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From Studies in Philosophy, Politics, and Economics

CHAPTER SIX

The Results of Human Action but not of Human Design[*1]

The belief in the superiority of deliberate design and planning over the spontaneous forces of society enters European thought explicitly only through the rationalist constructivism of Descartes. But it has its sources in a much older erroneous dichotomy which derives from the ancient Greeks and still forms the greatest obstacle to a proper understanding of the distinct task of both social theory and social policy. This is the misleading division of all phenomena into those which are 'natural' and those which are 'artificial'.[2] Already the sophists of the fifth century B.C. had struggled with the problem and stated it as the false alternative that institutions and practices must be either due to nature (*physei*) or due to convention (*thesei* or *nomō*); and through Aristotle's adoption of this division it has become an integral part of European thought.

It is misleading, however, because those terms make it possible to include a large and distinct group of phenomena either under the one or the other of the two terms, according as to which of two possible definitions is adopted that were never clearly distinguished and are to the present day constantly confused. Those terms could be used to describe either the contrast between something which was independent

* A French translation of this essay was published in: *Les Fondements Philosophiques des Systèmes Economiques*. Textes de Jacques Rueff et essais rédigés en son honneur., Paris 1967.

[1] Adam Ferguson, *An Essay on the History of Civil Society*, London, 1767, p. 187: 'Nations stumble upon establishments, which are indeed the result of human action, but not the execution of any human design.' Ferguson refers in this connection to the *Mémoires du Cardinal de Retz*, presumably the reference (ed. Paris, 1820, Vol. II, p. 497) to President de Bellievre's statement that Cromwell once told him that 'on ne montait jamais si haut que quand on ne sait où l'on va.'

[2] Cf. F. Heinimann, *Nomos und Physis*, Basel, 1945.

of human action and something which was the result of human action or to describe the contrast between something which had come about without, and something which had come about as a result of, human design. This double meaning made it possible to represent all those institutions which in the eighteenth century Adam Ferguson at last clearly singled out as due to human action but not to human design either as natural or as conventional according as one or the other of these distinctions was adopted. Most thinkers, however, appear to have been hardly aware that there were two different distinctions possible.

Neither the Greeks of the fifth century B.C. nor their successors for the next two thousand years developed a systematic social theory which explicitly dealt with those unintended consequences of human action and accounted for the manner in which an order or regularity could form itself among those actions which none of the acting persons had intended. It therefore never became clear that what was really required was a threefold division which inserted between the phenomena which were natural in the sense that they were wholly independent of human action, and those which were artificial or conventional[3] in the sense that they were the product of human design, a distinct middle category comprising those unintended patterns and regularities which we find to exist in human society and which it is the task of social theory to explain. We still suffer, however, from the lack of a generally accepted term to describe this class of phenomena; and to avoid continuing confusion it seems to be urgently necessary that one should be adopted. Unfortunately the most obvious term which should be available for that purpose, namely 'social', has by a curious development come to mean almost the opposite of what is wanted: as a result of the personification of society consequent on the very failure to recognize it as a spontaneous order, the word 'social' has come to be generally used to describe the aims of deliberate concerted action. And the new term 'societal' which, conscious of the difficulty, some sociologists have attempted to introduce appears to have small prospect of establishing itself to fill that urgent need.[4]

It is important to remember, however, that up to the appearance of modern social theory in the eighteenth century, the only generally

[3] The ambiguity of the term 'conventional', which may refer either to explicit agreement or to habitual practices and their results, has further contributed to enhance the confusion.

