# Kant's Possible Contribution to Natural Law Debates

by
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## I Introduction

Natural law is no doubt one of the most important issues in the history of humanity. As a philosophical concept, natural law is so subtle, vague, and controversial that even those who espouse it have failed to arrive at a common understanding of what it really is. Because of the many theoretical difficulties surrounding the subject, natural law has been repeatedly criticized, but the issues it presents keep returning, often with enhanced vigor. It is for this reason that people have spoken of an "invincible nostalgia"[1] or of the "eternal recurrence of natural law."[2]

As a philosophical issue, natural law can hardly be discussed without referring to the rival doctrine of positive law or legal positivism. Further complicating the problem is that, rather than being just a matter of theoretical dispute, the tug-of-war between natural and positive law has much to do with concrete mundane situations, including religious propensities and political climates. This paper makes no attempt to draw a balance sheet of all the pros and cons concerning natural law debates, which are in any case far too numerous to deal with. What we will do is to outline Kant's treatment of natural law in the hope of shedding light on some of the debates, the roots of which seem unclear even today.[3]

[1] See William A. Luijpen, *Phenomenology of Natural Law* (Pittsburgh: Duquesne University Press), 61f.

[2] Before his exile to the USA, Heinrich Rommen published a book in German in 1936 entitled *Die ewige Wiederkehr des Naturrrechts*. This book was later translated and published in English in 1947 as *The Natural Law*.

[3] This essay grew out of a paper presented at the "International Symposium on Kant's Moral Philosophy in Contemporary Perspectives," organized by the Institute of Foreign Philosophy and the Department of Philosophy, Peking University, and by the Goethe-Institut Peking.

## II Origin of the Issue: *Dikaion* as *Dichaion*

Historically speaking, the demarcation between natural and positive law can be traced back to Greek antiquity, namely, to the so-called Nomos-Physis distinction.[4] As one of the major conceptual demarcations in philosophy, the Nomos-Physis distinction has important bearings on a whole range of issues beyond that of law.[5] One other equally important area of application of the distinction, to mention in passing, lies in linguistics, namely in the issue concerning the correctness of the meaning of words, whether they rest upon the natural qualities of the verbal sounds or rather in conventions or norms.[6] In the context of law and jurisprudence, the issue lies with the problem of justice, which was in Greek antiquity a matter of the greatest concern both for philosophers such as Socrates and the Sophists, and for the tragic poets such as Sophocles (*Antigone*). And in parallel with the linguistic quest, the question being asked was simply: What is justice? Can its source be found in nature? Or is it just a matter of convention?

Before we embark upon the debate itself, let us explain what the issue is all about by throwing light on the central concept of "justice" (δικαιοσύνη). In the Greek language, the abstract noun δικαιοσύνη means right or righteousness, whereas the adjective δίκαιος is used to characterize people who are righteous in observing rules, duties, or laws (νόμος).[7] But what is right or righteous cannot be understood apart from what is wrong and malicious. This calls for a capacity to draw a dividing line, i.e., to distinguish right from wrong. To show that this is relevant, we should point out that in the Greek language the word δικαιοσύνη (justice) is etymologically related to the word δίχα, which means a "division into halves."[8] In fact, it was Aristotle who underlined this etymological relationship. In the *Nicomachean Ethics*, when talking about the principle of distributive justice, Aristotle suggested that

[4] See Felix Heinimann, *Nomos und Physis. Herkunft und Bedeutung einer Antithese im griechischen Denken des 5. Jahrhunderts* (Basel: Friedrich Reinhardt AG., 1945). Unlike mainstream opinion, Heinimann traced the origin of the Nomos-Physis distinction much further back than to the Sophists.

[5] Heinimann has addressed at least three other issues, namely, the doctrine of cultural development (*Kulturentwicklungslehren*), the theory of knowledge, and the philosophy of language. See *ibid*., 147ff.

[6] See Plato's *Cratylus* for a detailed discussion.

[7] See Liddel & Scott, *Greek English Dictionary* (Perseus); and Schenkl, *Griechisch-Deutsches Wörterbuch*.

[8] Compare the modern English word "dichotomy."

δίκαιον (that which is just) should in fact be spelt and understood as δίχαιον, which means simply "that which is in halves"; and that the judge (δικαστής) as the keeper of justice is in fact a "halver" (διχαστής).[9] Besides Greek etymology, this intrinsic relation between justice and dividing has left its trace even in modern German. The judge (*Richter*), the keeper of what is "right" (*richtig*, *recht*), is the one who makes the judgment (*Urteil*). And *Urteil* comes from the verb *urteilen*, which means literally "primal dividing." Besides the word *Richter*, a judge or magistrate, or a referee in sports can also be called a *Schiedsrichter*, which is the best testimony to the original correlation of dividing and justice. With this clarification, it becomes clear that the whole issue of δικαιοσύνη is one concerning justice as the capacity to tell or differentiate right from wrong. It is when dealing with this solemn issue that the generic Nomos-Physis distinction can be applied to provide two competing solutions to the quest for the source of justice—namely, positive and natural law.

With the above exposition, it becomes possible for us to point out below a few misconceptions that have burdened many discourses on the topic. Removing these misconceptions, or at least pointing them out, is of the utmost importance for our subsequent discussion.

1. Natural law has been given many names in European history: φύσει δίκαιον, *lex naturalis*, *ius naturae*, *l'ordre naturel*, *Naturrecht*, natural law, etc. Of all of these expressions, the term "natural law" in English (or similar structures) is conceptually in fact not a very good construction, because it leaves room for a number of serious misconceptions, for instance: a) "Law" is in fact another translation for "nomos," the rival idea to *physis* or nature. b) It is confused with the "scientific" conception of "law of nature."[10] With this remark I do not mean that natural law has nothing to do with the law of nature in the scientific sense. They are indeed related in a subtle manner, as will be pointed out later when we talk about Kant, but they are in the first place two different conceptions. c) More importantly, the term "natural law" blurs the direct relation between nature and justice,

[9] Aristotle, *Eth. Nic.*, Book 5, Ch. 9, 1132a. I am indebted to Vivienne Brown for drawing my attention to these etymological remarks of Aristotle. See her " 'Rights' in Aristotle's *Politics* and *Nicomachean Ethics*", *The Review of Metaphysics*, Vol. 55, No. 2, Issue 218 (2001), 269-294.

[10] English authors including John Locke and William Blackstone, for example, did use the term "law of nature" to mean what others call "natural law."

which is the center of the whole issue. In this light, the German expression of *Naturrecht* is much more accurate as a philosophical and jurisprudential notion.

2. Being an alternative answer to the quest for δικαιοσύνη, legal positivism also has to deal with the problem of justice.[11] However, we see that this baseline has constantly been queried by legal positivists, who have shown a tendency to separate law from morality. On the pretext of constructing what he called a "pure theory of law," Hans Kelsen, one of the leading legal positivists of the twentieth century, went so far as to identify justice and morality as "impure elements," which he tried with all his might to expel from his system of law. This is something I consider basically erroneous, not because it violates historical origins, but mainly because it puts the whole discipline of jurisprudence into question.
3. To prevent the intrinsic relevance of justice from becoming lost in legal discourses, it might be helpful to reformulate the distinction between natural and positive law simply as a distinction between "natural and positive justice."

## III The two levels of debate over natural law

As far as controversies over natural law are concerned, we can differentiate between two levels of debates. The first level is that of jurisprudence, and the second that of metaphysics. Instead of pretending to give another complete historical account of the debates involved, which would be too challenging a task to be accomplished in this short paper, what I will try to do is outline the two distinct levels and to point out the tension between them.

