autonomy, of rational self-determination. Because of this starting point, the classical doctrines of law collide with the historically given content of law. Exclusive private property can no longer be justified purely rationally, and the conflicts of bourgeois society, the connection between poverty and wealth, lead to difficulties and questions that can be answered neither by formal law nor by natural law.

5. Modernity

In the 19th century, there are again serious changes in the social structure. The feudal order of estates finally gives way to a bourgeois order in which all individuals become equally entitled. In the course of industrialisation and economisation of society, parties and interest groups are formed that influence political power and the development of law. The idea of universal feasibility, which goes hand in hand with the mutually accelerated development of natural sciences and technology, replaces the idea of a given natural order. Nature becomes the raw material at the disposal of human interests, especially second nature. Legislation becomes increasingly deliberative. Law can change just as particular interests change in relation to one another or alter over time. In modernity a regulating force of reason is also no longer perceived. The concomitant demand for bindingly valid laws leads to a comprehensive codification of existing law, which largely supersedes

natural law (cf. Wieacker 1967). The idea of natural law as well as the idea of the law of reason is confronted with a positivist understanding of law according to which every real and effective law possesses legal force. Thus, an insight of Christian Thomasius (1655–1728) becomes significant: whereas morality is not enforceable, law must be; both areas must therefore be kept apart according to their forms of validity.

Karl Marx (1818–1883) recognises the social function behind this positivity, behind the fact that law is arbitrarily set. The historically given law is an instrument for the coordination of interests in capitalist society, in which people do not act freely but submit to de facto constraints that seem given by nature. Positivist bourgeois law, deprived of its appeal to natural law, merely regulates these constraints. For Marx, their non-naturalness is the precondition for their changeability.

According to the positivist Hans Kelsen (1881–1973), natural law was only able to derive law from nature because it started from the false premise that the natural order was a divine order, i.e. something normative (Kelsen [1960] 2000: 80). Natural law describes de facto functional contexts, whereas the statements of jurisprudence (legal propositions) describe functional contexts in the mode of ought. The confusion of is and ought, which has become known as the 'naturalistic fallacy', was already pointed out by David Hume (1711–1776). According to Kelsen, jurisprudence is distinguished from the doctrine of natural law in that its statements are not normative. What is normative are the legal norms formulated by the legislator; science merely describes and systematises them.

The discussion of natural law flared up once again in Germany after the end of the Third Reich. Gustav Radbruch (1878–1949) argued that legal positivism had rendered the German legal profession "defenceless" (Radbruch 1946) in the face of the Führer principle. Only later, after the shock had subsided, could it be recognised that it was not so much positivism as a Führer cult loaded with natural law and the ideology of blood and soil as well as a "natural law of the German Volksgemeinschaft" (Dietze 1936: 9) that had been the reason for the National Socialists' legal views and their practice.

Subsequent discussion of natural law invoked theological, existentialist or ontological grounds, and occasionally Kant's concept of reason (cf. Kühl 1984), but it was no longer able to firmly establish itself. This was for two reasons. On the one hand, it was anachronistic: in the light of classical German philosophy's critique of metaphysics, metaphysical sources of law could no longer be invoked unproblematically; on the other hand, the positivist understanding of law prevailed, above all because the legitimising recourse to inaccessible sources of law – and Kant's categorical imperative is one such source – was paradoxically regarded as contrary to freedom. It is this sense that, in positivist law, even the explicitly non-negotiable concept of 'dignity' that is at the core of the German Constitution (*Grundgesetz*) must be capable of regular clarification by the courts (cf. Teifke 2011). It is true that in the field of human rights, especially in constitutional and international law, the content of natural law is often appealed to under the title of 'extra-positive law', which, according to its logical form, is a construct that comes into being through the negation of the positive (not positive, but extra-positive) and whose ground of validity cannot be further named. The handling of the contents of natural and rational law is here guided by pragmatism. This can be seen in particular in the broad normative reception of Kant's legal and moral theories, whose rigorism is to be mediated by everyday practice. In appeals to extra-positive law, neither a return to nor a preservation of natural law can be discerned. The expression 'extra-positive law' explicitly avoids naming the source of norms 'nature' or 'God' or 'reason'. In this way, extra-positive law tends to become a consensus (for example, of participating states), i.e., it is positive in its form. Even the positivisation of norms drawn from natural law does not represent a return to or preservation of natural law, because it then applies in the mode of positive law. And its most significant difference from natural law is that it can also be repealed by a legislative act. In this respect, law and nature move further and further apart in the history of positive law.