[4] See F. Stuart Chapin, *Cultural Change*, New York, 1928 and M. Mandelbaum, 'Societal Facts' in Patrick Gardiner, ed. *Theories of History*, London, 1959. The term 'cultural' which social anthropologists have adopted as a technical term to describe these phenomena will hardly do for general usage, since most people would hesitate to include, e.g., cannibalism under 'cultural' institutions.

understood term through which it could be expressed that certain observed regularities in human affairs were not the product of design was the term 'natural'. And, indeed, until the rationalist reinterpretation of the law of nature in the seventeenth century, the term 'natural' was used to describe an orderliness or regularity that was not the product of deliberate human will. Together with 'organism' it was one of the two terms generally understood to refer to the spontaneously grown in contrast to the invented or designed. Its use in this sense had been inherited from the stoic philosophy, had been revived in the twelfth century,[5] and it was finally under its flag that the late Spanish Schoolmen developed the foundations of the genesis and functioning of spontaneously formed social institutions.[6]

It was through asking how things would have developed if no deliberate acts of legislation had ever intertered that successively all the problems of social and particularly economic theory emerged. In the seventeenth century, however, this older natural law tradition was submerged by another and very different one, a view which in the spirit of the then rising constructivist rationalism interpreted the 'natural' as the product of designing reason.[7] It was finally in reaction to this Cartesian rationalism that the British moral philosophers of the eighteenth century, starting from the theory of the common law as much as

[5] Cf. particularly the account in Sten Gagnér, *Studien zur Ideengeschichte der Gesetzgebung*, Uppsala, 1960, pp. 225–40 of the work of Guillaume des Conches, especially the passage quoted p. 231: 'Et est positiva que est ab hominibus inventa. . . . Naturalis vero que non est homine inventa.'

[6] See particularly Luis Molina, *De iustitia et iure*, Cologne, 1596–1600, esp. tom. II, disp. 347, No. 3, where he says of natural price that 'naturale dicitur, quoniam et ipsis rebus, seclusa quacumque humana lege eo decreto consurgit, dependetur tamen a multis circumstantiis, quibus variatur, atque ab hominum affectu, ac aestimatione, comparatione diversum usum, interdum pro solo hominum beneplacito et arbitrio'. In an interesting but unpublished doctoral thesis of Harvard University, W. S. Joyce, *The Economics of Louis de Molina*, 1948 (p. 2 of the Appendix 'Molina on Natural Law'), the author rightly says that 'Molina explains that unlike positive law, natural law is "de objecto"—an untranslatable but very handy scholastic term which means very much "in the nature of the case"—because from the very nature of the thing (*ex ipsamet natura rei*) it follows that, for the preservation of virtue or the avoiding of vice, that action should be commanded or forbidden, which the natural law commands or forbids. "Hence," Molina continues, "what is commanded or forbidden results from the nature of the case and not from the arbitrary will (*ex voluntate et libito*) of the legislator."

[7] The change in the meaning of the concept of reason which this transition involves is clearly shown by a passage in John Locke's early *Essays on the Law of Nature* (ed. by W. von Leyden, Oxford, 1954, p. 111) in which he explains that 'By reason, however, I do not think is meant here that faculty of the understanding which forms trains of thought and deduces proofs, but certain definite principles of action from which spring all virtues and whatever is necessary for the proper moulding of morals.' Cf. also *ibid.*, p. 149: 'For right reason of this sort is nothing but the law of nature itself already known.'

from that of the law of nature, built up a social theory which ma
undesigned results of individual action its central object, and in
cular provided a comprehensive theory of the spontaneous order
market.

There can be little question that the author to whom more than
other this 'anti-rationalist' reaction is due was Bernard Mand
But the full development comes only with Montesquieu[9] and partic
with David Hume,[10] Josiah Tucker, Adam Ferguson, and Adam
The uncomprehending ridicule later poured on the latter's expres
the 'invisible hand' by which 'man is led to promote an end which
part of his intention',[11] however, once more submerged this pro
insight into the object of all social theory, and it was not until a c
later that Carl Menger at last resuscitated it in a form which no

[8] The basic idea is already contained in many passages of the original poems especially

The worst of all the multitude
Did something for the common good,

but the fully developed conception occurs only in the second part of the prose com added more than twenty years later to *The Fable of the Bees* (see ed. by F. B. Kaye, 1924, Vol. II, esp. pp. 142, 287–8, and 349–50 and compare Chiaki Nishiyama, *T of Self-Love. An Essay in the Methodology of the Social Sciences, etc.*, Chicago Ph.D. the 1960—esp. for the relation of Mandeville's theories to Menger's).