[11] In the *Rhetoric*, Aristotle differentiated under law (νόμος) that which is "particular" (ἴδιος) or law administered by a state on the one hand and that which is "common" (κοινός) or law "universally recognized" on the other [See Aristotle, *Rhetoric* (1368b3-10)]. Later on in the same work, he raised Antigone's burial of his brother as an example to show that it is common law that prevails over the particular law of a country. The reason for this was that while "particular laws are established by each people in reference to themselves," it is common law whose justice is "based upon nature" (κατὰ φύσιν; ὡς φύσει ὂν τοῦτο δίκαιον); and that all men divine or reckon (μαντεύονταί) with these various laws "even if there is neither communication nor agreement between them" [*Rhetoric* (1373b4-11)]. See also George B. Kerferd, *The Sophistic Movement* (Cambridge: Cambridge University Press, 1981), 113.

*a) Jurisprudential debates*

On the jurisprudential level, debates over natural law have to be understood with reference to and only in its relation to positive law, which humanity must have known ever since the beginning of human society. Legal positivism is basically a concept of social contract. In a society made up of finite individuals with all kinds of intentions, we need, pragmatically speaking, to enact a set of norms (by force if necessary) to maintain peace and order, and to regulate human encounters in different walks of life, including marriage and property; contract and tort, and so forth. Insofar as the enactment of law is necessary for everyday social coexistence, positive law should be given a certain pragmatic primacy over natural law.[12] It is therefore understandable that while some legal positivists would readily fancy the idea of doing away with natural law (with Kelsen's "pure theory of law" being the most extreme example), probably no natural law theorist could afford to undermine the importance of positive law without running the risk of seeing human society fall into disorder. So where does the need for natural law arise?

Given this practically incontestable primacy of positive law, we should never forget that lawmakers themselves are finite, fallible beings. We should also not forget that the enactment of laws itself is often bound up with contingent social factors such as group interests that might be religiously, sexually, or politically biased. The undeniable presence of such contingencies renders positive law as a source of justice always questionable. It is at this point that natural law acquires its foothold. What most or nearly all natural lawyers claimed was that, given the unavoidable shortcomings of positive law, we need to have a supposedly abiding, eternal principle of justice, i.e. natural law, to hold up as a "higher law" so that justice can still be arbitrated in the event legal positivity is questioned.

Unlike positive law, which can involve an elaborate system of law codes, this so-called "Higher Law" can only be a general principle for the arbitration of final justice. But despite its unavoidable vagueness and broadness, natural law has proven to be of the utmost importance both in history and in various legal and political settings of our time. Historically, natural law theory has left its trace in the refining of Roman law[13] as well as in the

[12] See Roger A. Shiner, *Norm and Nature. Movements of Legal Thought* (Oxford: Clarendon Press, 1992), 5-11, for further arguments.

[13] See Wolfgang G. Friedmann, *Legal Theory*, 5th Edition, 1953, 95-96; 101-103.

Anglo-American common law tradition.[14] It has influenced the outbreak of the French Revolution and the drafting of the American Constitution. Even today, there are many scenarios where a strong appeal to natural law can still be made: consider situations related to dictatorship, the tyranny of the majority, civil disobedience, abuse of laws and the constitution, basic human rights claims across borders, and even when reckoning with international justice. These are scenarios where the limits of legal positivism are most easily encountered.

Thus, while natural law is ready to concede *pragmatic primacy* to legal positivism, it claims in return, by presenting itself as a "higher law," its own *metaphysical primacy* over the latter. But in what way is natural law a "higher law"? Although natural law undoubtedly has a strong appeal, is it theoretically speaking a tenable concept? To answer these questions, we need to proceed to the metaphysical level of natural law debates.

*b) Metaphysical debates*

In the context of the philosophy of law, it is quite obvious that when "metaphysical status" is being queried, only natural law will be involved. Positive law, on the other hand, is largely empirical, which allows it to be easily exempted from such metaphysical queries. In fact, in jurisprudential debates, legal positivists always take advantage of this intrinsic weakness of natural law to keep claims to the latter at bay. For example, Kelsen, the leading legal positivist, was determined to liberate "the law from the metaphysical mist with which it has been covered at all times by the speculations on justice or by the doctrine of *ius naturae*."[15]

Thoughts about natural law in the West can be divided roughly in to pagan and Christian doctrines. But overall, Kelsen's complaint was not unfounded. In Greek mythology, the concept of justice (δικαιοσύνη) was personified as the goddess Dike, who through her retributive power (bestowed by Zeus)

[14] Blackstone (1723-1780), the key theoretician of British common law, wrote: "Man, considered as a creature, must necessarily be subject to the laws of his Creator […] it is necessary that he should […] conform to his Maker's will. This will of his Maker is called the Law of Nature. For as God, […] when he created man, and endued him with free-will to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that free-will is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws. […] Upon these two foundations, the law of nature and the law of revelation, depend all human laws." See Sir William Blackstone, *Commentaries on the Laws of England* (Boston: Beacon Press, 1962), Introduction Section 2, 39-43; cited by Wu, 188.

[15] See Kelson "Law, A Century of Progress", cited in G.W. Paton, *A Text-book of Jurisprudence*, 2nd edition (Oxford: Oxford University Press, 1951), 11.

watches over mankind holding everything in balance.[16] In answering the question of justice, Socrates suggested a deity (δαιμόνιον) that presents itself as an "inner voice"(φωνή), and it is this voice that keeps him from doing improper things at critical moments.[17] Similarly, Cicero suggested that natural law is "eternal and imperishable" and reigns "in all times and nations,"[18] and that it distinguishes right from wrong as if "nature herself has placed in our ears a power of judging."[19] In contrast to such quasi-mythological accounts the Stoics conceive of natural law as a moral order that prevails in nature, and this natural moral order is so universal that it should presumably be understandable by and therefore prescriptively binding for all men.

In the Christian era, the Stoic conception of natural law became Christianized. The natural order of the "law" was absorbed into divine providence, and the intelligibility of it dictated by divine revelation. For Paulus, natural law was simply "God's Law," which prevails like "a law written in the human heart…"[20] In the Middle Ages, Thomas Aquinas interpreted natural law as man's participation in the eternal law of God, where it also derives its source of eternal justice. Aquinas regarded natural law as known to all men, the basic precept of which is to do good and avoid evil.

Although natural law has been formulated in countless ways by pagans as well as Christians, its main tenets can be summarized in a few basic claims:

1. Natural law is an abiding principle of justice that prevails in nature that allows men to tell right from wrong.
2. Natural law is accessible to the human mind through the correct use of reason.
3. The validity of natural law is not bound to any particular legal system, but applies to all men under all circumstances, i.e., it is universally valid.
4. In the last analysis, all positive law systems derive their source of justice from the natural law.

[16] Hesiod, *Works and Days*, 248; *Theogony* 901 (Perseus Web, Tufts University).

[17] See Plato, *Apology* 31d, 40a, *Phaedrus*; Xenophon, *Memorabilia* I, 1, 4, etc.

[18] Cicero, *On the Commonwealth*, Book III, Ch. 22.

[19] See Cicero, *On Duties* (*De Officiis*) (Cambridge: Harvard University Press, Loeb edition, 1975), 61. This classical statement has been quoted in the following paper, the title of which includes the dictum itself: Hardley Arkes, "That 'Nature Herself Has Placed in our Ears a Power of Judging': Some Reflections on the 'Naturalism' of Cicero", *Natural Law Theory. Contemporary Essays*, edited by Robert P. George (Oxford: OUP, 1992), 245-277.