A contemporary alternative to natural law and positivism is the social-theoretical critique of the concrete social functions of law, which is based on the concept of autonomy in classical German philosophy – the subject's claim to self-determination – in which moments of freedom and moments of domination are interconnected (cf. Adorno 1966: 295–353). According to this view, bourgeois law is afflicted with contradictions from its very beginning: it is the historical form in which the natural freedom of the individual human being is socially unfolded for the first time. At the same time, human

beings are always regarded here as functionaries under social conditions that they themselves do not control. In order to judge modern law appropriately, its ideal foundations in natural law must be considered in relation to the results of its pragmatic adaptation to concrete social functions (cf. Bulthaup 1998).

The mainstream of modern legal theory, however, reacts affirmatively to positivism. The influential systems theory of Niklas Luhmann (1927–1998) sees itself as a non-normative theory, an observer position. Theory does not generate law, nor does it influence it. Law is generated by procedures that are themselves legally regulated (legislation, implementation of law, contracts, etc.). Thus, law continually generates itself, it becomes an autopoietic system, a system that relates to objects in its environment (system environment) through the application of immanent rules and thereby turns them into objects of law. Outside of law there is no law and within law there is nothing but law. Luhmann thus succeeds in giving a precise description of what law is today, but not a theoretical explanation of why law is the way it is. Nor does he claim to do so. In this respect, legal thinking has detached itself from the normativity that was handed down from natural law thinking.

Jürgen Habermas (born 1929) also rejects the objective, supra-factual claims to justification of natural law and the law of reason, but he also fears the consequence of a legal system that takes on a life of its own. He proposes reattaching the validity of law to intersubjective discourses of justification, without, of course, being able to justify their reliability.

The waning of reflected and normative human subjectivity in the understanding of law has many facets. The most extreme is the neo-naturalistic view of the human being, which has gained increasing influence in recent years: people are determined by their physical bodies, their so-called mind consists of neurophysiological reactions in the brain and the nervous system, and there is no freedom of the will. Experiments such as the Libet experiment seem to speak in favour of this, but only if one disregards their theoretical background, e.g. the intention of the experimenter, the goal-oriented elaboration of the question or hypothesis, the interpretation of the measured values in relation to this, and finally the conscious participation of the test persons. All this speaks against a naturalistic interpretation (cf. Zunke 2008; Falkenburg 2012). Neo naturalism in law assumes that although people have no free will, they can still be held responsible for actions. What it misses is that even if actions could ultimately be shown to be determined by scientific analysis, they are perceived as self-determined and free in the everyday perspective of experience, both immanently by the acting subject and externally by other subjects who observe the behaviour. In this inner and outer space of experience, action can also be controlled by sanctions, which is why it makes sense to speak of guilt and punishment (cf. Pauen/Roth 2008). Today's positivist understanding of law can certainly come to terms with this finding: The task of law is not to protect legal goods such as freedom, property or life, but to protect the validity of the norm. The law protects itself for the sake of social order and for this purpose may, indeed must, symbolically punish the de facto violator of norms, treat him or her as guilty, even if theoretically it remains unclear whether there is any culpability at all (cf. Merkel 2008). In a society in which people are largely dominated by material constraints and in fact lose control over their lives, such an understanding of law may seem self-evident.

However, the concept of nature on which neo-naturalism is based is, for all its neurophysiological subtlety, mechanistic, whereas the concept of nature in classical metaphysical natural law was an organic-teleological one (which, of course, was already rejected in early modern empiricism, which provides the epistemological foil for modern positivism). Because of their fundamentally mechanistic assumptions, positivism and neo-naturalism tend to dissolve the opposition between nature and law in favour of nature: The binding character of law is seen as if it were natural determinism. What was once an analogy in metaphysical natural law tends towards identification. The other side of the contrast, the difference between natural law and juridical law, which had been the necessary condition for not only describing the normativity of law, but for making the justified demand that it do justice to rational human freedom, is thus lost.

6. Conclusion

In summary, the development of the relationship between nature and law is the history of a continuous movement of separation. Although there are breaks and setbacks, as in every history, the becoming in-dependent of law is the

general tendency. In the beginning, as in human history in general, there is the immediacy of the embeddedness of human existence within natural contexts, which is successively conceptualised through reflection on and processing of nature. Human orders are distinguished from natural orders. This, of course, opens up the possibility of a rational organisation of social life as well as the possibility of arbitrary law-making. The problem of resorting to the immediacy of natural law from the standpoint of a reflective consciousness becomes a barrier to rational justifications of law. Yet the fact that in the history of natural law, insights worth considering have been gained, e.g. about human freedom, is increasingly being forgotten.

Basic Literature

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