[9] On the influence of Mandeville on Montesquieu see J. Dedieu, *Montesqu Tradition Politique Anglaise*, Paris, 1909.

[10] David Hume, *Works*, ed. by T. H. Green and T. H. Grose, Vol. I and II, *A T Human Nature*, Vol. III and IV, *Essays, Moral, Political, and Literary*, esp. II, p. vantageous to the public though it be not intended for that purpose by the invent III, p. 99: 'if the particular checks and controls, provided by the constitution . . . not the interest, even of bad men, to act for the public good'; as well as II, p. 289 to do a service to another without bearing him a real kindness'; and II, p. 195: institutions arise merely from the necessity of human society.' It is interesting to the terminological difficulties into which Hume is led because, as a result of his op to contemporary natural law doctrines, he has chosen to describe as 'artifact', 'arti 'artificial' precisely what the older natural law theorists had described as 'natural' II, p. 258: 'where an invention is obvious and absolutely necessary, it may as pro said to be natural as anything that proceeds immediately from original principles; the intervention of thought and reflection. Though the rules of justice be *artificial* not *arbitrary*. Nor is the expression improper to call them *Laws of Nature*; if by na understand what is common to any species, or even if we confine it to mean wh separable from the species.' Cf. my essay on 'The Legal and Political Philosophy Hume', reprinted in this volume. Professor Bruno Leoni has drawn my attention t that Hume's use of 'artificial' in this connection derives probably from Edwar conception of law as 'artificial reason' which is of course closer to the meaning scholastics had given to 'natural' than to the usual meaning of 'artificial'.

[11] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1 IV, ii, ed. E. Cannan, London, 1904, Vol. I, p. 421.

another eighty years later, seems to have become widely accepted,[12] at least within the field of social theory proper.

There was perhaps some excuse for the revulsion against Smith's formula because he may have seemed to treat it as too obvious that the order which formed itself spontaneously was also the best order possible. His implied assumption, however, that the extensive division of labour of a complex society from which we all profited could only have been brought about by spontaneous ordering forces and not by design was largely justified. At any rate, neither Smith nor any other reputable author I know has ever maintained that there existed some original harmony of interests irrespective of those grown institutions. What they did maintain, and what one of Smith's contemporaries, indeed, expressed much more clearly than Smith himself ever did, was that institutions had developed by a process of the elimination of the less effective which did bring about a reconciliation of the divergent interests. Josiah Tucker's claim was not that 'the universal mover of human nature, self love' always did receive, but that 'it may receive such a direction in this

[12] Carl Menger, *Untersuchungen über die Methode der Socialwissenschaften und der Politischen Ökonomie insbesondere*, Leipzig, 1883, p. 182: 'die unbeabsichtigte Resultante individueller, d.i. individuellen Interessen verfolgender Bestrebungen der Volksglieder . . . die unbeabsichtigte sociale Resultante individuell teleologischer Faktoren' (in the English translation of this work by F. J. Nock, ed. by L. Schneider, *Problems of Economics and Sociology*, Urbana, 1963, p. 158). The more recent revival of this conception seems to date from my own article on 'Scientism and the Study of Society', *Economica*, N. S. IX/35, August 1942, p. 276 (in the reprint in *The Counter-Revolution of Science*, Glencoe, Ill., 1952, p. 25) where I argued that the aim of social studies is 'to explain the unintended or undesigned results of many men'. From this it appears to have been adopted by Karl Popper, 'The Poverty of Historicism', *Economica*, N. S. XI/3, August 1944, p. 122 (in the book edition, London, 1957, p. 65), where he speaks of 'the undesigned results of human action' and adds in a note that 'undesigned social institutions may emerge as *unintended consequences of rational actions*'; as well as in *The Open Society and its Enemies*, 4th ed., Princeton, 1962, Vol. II, p. 93, where he speaks of 'the indirect, the unintended and often the unwanted by-products of such actions' (i.e., 'conscious and intentional human actions'). (I cannot agree, however, with the statement, *ibid.*, p. 323, based on a suggestion of Karl Polanyi, that 'it was Marx who first conceived social theory as the study of the *unwanted social repercussions of nearly all our actions*'. The idea was clearly expressed by Adam Ferguson and Adam Smith, to mention only the authors to whom Marx was unquestionably indebted.) The conception is also used (though perhaps not adopted) by Ernest Nagel, 'Problems of Concept and Theory Formation in the Social Sciences', in *Science, Language and Human Rights* (American Philosophical Association, Eastern Division, Vol. 1), Philadelphia, 1952, p. 54, where he says that 'social phenomena are indeed not generally the intended results of individual actions; nevertheless the central task of social science is the explanation of phenomena as the unintended outcome of springs of action'. Similar though not identical is K. R. Merton's conception of 'The unanticipated consequences of purposive social action' (see his article under that title in *American Sociological Review*, 1936, and the further discussion in *Social Theory and Social Structure*, rev. ed. Glencoe, Ill., 1957, pp. 61–2).