[20] *The Bible*, Romans, 2: 12-15.

From the Nomos-Physis distinction discussed above, we understand that natural law is an answer to the question of "justice." But if we look closer at the claims generalized above, it becomes clear that the greatest trouble about natural law theories lies in the difficulty they encounter in explaining the relation between justice and nature as two utterly different realms of discourses. This challenge becomes more pressing if we consider such questions as: Where does natural law derives its source of justice? How can justice be rooted in nature? How can the juxtaposition of natural and moral order be conceivable? Or, to put it in modern terms, how can the Ought be derived from the Is? Since these questions involve insurmountable metaphysical difficulties, believers in natural law have never found them easy to handle. With the rise of modern philosophy and modern science, the situation became even more unfavorable for natural law theory, since the power of faith is waning, and the idea of finality is increasingly being questioned.

Despite all of these theoretical impasses, natural law still plays a certain role in the legal profession, in academia, in politics, and even among laypeople, especially when there is a need to appeal to a "higher law" that would check legal positivism. Natural law is very much like mathematical theories, which are often put into practical application long before their principles have been proven. In other words, while theoretically questionable, natural law remains in practical demand. With so many metaphysically unsolved puzzles, natural law is like the "beloved one" depicted by Kant, with whom we have had a quarrel but to whom we shall always return.[21] To make sense of this discrepancy in the theoretical and practical reception of natural law, we shall turn to Kant for an in-depth explanation and justification.

## IV Kant's transformation of the natural law problematic

As far as terminology is concerned, natural law at first glance does not belong to the most important notions of Kant's system. But this is only a superficial judgment. Contemporary Kantian research has clearly shown that Kant was certainly aware of the whole advent of natural law theory from Grotius through Pufendorf and Wolff to Hutcheson. It has even been pointed out that, starting from the basic perception of man's "unsocial sociability,"

[21] See Immanuel Kant, *Kritik der reinen Vernunft*, A850/B878.

Kant's ethical and political writings can be understood as an attempt to deal with "the modern natural law problematic of conflict."[22]

Now, if natural law is an important issue for Kant, how much weight did he place on it? Before answering this question, we need to bear in mind that with Kant's severe criticism of traditional metaphysics, a "metaphysical" concept like natural law would definitely face a crisis. This was indeed the case. In fact, during the whole of the nineteenth century, natural law theories were in demise. So what did Kant do at this juncture? Did he bring an end to all discourses on natural law, or did he rather, through subtle means, bring about a transformation of the whole issue so that natural law discourses could have a new room for expression?[23] I am convinced that the answer lies in the second outcome. In the following, I will try to outline some hints from Kant's moral and legal doctrines to show how such a transformation has taken place.

*Kant's Concept of* Recht

In an earlier section, we underlined the view that law has to deal with the central concept of "justice" (δικαιοσύνη). This basic perception was fully endorsed by Kant. In the first part of his *Metaphysik der Sitten*, Kant assigned himself the job of furnishing a metaphysical treatment of the so-called *Rechtslehre,* which is in a sense a "doctrine of justice."

The German notion *Recht* here, being the common denominator of both *Naturrecht* and *das positive Recht* (natural and positive law), is much richer in meaning than the English word "law". First and foremost, *Recht* carries the connotation of *justice*,[24] or being right (as in "right and wrong") or correct (*richtig*); second, it can mean "right" in the sense of a justifiable claim, as in the phrase a "human right"; third, it can also be understood as "law" or *Gesetz* in German. In fact, regardless of whether the word *Recht* is

[22] See Jerome B. Schneewind, "Kant and Natural Law Ethics", *Ethics*, Vol. 104, No. 1 (Oct., 1993), 53-74; especially 59-60. In this paper, Schneewind also referred to Allen W. Wood's paper on "unsocial sociability."

[23] See Leonard Krieger, "Kant and the Crisis of Natural Law", *Journal of the History of Ideas*, Vol. 26, No. 2 (April-June, 1965), 191-210 for a similar argument.

[24] Of the various translators of Kant's *Metaphysik der Sitten*, John Ladd has favored the word justice as a rendering of *Recht* in German. To convince ourselves of the soundness of this translation, just consider that lawyer or *Rechtsanwalt* in German is "the one who readily enforces justice," and that in America, the federal government's legal department is called the Department of Justice.

used alone or in combined forms (e.g., *Naturrecht*[25]), all of these three senses are always implied, although this or that sense might be more decisive depending on the case. While this might seem quite confusing, there is one simple and "Kantian" way to show how these three seemingly disparate meanings can have coherence. The clue is that despite their superficial disparity, all three meanings converge insofar as they all have something to do with *man's* social coexistence with one another.[26] To put it more explicitly, *Recht* has to do with *justice* for this man or this sector of people; for this to take effect, certain *rights* of the individual or the sector have to be defended; and to uphold rights and justice we need a *law* that applies equally to all men.

In *Metaphysik der Sitten*, Kant first discussed the concept of *Recht* in some detail. Kant maintained at the outset that *Recht* as obligation has somehow a "corresponding" (*korrespondierend*) relationship with internal moral obligation, although *Recht* distinguishes itself through three major characteristics: First, *Recht* deals with those external and yet practical relations of one person with another. Second, *Recht* does not treat of the relation of one's Will (*Willkür*) to another's Wish, but that of one's Will to the Will of others, who compete with him on terms of equal status and footing. Third, *Recht* does not care about the material part of interpersonal relations, but only the formal part, namely with respect to whether the freedom of the Will of different persons can be united or compromised according to some universal law. Having explained this, Kant summarized his basic ideas into the following definition of *Recht*:

> Justice is therefore the aggregate of those conditions under which the will (*Willkür*) of one person can be conjoined with the will of another in accordance with a universal law of freedom.[27]

[25] Besides the basic term *Naturrecht*, Kant sometimes used "*das natürliche Recht*" or "*das natürliche Gesetz*" as alternatives, even when he is talking about *Naturrecht*.

[26] I am referring to Kant's making "What is man?" the fourth and most fundamental question that underlies the three cardinal questions raised in the *Kritik der reinen Vernunft*. For details see *Kant's Logik. Ein Handbuch zu Vorlesungen*, KGS Band IX, 25.

[27] *Metaphysik der Sitten*, 230. Translation by Ladd. "Das Recht ist also der Inbegriff der Bedingungen, unter denen die Willkür des einen mit der Willkür des anderen nach einem allgemeinen Gesetze der Freiheit zusammen vereinigt werden kann." This passage is difficult for the translator as well as the reader because of the simultaneous presence of two ambiguous and difficult terms: *Recht* and *Willkür*, which were translated differently by Mary Gregor as "Right" and "choice."

In this definition, *Recht* entails all three meanings explained above. *Recht* is nothing but the justice, the right, and/or the law that governs how a group of free people can possibly live together by each paying heed to the other's freedom.