case (as in all others) as to promote the public interest by those effor shall make towards pursuing its own.'[13]

The point in this which was long not fully understood until at Carl Menger explained it clearly, was that the problem of the origi formation and that of the manner of functioning of social institut was essentially the same: the institutions did develop in a particular because the co-ordination of the actions of the parts which they sec proved more effective than the alternative institutions with which had competed and which they had displaced. The theory of evolutio traditions and habits which made the formation of spontaneous or possible stands therefore in a close relation to the theory of evolutio the particular kinds of spontaneous orders which we call organisms, has in fact provided the essential concepts on which the latter built.[14]

But if in the theoretical social sciences these insights appear at la have firmly established themselves, another branch of knowledg much greater practical influence, jurisprudence, is still almost wh unaffected by it. The philosophy dominant in this field, legal positiv still clings to the essentially anthropomorphic view which regard rules of justice as the product of deliberate invention or design, and prides itself to have at last escaped from all influence of that 'm physical' conception of 'natural law' from the pursuit of which, a have seen, all theoretical understanding of social phenomena spri This may be accounted for by the fact that the natural law con against which modern jurisprudence reacted was the perverted ration conception which interpreted the law of nature as the deductive structions of 'natural reason' rather than as the undesigned outcome process of growth in which the test of what is justice was not anybo arbitrary will but compatibility with a whole system of inherited partly inarticulated rules. Yet the fear of contamination by what regarded as a metaphysical conception has not only driven legal th into much more unscientific fictions, but these fictions have in e

[13] Josiah Tucker, *The Elements of Commerce* (1756), reprinted in *Josiah Tucker: A Se from his Economic and Political Writings*, ed. R. L. Schuyler, New York, 1931, p. 59. C my *Individualism and Economic Order*, London and Chicago, 1948, p. 7.

[14] Carl Menger, *l.c.*, p. 88: 'Dieses genetische Element ist untrennbar von de theoretischer Wissenschaften'; also C. Nishiyama, *l.c.* It is interesting to compare this the insight from the biological field stressed by L. von Bertalanffy, *Problems of Life*, York, 1952, p. 134: 'What are called structures are slow processes of long dur functions are quick processes of short duration. If we say that a function such as a traction of a muscle is performed by a structure, it means that a quick and short pro wave is superimposed on a long-lasting and slowly running wave.'

deprived law of all that connection with justice which made it an intelligible instrument for the inducement of a spontaneous order.

The whole conception, however, that law is only what a legislator has willed and that the existence of law presupposes a previous articulation of the will of a legislator is both factually false and cannot even be consistently put into practice. Law is not only much older than legislation or even an organized state: the whole authority of the legislator and of the state derives from pre-existing conceptions of justice, and no system of articulated law can be applied except within a framework of generally recognized but often unarticulated rules of justice.[15] There never has been and there never can be a 'gap-less' (*lückenlos*) system of formulated rules. Not only does all made law *aim* at justice and *not create* justice, not only has no made law ever succeeded in replacing all the already recognized rules of justice which it presupposes or even succeeded in dispensing with explicit references to such unarticulated conceptions of justice; but the whole process of development, change and interpretation of law would become wholly unintelligible if we closed our eyes to the existence of a framework of such unarticulated rules from which the articulated law receives its meaning.[16] The whole of this positivist conception of law derives from that factually untrue anthropomorphic interpretation of grown institutions as the product of design which we owe to constructivist rationalism.

The most serious effect of the dominance of that view has been that it leads necessarily to the destruction of all belief in a justice which can be found and not merely decreed by the will of a legislator. If law is wholly the product of deliberate design, whatever the designer decrees to be law is just by definition and unjust law becomes a contradiction in terms.[17] The will of the duly authorized legislator is then wholly unfettered and guided solely by his concrete interests. As the most consistent representative of contemporary legal positivism has put it, 'From the point of view of rational cognition, there are only interests of human beings and hence conflicts of interests. The solution of these conflicts

[15] Cf. Paulus (*Dig.* 50.17.1) 'non ex regula ius sumatur, sed ex iure quod est regula fiat'; and Accursius (Gloss 9 to *Dig.* I.1.1.pr.) 'Est autem ius a iustitia, sicut a matre sua, ergo prius fuit iustitia quam ius.'

[16] Cf. H. Kantorowicz, *The Definition of Law*, ed. A. H. Campbell, London, 1958, p. 35: 'The whole history of legal science, particularly the work of the Italian glossators and the German pandectists, would become unintelligible if law were to be considered as a body of commands of a sovereign.'

[17] Cf. T. Hobbes, *Leviathan*, Ch. 30, ed. M. Oakeshott, London, 1946, p. 227: 'no law can be unjust.'

can be brought about either by satisfying one interest at the expe
another, or by a compromise between the conflicting interests.'[18]

All that is proved by this argument, however, is that the approa
rationalist constructivism cannot arrive at any criterion of justice.
realize that law is never wholly the product of design but is judge
tested within a framework of rules of justice which nobody has inv
and which guided people's thinking and actions even before those
were ever expressed in words, we obtain, though not a positive, yet
negative criterion of justice which enables us, by progressively elir
ing all rules which are incompatible with the rest of the syst
gradually to approach (though perhaps never to reach) absolute just
This means that those who endeavoured to discover something
urally' (i.e., undesignedly) given were nearer the truth and therefore
'scientific' than those who insisted that all law had been set ('posite
the deliberate will of men. The task of applying the insight of
theory to the understanding of law has, however, yet to be accompl
after a century of the dominance of positivism has almost entirely
erated what had already been accomplished in this direction.

Because there has been a period in which those insights of social t
had begun to affect legal theory; Savigny and his older historical sc
largely based on the conception of a grown order elaborated b
Scottish philosophers of the eighteenth century, continued their e
in what we now call social anthropology and even appear to have
the main channel through which those ideas reached Carl Menge
made the revival of their conceptions possible.[21] That in this re

[18] Hans Kelsen, *What is Justice?*, University of California Press, 1960, pp. 21–2.

[19] On the problem of compatibility of the several rules as test, see now the inte
studies by Jurgen von Kempski, collected in *Recht und Politik*, Stuttgart, 1965, a
essay 'Grundlegung zu einer Strukturtheorie des Rechts', *Abhandlungen der Geis*
Sozialwissenschaftlichen Klasse der Akademie der Wissenschaften und der Literatur in Mai
1961, No. 2.

[20] The conception of a negative test of the justice of legal rules (essentially of the
which the legal philosophy of I. Kant aimed) which would enable us continuously to ap
justice by eliminating all inconsistencies or incompatibilities from the whole body
of justice, of which at any one time a large part is always the common and und
possession of the members of a given civilization, is one of the central points of a b
which I am at present working.