*The Double Division of Rechte into* Naturrecht *and* das positive Recht, *and into Innate Right and Acquired Right*

With the concept of *Recht* explained, we can embark upon the important task of its "division" (*Einteilung*). Curiously enough, instead of simply making the classical distinction between natural and positive law, Kant introduced a two-fold division according to two different criteria, of which the classical division is only one. In view of the complicated nature of the text, I am quoting both common translations: [28]

> (1) [Justice in the sense of Law.] Law considered as a system [of laws] can be divided into natural Law, which rests on nothing but *a priori* principles, and positive (statutory) Law, which proceeds from the Will of a legislator. [Ladd]
>
> (2) [Justice in the sense in which it refers to rights.] Rights, considered as (moral) capacities to bind others, provide the lawful ground for binding others (*titulum*). The main division of rights is into innate rights and acquired rights. An innate right is one that belongs to everyone by nature, independently of any juridical act; an acquired right requires such an act. [Ladd]

> (1) As systematic *doctrines*, rights are divided into *natural right*, which rests only on *a priori* principles, and *positive* (statutory) *right*, which proceeds from the will of a legislator. [Gregor]
>
> (2) The highest division of rights, as (moral) *capacities* for putting others under obligations (i.e., as a lawful basis, *titulum*, for doing so), is the division into *innate* and *acquired* right. An innate right is that which belongs to everyone by nature, independently of any act that would establish a right; an acquired right is that for which such an act is required. [Gregor]

This pattern of division is so tricky that some exegesis is required:

[28] *Metaphysik der Sitten,* 237. Since both English translations (Ladd, Gregor) include the German KGS-pagination, their page numbers will not be quoted. In Ladd's translation, we see clearly how he finds the need to use the three meanings of justice, right, and law interchangeably to translate *Recht*.

a) In the above, we see clearly that Kant was using two different criteria for his division of *Rechte*. In his text, these two criteria are given as "systematic doctrines" and "putting others under obligations," respectively. We can call the first a *theoretical* criterion, which considers how the discipline of law should be classified theoretically regarding its source; and the second a *practical* criterion, which considers how *Rechte* (or right) can be defended in legal praxis, what to defend, and on what grounds to defend.
b) To Kant, the two divisions were of the highest ranking, i.e., one is not subordinated to the other. They are, in a sense, two divisions in parallel. But of greatest interest is that, after briefly naming the first (the traditional) division, Kant immediately switched all emphasis to the second division, which he later replaced with yet another equally practically oriented division of private and civil rights. But while doing this, Kant kept using the word *Naturrecht* intermittently to back up what he called "innate right"[29] or private right. In this way, Kant transformed the traditional problem of natural law into one of "innate right." And this whole tactic clearly shows that Kant was shifting the traditional issue of natural law from a theoretical to a practical standpoint.

Of the two divisions of *Rechte*, obviously, it was not the first but the second division upon which Kant came to focus. In the first division, Kant's characterization of positive law as proceeding from a legislator can easily be understood; but what did he mean when he said that natural law "rests only on a priori principles"? To fully answer this question, we need to tackle the problem from different angles, which we still have to cover one after the other, but let us first jump to the second division.

In his second division, Kant drew his distinction by treating *Recht* as the "capacities to oblige others." It is in this practical respect that Kant divided *Rechte* into "innate rights" (*angeborenes Recht*) and "acquired right" (*erworbenes Recht*). Under this new perspective, *Rechte* became literally "rights," which one can talk about defending or being infringed upon by others. We can summarize Kant's idea into the following:[30]

a) The innate rights of man can be understood as what is "internally mine and yours" as distinct from acquired rights, which deal with

[29] See Kant's wordings "...eine solche Einteilung in das System des Naturrechts (sofern es das angeborene angeht)..." *Metaphysik der Sitten*, 238.

[30] Unless otherwise cited, the following are summarized from *Metaphysik der Sitten*, 237-238.

what are "externally mine and yours." Note that "*Mein und Dein*" is a general expression that Kant used to depict "rights" from an interpersonal perspective. "Mine and yours" used in a multiple manner from various angles will cover society as a whole.

b) There is only one innate right, namely *freedom*. For Kant, man's freedom from bondage by others might not be a fact, but is therefore definitely a right.
c) Freedom as an innate right, or as what is internally mine and yours, "belongs," by default, to me, to you, and "to everyman by virtue of his humanity." This is a basic position already declared by Kant in his earlier doctrines of the person as an *end-in-itself* rather than as a *means*, and as having "intrinsic value" or "dignity" (*Würde*).[31]
d) Human freedom, considered socially in accordance with an *a priori* principle of coexistence or reciprocity, can only be a principle of equality (*Gleichheit*), or, as Kant elsewhere puts it, a matter of justice (*Gerechtigkeit*).[32]
e) Acquired rights arguably should fall under the domain of positive law.
f) Innate right (natural right) is singular and simple, but acquired rights are multiple and controversial, and are liable to be disputed. Should such disputes occur, Kant suggested that the defendant "who refuses to accept the obligation can appeal methodically to his innate right to freedom." In other words, innate right, despite its simplicity, is a last ground of appeal not to be legally violated. It is along this same line of thought that Kant elsewhere maintained that, "[i]n a society under a civil constitution, natural Law (that is, that kind of Law that can be derived for such a society from *a priori* principles) cannot be abrogated by the statutory laws of that society."[33]

In this way, if we follow Kant's way of thinking, natural law (in the form of innate right) has infiltrated not only into the enactment of positive law, but also into its ruling and application. This is also the reason why Kant sometimes used the word *Naturrecht* in a very broad sense so as to embrace the system of Law *in toto*.[34]

[31] *Grundlegung*, 434-435.

[32] *Metaphysik der Sitten*, 302.

[33] *Metaphysik der Sitten*, 256 (Ladd).

[34] *Metaphysik der Sitten*, 242. It is under this broad sense of *Naturrecht* that Kant made a further division into *natürliches Recht* (narrower sense) and *bürgerliches Recht*, a demarcation that he further explained to be one between "private right" (*Privatrecht*) and "civil right" (*öffentliches Recht*). But these are further technicalities that cannot be dealt with in this short paper.

*Convergence and divergence of the law of justice* (Rechtsgesetz) *with moral law (categorical imperative)*

Kant's concept of *Rechtsgesetz*, which he also depicts as a universal principle of justice, is the fountainhead of Kant's legal doctrine. Of the various translations of this cardinal concept, "law of justice" (Ladd) fits well with the German term, since *Rechtgesetz* is indeed a universal principle of inter-personal social living that covers both natural and positive law. Let us cite the *locus classicus* of *Rechtsgesetz*:

> Hence the universal law of justice is: act externally in such a way that the free use of your will is compatible with the freedom of everyone according to a universal law... [Ladd].[35]

We note immediately that this so-called *Rechtgesetz* can be obtained simply by turning the whole definition of *Recht* into a practical command or imperative. Furthermore, we can compare this law of justice with the moral law (or categorical imperative) put forward by Kant in his earlier ethical writings, namely:

> Act only on that maxim through which you can at the same time will that it should become a universal law [Paton] .[36]

As far as their verbal form is concerned, they both start with the wording "*Handle … so*," which clearly signals that both moral law and the law of justice have to do with obligations. But on top of this convergence, the two laws diverge again. While moral law is the universal principle of practical reason with respect to the *inner* selfgovernance (autonomy) of the agent (*Handelnden*), *Rechtsgesetz* is the universal principle governing men's behavior with respect to their *outer* actions (*Handlungen*) done to one another. In other words, while moral law obliges the agent internally to perform certain moral duties, the law of justice prescribes that one's free action should not infringe upon the freedom of others. While moral law pertains to the autonomy of the agent, the law of justice governs the action only, irrespective of the very incentive and intention of the agent himself.[37]

[35] *Metaphysik der Sitten*, 231. "Also ist das allgemeine Rechtsgesetz: Handle äußerlich so, daß der Idee der freier Gebrauch deiner Willkür mit der Freiheit von jedermann nach einem allgemeinen Gesetze zusammen bestehen könne... "

[36] *Grundlegung*, 421. "Handle nur nach derjenigen Maxime, durch die du zugleich wollen kannst, dass sie ein allgemeines Gesetze werde."

[37] For the contradistinction of the agent and the action, see Bernd Ludwig, *Kants Rechtslehre* (Hamburg: Felix Meier, 1988), 96.

Thus, in this sense, the two laws do point to two distinct spheres of human practice, morality and legality.

*Categorical imperative and the analogy of nature—natural law transformed*

The next important thing we should point out is that in his formulation of the categorical imperative, which is a principle of obligation or coercion applicable both to morality and law, Kant used *nature* as a symbol or an analogy to depict the universal necessity or lawfulness (*Gesetzlichkeit*) that one can expect of the imperative. This basic intention is so clear that we find expression of it in all three major works of Kant's practical philosophy.

1. *Groundwork of the Metaphysic of Morals*: It is well known that Kant has in the Groundwork provided us with a number of formulations of the categorical imperative, which according to Kant is the "general canon for all moral judgment of action."[38] In so doing, Kant employed various concepts to depict the humanistic and social nature of the imperative, including notions such as "end but not means," "kingdom of ends," and so forth. But the foremost formula of the imperative remains: "Act only on that maxim though which you can at the same time will that it should become a universal law."[39] Here, the most important task of the categorical imperative is that, as a principle of obligation, it should be able to necessitate universally. How can this be done? The answer to this question is that, Kant emphasizes a number of times and in various contexts that we should be able to conceive and treat such a practical law "as if" it is a "universal law of nature" (das allgemeine Naturgesetz).[40]
2. *Critique of Practical Reason*. In the Second Critique, a theoretical device similar to the above is the important doctrine of "typic" (Typik). "Typic" in the Second Critique is a section comparable to "Schematism" as expounded in the First Critique, since both deal with the concrete application of the power of judgment. In this section, Kant clarified the view that in exercising the practical law of freedom of action, "we are allowed to use the nature of the sensuous world as the

[38] *Grundlegung*, KGS-IV, 424

[39] *Grundlegung*, KGS-IV, 421.

[40] *Grundlegung*, KGS-IV, 421, 424, 431. This sentence in German is "Handle so, als ob die Maxime deiner Handlung durch deinen Willen *zum allgemeinen Naturgesetze* werden sollte." It should be noted that Kant even put the words "zum allgemeinen Naturgesetze" in bold letters.

type (Typus) of an intelligible nature."[41] Later on, Kant even described human reason as "having a right, and is even compelled" to use nature as such a type.

3. *Metaphysics of Morals*: After bringing forth the "principle of justice" (Rechtsgesetz) at the beginning of this work, Kant again resorted to using nature as an "analogy." Here, Kant even went one step further to use Newton's Third Law of action and reaction to explain the legal coercion demanded by the principle of justice. Thus: "The law of a reciprocal coercion necessarily in accord with the freedom of everyone under the principle of universal freedom is […] the presentation of it in pure intuition a priori, by analogy with presenting the possibility of bodies moving freely under the law of the equality of action and reaction."[42] On this occasion, Kant was not only referring to the "law of nature" in general, but even to some concrete scientific laws.

After citing in parallel all of the above passages, we need to ask the question: What is it all about? Why did Kant so strongly emphasize the notion of the "law of nature" (*das natürliche Gesetz*) when he was in fact talking about practical matters such as morality and law? For a suspicious reader, is Kant playing with some sort of "natural law theory"? For it seems obvious that, instead of the age-old concept of natural law, what Kant had in mind here is rather a natural scientific conception. But if this is the case, we can raise even more questions: Was Kant trying to blur the distinction between Is and Ought? Or was he trying to derive the Ought from the Is? While answering these questions, we touch upon one of the most central issues of this paper.

To go straight into the heart of the issue, let me point out that Kant's mention of "nature" or "law of nature" in his practical writings should not be understood as referring to physical nature as a fact or as an objective state of affairs. Rather, as the cited texts have clearly indicated, nature or "law of nature" was being used primarily as an "analogy"[43] or a "symbol."[44] What was being symbolized or hinted at analogically by Kant was nothing but

[41] *Kritik der praktischen Vernunft,* 124, Beck-72.

[42] *Metaphysik der Sitten*, 232. Although Kant did not mention Newton's name, the reference to the latter is very clear.

[43] *Grundlegung*, 431.

[44] *Kritik der praktischen Vernunf,* 125; Beck-73

nature's very "form of lawfulness in general," and not its content.[45] Or as Kant put it, "Maxims must be chosen as if they had to hold as universal laws of nature."[46] Here, nature is chosen as an analogy, precisely because nature and its laws objectively exhibit such universality and rigidity that no exceptions and compromises are allowed. This explains why Kant said the following in the "deduction" of the Second Critique:

> When the maxim according to which I intend to give testimony is tested by practical reason, I always inquire into what it should be if it were to hold as a universal law of nature. It is obvious that, in this way of looking at it, it would oblige everyone to truthfulness.[47]

Of course, Kant was not unaware of the fact that asking the moral person to will his moral maxims to be universally valid is one thing, but whether in real life he can or will remain consistent is quite another. In other words, Kant knew very well that, in the face of the self-imposed universal governance of the moral law, human individuals always fancy that they can somehow make "exceptions" for themselves, "even just for this once."[48] Instead of putting the moral imperative into difficulty, such seemingly contradictory intentions of the human agents allow us to grasp its very nature more precisely: namely, that moral law is after all only a command and not a "law" in the scientific sense. It has nothing to do with some "laws" in nature. It only borrows from the latter the very form of lawfulness that man's behavior precisely lacks. Kant does not derive the Ought from the Is because, for Kant, the Ought qua Ought is always self-imposed (selbstgesetzgebend),[49] and its universality, unlike real laws of nature, can always be violated in the real world.

Against this backdrop, we can point out one very interesting thing about moral law or the categorical imperative: Although a principle or an imperative bestowed with a claim to universality and necessity, the categorical imperative was nearly without exception formulated by Kant in the "subjunctive" mood. This applies to all Kantian texts. In German, this subjunctivization is expressed either directly with Konjunktiv-I verbs such as "sei," "könne," "werde," "gelte/gölte," etc., or indirectly with the famous Kantian

[45] *Kritik der praktischen Vernunft*, 124, Beck-73. "Form der Gesetzmäßigkeit überhaupt".

[46] *Grundlegung*, 436.

[47] *Kritik der praktischen Vernunft*, 75, Beck-45.

[48] *Grundlegung*, 424.

[49] *Grundlegung*, 431.

phrase "als ob" (as if). In English translations, this can often be recognized by the use of "if…would" structures.[50]

To Kant, although the universality of the moral law is established only through self-legislation (i.e., a self-imposed demand), this very universality should be considered binding on our actions just as the laws of nature are binding on natural events. This relation of the categorical imperative to the "laws of nature," besides being pertinent to Kant's moral theory itself, also indirectly explains why since antiquity the "natural law (justice)" was supposed to be rooted in nature or physis. From a Kantian point of view, the appeal to natural law, which in fact is an appeal to morality, shares with the latter the same analogy to nature with regard to its universality and lawfulness. In short, natural law is moral law externally transfigured; it is the moral law of human conduct in disguise.

### Willkür *and its Relevance for Morality and Law*

In the above we have embarked upon the notion of the subjunctivization of the categorical imperative. From the point of theory, this has an important bearing on morality as well as on law. The clue to this issue is as follows: Although Kant's pure ethics does rest on the self-governance or autonomy of human reason, this same reason is not the sole determinant of our actions. In parallel with reason, sensuous motives or inclinations are always in the background appealing to our lower faculty of desire, persuading man to deviate from the self-governance of his reason. To clarify this, we need to embark upon one of Kant's most difficult concepts, the *Willkür*.

The problem of *Willkür* in Kant is a complicated issue for three reasons. First, *Willkür* can very easily be mixed up with the other concept *Wille*, with both having multiple but sometimes confusing translations; second, in Kant *Willkür*, *Wille*, practical reason, and the faculty of desire are intimately related and, in a very subtle way, they can even be considered as overlapping, if not "numerically identical" concepts; third, the concept of *Willkür* has a history traceable back to the arbitrium (which Kant still used) of the Middle Ages (Aquinas and Augustinus), as well as to προαίρεσις in Aristotle.

Kant's thoughts about *Willkür* can be summarized as follows:[51]

[50] See Beck's translation of the *Second Critique*, 18, 72 …

[51] See *Metaphysik der Sitten*, 213; see also the table appended to the end of Kant's introduction to his *Kritik der Urteilskraft*. For details, see Tze-wan Kwan, "On Kant's Problem of *Willkür*", in: *Proceedings of the International Conference on the Role of Christian Higher Education in Asia*, Association of Christian Universities in Asia and the Tunghai University Press, Taichung, 1984.

a) *Willkür* and *Wille* are, in one way or another, the faculty of desire itself. Whereas *Wille* represents the faculty of desire supposedly purified through the self-legislation of practical reason, *Willkür* represents the same faculty in the crude and "ambivalent" sense of being originally susceptible to both the moral law and to sensuous inclinations; in other words, *Willkür* pertains to an original "choice (*Wahl*) between inclination and reason."[52]
b) Although morality is supposedly self-legislation through reason, reason, as we have pointed out, is not the sole determinant for human action. Besides reason, inclinations are equally powerful as a ground to determine our actions.
c) The original ambivalence of *Willkür* explains why the categorical imperative is always formulated subjunctively. It also explains why in Kant's definition of Recht or the Rechtsgesetz, it is the *Willkür* of men rather than their *Wille* that counts.
d) For Kant, "Man is […] neither actively nor passively determined."[53] By the same token, human *Willkür* is neither holy nor brutal (as *arbitrium brutum*), but literally a mixed *Willkür*. To put it in another way: *Willkür* is neither positively determined to be holy (angelic) nor negatively to be sensuous, which renders morality either unnecessary or impossible.
e) The original ambivalence of *Willkür* does not entail two disparately unconnected options for action (moral control or sensuous indulgence), i.e., it does not entail an "indifference" of the *Willkür*. On the contrary, as Kant firmly underlined, "only freedom with regard to the inner legislation of reason is really a power," whereas "the possibility of deviating from legislative reason is a lack of power."[54]
f) Moral deeds taken as *officium* (duty) should no doubt be the outcomes necessitated by the universality of the categorical imperative; but human deeds as *factum* were for Kant merely a "certain degree of preponderance (*Übergewicht*) of the reason over the sensibility."[55] Kant also indicated that: "All stimuli of the sensuous *Willkür* cannot render the active in man passive. Yet the obere *Willkür* decides itself,

[52] *Reflexionen zur Metaphysik*, Refl.4222, *KGS*, Band XVII, 463, translation by the author.
[53] *Reflexionen zur Metaphysik*, Refl.4227. *KGS*, Band XVII, 466.
[54] *Metaphysik der Sitten*, 226.
[55] *Reflexionen zur Metaphysik*, Refl.4227. *KGS*, Band XVII, 466.

why it in one occasion decides for sensibility and in another occasion for reason. No law is obtainable as regards such a decision, because there is no fixed law governing the two forces."[56]

g) All of the above is in line with Kant's well-known notion of the "fact of reason" (*Faktum der Vernunft*),[57] which means nothing but man's undeniable (*unleugbar*) consciousness of the possibility of self-restraint. With this, Kant deprived all men of the chance to use "moral incompetence" as an excuse or as a disclaimer for one's own wrongs. It is also for this reason that all human actions are morally imputable and at times even legally accountable.[58]

h) It is ideal to have *Wille* (Willkür or the faculty of desire fully rationalized) take charge of one's morality, but there is no guarantee of this (Willkür not being positively determined). This is where internal morality finds its limit, and where the need for external law and sanctions comes in.[59] We have shown above that because of the fact of reason, one cannot excuse oneself for being immoral. But the next question is: Moral and legal duties are not exactly the same; would immorality immediately make one liable to legal responsibility? If there should be some relation between morality and legality, where does the borderline between them lie?

*Legal Duties versus Moral Duties:*
*The Continuum between Legality and Morality*

For Kant, the relation between legal duties (*Rechtspflichten*) and moral duties (*Tugendpflichten*) should be explained with at least four distinct but related demarcations of duties in general:[60] first, whether they are duties to one's self or to others; second, whether the duties are "internal" or "external"; third, whether they are "perfect" or "imperfect"; and, fourth, whether we do something "according to duty" or "from duty." With these distinctions in mind we can explain the differences between legal and moral duties as follows:

[56] *Reflexionen zur Metaphysik*, Refl.4226. *KGS*, Band XVII, 465-466.

[57] *Kritik der praktischen Vernunft*, 55, Beck-44.

[58] This is in line with Hart's position in *Punishment and Responsibility*.

[59] It should be added that other practical issues such as religion also play a role here.

[60] Besides these four, Kant made further demarcations of duties in other contexts.

Under duties in general, Kant usually started with the distinction between duties to oneself and duties to others.[61] Legal duties, insofar as they are bound to be legally observed in relation to others, are "perfect duties" (*vollkommene Pflicht*). Such duties are those external duties that the law requires someone to perform. Such duties, if violated, are punishable. If someone performs such duties solely out of legal reasons, he performs this "according to duty" (*pflichtgemäß*). Moral duties to others, on the other hand, insofar as they are not legally binding, are "imperfect duties" (*unvollkommene Pflicht);*[62] such duties are not "required" in the strict sense, but are praiseworthy if fulfilled, because they are performed morally through the agent's internal self-determination, or, as Kant used to describe, they are done "from duty" (*aus Pflicht*). It is also along this line of thought that Kant distinguished the concept of obligation (*Verbindlichkeit*) into legal and moral ones. While legal obligation is considered "narrow" (*eng*), moral obligation is "wide" (*weit*) and meritorious (*verdienstlich*).[63]

To Kant, legal and moral duties were separate realms that did not necessarily have to be mixed up. However, this does not mean that Kant believed that moral and legal duties cannot overlap. What does this mean? Was Kant not blurring the distinction between law and morality?

To answer this question, we must remind ourselves that Kant indeed considered law and morality as having distinctly different ways of legislation (*Gesetzgebung*), namely external legislation in law, but internal or self-legislation in morality. While law is heteronomy, morality is autonomy simpliciter. But while law and morality belong to two different realms, they are not without connection. As we have shown above, for Kant, positive law cannot violate natural law (in the sense of innate right), and innate right in the sense of social equality rests in the last analysis on moral principles such as human dignity and the person as an end-in-itself. In other words, although law and morality constitute two realms of discourse, they do intersect with

[61] Under duties to oneself, Kant further differentiated those that are "perfect" (i.e., binding) from those that are "imperfect." Perfect duties to oneself include not killing oneself or abusing one's body with drunkenness and gluttony or by putrefying one's soul by lying, avarice, etc. Imperfect duties to oneself include developing one's aptitudes. These and other duties will not be discussed in this paper. Please refer to *Metaphysik der Sitten*, 421f, 444ff, 448ff.

[62] In fact, Kant's full position was that while we can readily talk about perfect moral duties (like refraining from committing suicide or lying), it is only moral duties which can be "imperfect duties"; legal duties, on the other hand, are without exception "perfect duties." See *Metaphysik der Sitten*, 390. "Die unvollkommen Pflichten sind also allein Tugendpflichten."

[63] *Metaphysik der Sitten*, 390; *Grundlegung*, 418, 424.

each other, forming a continuum of human practice, which Kant tactfully circumscribed with the following dictum in the section on the "Division of a Metaphysics of Morals":

> Ethical lawgiving [legislation] (even if the duties might be external) is that which cannot be external; juridical lawgiving is that which can also be external.[64]

This short but lapidary passage of Kant is very subtle in meaning, but I hope the following exegesis will make it clearer: As a moral agent, or at least as one who can not renounce his own humanity, man has to fulfill both internal as well as external (legal) duties. The former is not legally required, but is a result of the moral agent's autonomy (internal legislation) and benevolence, which is praiseworthy. On the other hand, although law (or legality) is basically a matter of external legislation, it is not incompatible with the internal legislation of morality, and indeed it would even be ideal if legality and morality could match. The key to such a possibility lies in the agent's "respect for the law" (*Achtung fürs Recht*)[65] and in his making the law of justice the incentive (*Triebfeder*) of his very action. While performing the latter (legal duties), instead of just blindly following external laws, the moral agent can, as long as he is sure that these laws will not collide with man's innate rights (freedom and equality), internalize them by paying respect to the law and readily making this an incentive of his own deeds. In so doing, he renders his obedience of external laws compatible with his own autonomy. Combining the two words "*pflichtgemäß*" and "*aus Pflicht*," Kant characterized this scenario with the so-called universal ethical command: "Act in conformity with duty from duty" (*Handle pflichtmässig aus Pflicht*).[66] But in case this ideal situation is not attainable, the law will have to stand with an iron face to enforce through external legislation and sanctions that minimal justice that is the condition for peaceful coexistence between man and man, based on the principles of equality and justice.

[64] *Metaphysik der Sitten*, 220.

[65] *Metaphysik der Sitten*, 390, 394. "Respect for the law," externally applied, is completely in line with L. H. A. Hart's recognition of social norms and obligations as pertaining to the "primary element" of the legal system.

[66] *Metaphysik der Sitten*, 391. Note that *pflichtmässig* and *pflichtgemäß* are semantically identical.

## V Natural Law from the Other Angle

The problem raised of old concerning the source of justice is still far from having been settled. A clear indication of this is that, with respect to the rule of law, the Western world is still divided into Anglo-American common law on the one hand and Roman-Continental civil law on the other—not to mention other prevailing systems of law including the Islamic, the Socialist, and the traditional Chinese legal systems. Common law, which is accumulated from case to case by the judge taking note of decisions of the jury (common people), is more or less based on natural law. Continental civil law, on the other hand, which is mainly codified by the state, shows a much stronger trait of legal positivism. However, as many jurists have pointed out, even in the course of the development of positive law, say, in the processes of the "reenactment" of the law, the role played by natural law as a directive force is undeniable.[67]

Regarding legal positivism, the common understanding was that it derives its source from conventions (*nomoi*); however, even legal positivists themselves debate the exact meaning of "convention."[68] John Austin, a forerunner of modern legal positivism, considered law to be the totality of coercive commands laid down by the sovereign, who can exercise sanctions upon his subjects for not observing it. For Austin, as well as for Bentham, legality had to be separated from moral values, a thesis still defended by Kelsen.

According to Kelsen, the major purpose of law is to provide a body of coercive rules that works consistently; and law needs to be objective for it to work. To Kelsen, only positive law provides us with the kind of objectivity that allows us to make objective decisions. It is for this reason that Kelsen was determined to separate law and morality and also why he wanted to exclude even the concept of justice from his pure theory of law.

Kelsen's position was so extreme that even fellow positivists of his time showed signs of disapproving, including Hart, another leading (analytical) legal positivist who critically developed Kelsen's view.[69] Hart criticized

[67] Friedmann, 153.

[68] See H. L. A. Hart, *The Concept of Law* (Oxford: OUP, 1979 [1961]), notes to Chapter IX, 253.

[69] For Hart's relation to Kelsen, see Norberto Bobbio and Danilo Zolo, "Hans Kelsen, the Theory of Law and the International Legal System—A Talk", in *European Journal of International Law* 9/2 (1998). Available online at http://www.ejil.org/journal/Vol9/No2/art8.html (February 2008).

Kelsen's pure theory of law as being overly harsh, and as undermining the importance of the legitimacy and social acceptance of the law. In fact, as history and common sense have taught us, if a set of norms is to become generally acceptable and functional, in the long run lawmakers have to make the norms as objective and unbiased as possible. That is why the figure of the blindfolded goddess Dike eventually evolved as a symbol of positive law. It is along this line of thought that Hart readmitted social morality and some "minimal" and empirically based natural law elements into legal discourses.[70]

Norberto Bobbio, now a leading legal positivist in Europe, attacked and discredited what he called "the positivist ideology of the primacy of the law of the state," which is central to Kelsen's theory. Bobbio also admitted that one major and grave difficulty of Kelsen was his overemphasis on public power at the expense of personal freedom.[71] It is obvious that Kant would have subscribed to Bobbio's critique given his own notion of innate rights as nothing but human freedom.

In fact, even without Bobbio's critique, we already find in Kelsen's later involvement in international law signs of self-reappraisal. Being a logically minded legal positivist, Kelsen proposed a kind of "international law monism," which treats international law as a supra-national law. For Kelsen, this "monistic" view of international law does not mean that national law should be deprived of its content—becoming "null". Rather, it only means that it has to be "annullable," and to be annulled in case it violates international law.[72] Having banished natural law decisively from his "pure theory of law," in his later discourses on international law Kelsen reintroduced the element of "international morality," which is undeniably reminiscent of natural law thinking. Many jurists believe that it is when Kelsen discusses international law that "the ghost of natural law" seems to have crept in.[73]

[70] See H. L. A. Hart, *The Concept of Law* (Oxford: OUP, 1961), especially Chapter IX, sections 1 and 2.

[71] Bobbio's interview with Danilo Zolo, op. cit.

[72] Hans Kelsen, *The Pure Theory of Law* (transl.) Max Knight (Berkeley/Los Angelos: University of California Press, 1970), chapter on "State and International Law", 333ff, especially 342. For more discussion on this topic, see *European Journal of International Law* 9/2 (1998), which is a special issue on the topic "The European Tradition in International Law: Hans Kelsen."

[73] See G. W. Paton, *A Text-book of Jurisprudence*, op. cit., 92.

Ronald Dworkin, successor to Hart's chair at Oxford, resumed the debate over law and morality. In face of the strong urge in the positivistic tradition to separate law from morality, Dworkin repeatedly emphasized that jurists do "worry about what law should be." Dworkin considers law to be made up not only of rules but also of principles, including moral principles, so that even law itself should have in a sense moral integrity. To Dworkin, the philosophy of law is unavoidably parasitic upon the philosophy of ethics, mind, action, and politics; and he thinks that the practice of law should by no means be separated from the philosophy of law, which he depicts as "itself the nerve of legal reasoning."[74]

Having briefly recapitulated these developments, we see clearly that after more than two millennia of debates, the confrontation between natural law theory and legal positivism continues. But it is important to note once again that, in all of these debates, it was always the positivists who wanted to get rid of the natural law theorists, not vice versa. While the positivists always fancy that they can do without natural law (although in reality they hardly can), the natural law theorists know too well that positive law is always indispensable, because the higher justice upheld by natural law always needs positive law for its reincarnation.[75]

## Conclusion: Kant's relevance for Jurisprudence

Before ending this paper, we need to resume the question: What can we learn from Kant? Or, to put it differently, how can Kant's transformation of natural law theory have contemporary relevance?

While the quarrel between natural law theorists and legal positivists is traceable back to early antiquity, the overall trend of the debate over the past two centuries is on the whole to the advantage of the latter camp. Yet immediately after the Second World War, the natural law camp showed signs of being revived in Germany. This was of course a result of the debasing experience of uncontrolled legal positivism under Nazi rule, which rekindled

[74] For all this, see Dworkin's introduction to the anthology *The Philosophy of Law* edited by him for the Oxford Readings in Philosophy series (Oxford: Oxford University Press, 1977), 1.

[75] To know more about how natural law theorists defend themselves and what stance they have taken on legal positivism, see the interesting work of Charles Covell, *The Defense of Natural Law* (London: St. Martin's Press, 1992). In this book, Covell has given a clear account of the views of Fuller, Oakeshot, Hayek, Dworkin, and Finnis.

the need of old for humanity to have a "higher law" as a check and balance. It was along this line of thought that Gustav Radbruch, a positivist before the war, became a herald of this movement of revival with the publication of his famous essay "Legal Injustice and Supra-legal Justice" (*Gesetzliches Unrecht und übergesetzliches Recht*).[76]

For Kant, natural law in the sense of innate right is nothing but the freedom of man as a social being among fellow partners whose freedom should be mutually respected, based on the principle of equality. This basic legal and political thinking is rooted in, and indeed reinforced by, Kant's moral ideas such as human dignity, persons as ends rather than means, and human society as a kingdom of ends, etc. Although notionally different from moral law, in Kant natural law is rooted in the former, constituting some sort of pact or continuum.

In an earlier paragraph we delineated a number of intrinsic metaphysical difficulties of the doctrine of natural law. We raised the query: How can justice be derived from nature? Kant's answer was straightforward: Natural law, in a pact with moral law, does not derive its source from Nature; it only borrows its form of lawfulness. For Kant, man does not derive the Ought from the Is, but posits the Ought himself through self-legislation. With his epoch-making *Kritizismus* as a backdrop, Kant tactfully reinstated the importance of natural law without risking falling into the metaphysical traps he himself had criticized. For this, Ernst Bloch paid Kant the highest tribute. In his book *Natural Law and Human Dignity*, Bloch credited Kant for screening out all "methodological impurities" of natural law discourses by calling for a "deduction" or "founding of the determining ground of natural law in an *a priori* principle," which is not solely a principle of individual freedom, but one of "general freedom as a principle of any possible human coexistence."[77] This exactly is what Kant's *Rechtsgesetz* has taught us.

For Kant, natural law is not man-made in the same sense as positive law, but it is still demanded or self-posited by man himself, with nature taken as

[76] *Süddeutsche Juristenzeitung* (August 1946); reprinted in Gustav Radbruch, *Rechtsphilosophie* (Stuttgart: Koehler, 1956); cited in Friedmann, op. cit., 155. Radbruch's paper aroused another round of jurisprudential debates between Lon Fuller and H. L. A. Hart on whether an unjust law should be challenged.

[77] Ernst Bloch, "Kant's and Fichte's Natural Law without Nature", *Natural Law and Human Dignity*, translated by Dennis J. Schmidt (Cambridge/London: The MIT Press, 1986), 66-75; especially 67-68. This book of Bloch was originally published in 1961 as *Naturrecht und menschliche Würde*. (Frankfurt-Main, Suhrkamp). Please note the title of the chapter, which is already extremely telling.

its model of analogy. By redefining natural law together with moral law (or the categorical imperative) as a self-imposed law analogous to the lawfulness of the law of nature, Kant indirectly explained how the very idea of natural law came about in the history of humanity. More importantly, through the demystification of the notion of natural law, Kant allowed humanity to reinstate natural law as a higher order of justice, which we can rightfully claim. In other words: Robbed of its divinely "natural" mantle, natural law is brought back to a defensible stance, namely as a practically meaningful and useful notion demanded by man himself.

Regarding natural law in general, Kant's contribution to the jurisprudential level of the debate might appear to be indirect and marginal, but his contribution to its metaphysical level is direct and essential. By cutting the Gordian Knot, which for millennia has tied up the problematic of natural law, Kant's contribution to jurisprudence in general should not be undermined.

By shifting his emphasis from theory to praxis, Kant demonstrated that natural law is a theoretical concept that is not as such demonstrable, but which is an indispensable postulate if higher justice is to be made pragmatically conceivable. Having clarified this, Kant and his successors have no need to wait for the existence of natural law to be proven before they can ask for social justice as if such a law prevails. Kant's account of legal philosophy might be inadequate to cope with the complexities of contemporary legal matters. But notwithstanding such unavoidable asynchronicity of the Kantian doctrine, the legal profession nowadays, in point of the ultimate source of the law, obviously still has something crucial to learn from Kant.

Through Kant, the very idea of natural law, freed from two millennia of metaphysical mist, experienced a transfiguration. For some, it might still appear too high-sounding.[78] But it is precisely what we need in a world of physical nature, of empirical facts and, at times, of insane rule and international terror. It seems that, instead of being a matter of theory, natural law functions rather as a perennially available practical option for all men; as the

[78] Wolfgang Friedmann, a famous jurist, once remarked that "Kant's legal philosophy is entirely a theory of what the law ought to be." He also complained that Kant did not take full note of the discrepancy between the law that is and the law that ought to be, so that his legal philosophy is one "of the philosopher, not of a lawyer." This kind of remark is not surprising, as it does reflect the way an average legal positivist would look at Kant. See Friedmann, *Legal Theory*, 5th edition (London: Stevens & Sons, 1967), 159. Friedman was a Barrister-at-Law of the Middle Temple, a Professor of International Law at Columbia University, as well as the namesake of the Wolfgang Friedmann Memorial Award for International Law at Columbia.

hallmark of the "supersensible substrate of humanity," natural law provides for us a regulative force that propels us to strive for a better way of life that we merit as a being of dignity—as was hinted by Goethe's word…

> He who shies away from the idea
> finally does not even have the concept.
>
> (Wer sich vor der Idee scheut,
> hat auch zuletzt den Begriff nicht mehr.)

## Postscript

This essay, which was drafted four years ago but only recently finalized, is dedicated to Gerhold Becker as a token of gratitude for our many years of friendship. Gerhold belongs to the very few friends of mine in Hong Kong to whom I can speak German. More importantly, Gerhold was for me always an enlightening partner in scholarly discussion, someone who shared many of my intellectual interests but knew better and more. In fact many writing projects of mine have benefited from hours of stimulating discussion with him, this paper being only another example. I still remember how we, besides our regular but not all too frequent meetings with each other, often talked over the phone for an hour or more discussing different aspects of philosophical and technical issues. It was in such a way that Gerhold's erudition and insights have left a mark in my own modest intellectual endeavors. Once over a glass of wine at Gerhold's place, I told him out of gratitude how lucky I felt that after the completion of my doctoral studies in Germany, I found in him "a piece of Germany in Hong Kong" (Du bist für mich wie ein Stück Deutschland in Hong Kong). Upon hearing this, Gerhold replied that this remark applied to him in exactly the same spirit…

And this same conversation resounded happily between us, time and again, until Gerhold's retirement. My dear friend, Hong Kong will miss you.