[21] For the channels through which the ideas of Burke (and through Burke, t
David Hume) appear to have reached Savigny see H. Ahrens, *Die Rechtsphilosophie*
Naturrecht, 4th ed. Wien, 1854, p. 64. This book was probably also one of Carl M
first sources of information. On Savigny and his school, cf. also the acute observat
E. Ehrlich, *Juristische Logik*, Tübingen, 1918, p. 84: 'Burke, Savigny und Puch
verstehen, was immer verkannt wird, unter Volk oder Nation dasselbe, was wir h
Gesellschaft im Gegensatz zum Staate bezeichnen, allerdings in nationaler Begrenzur
Sir Frederick Pollock, *Oxford Lectures and Other Discourses*, London, 1890, pp. 41–

Savigny continued or resumed the aim of the older natural law theorists has been concealed by his rightly directing his argument against the rationalist natural law theories of the seventeenth and eighteenth centuries. But though he thereby helped to discredit that conception of natural law, his whole concern had been to discover how law had arisen largely without design, and even to demonstrate that it was impossible by design adequately to replace the outcome of such natural growth. The natural law which he opposed was not the natural law to be discovered but the natural law which was deductively derived from natural reason.

But if for the older historical school, though they spurned the word 'natural', law and justice were still given objects to be discovered and explained, the whole idea of law as something objectively given was abandoned by positivism, according to which it was regarded as wholly the product of the deliberate will of the legislator. The positivists no longer understood that something might be objectively given although it was not part of material nature but a result of men's actions; and that law indeed could be an object for a science only in so far as at least part of it was given independently of any particular human will: it led to the paradox of a science which explicitly denied that it had an object.[22] Because, if 'there can be no law without a legislative act',[23] there may arise problems for psychology or sociology but not for a science of law.

The attitude found its expression in the slogan which governed the whole positivist period: that 'what man has made he can also alter to suit his desires'. This is, however, a complete *non-sequitur* if 'made' is understood to include what has arisen from man's actions without his design. This whole belief, of which legal positivism is but a particular form, is entirely a product of that Cartesian constructivism which must deny that there are rules of justice to be discovered because it has no

doctrine of evolution is nothing else than the historical method applied to the facts of nature, the historical method is nothing else than the doctrine of evolution applied to human societies and institutions. When Charles Darwin created the philosophy of natural history (. . .), he was working in the same spirit and towards the same ends as the great publicists who, heeding his fields of labour as little as he heeded theirs, had laid in the patient study of historical facts the bases of a solid and rational philosophy of politics and law. Savigny, whom we do not yet know and honour enough, or our own Burke, whom we know and honour but cannot honour too much, were Darwinians before Darwin. In some measure the same may be said of the great Frenchman Montesquieu, whose unequal but illuminating genius was lost in a generation of formalists.' The claim to have been 'Darwinians before Darwin' was, however, first advanced by the theorists of language (see August Schleicher, *Die Darwinsche Theorie und die Sprachwissenschaft*, Weimar, 1869, and Max Müller, 'Lectures on Mr. Darwin's Philosophy of Language', *Frazer's Magazine*, Vol. VII, 1873, p. 662) from whom Pollock seems to have borrowed the phrase.

[22] Cf. Leonard Nelson, *Rechtswissenschaft ohne Recht*, Leipzig, 1917.

[23] John Austin, *Jurisprudence*, third edition, London, 1872, p. 555.

room for anything which is 'the result of human action but not of human design' and therefore no place for social theory. While on the whole we have now successfully expelled this influence from the theoretical sciences of society—and had to, to make them possible—the conceptions which today guide legal theory and legislation still belong almost wholly to this pre-scientific approach. And though it was French social scientists who earlier than others had clearly seen that from the famous *Discours de la Méthode* 'il était sorti autant de déraison sociale et d'aberrations métaphysiques, d'abstractions et d'utopies, que de données positives, que s'il menait à Comte il avait aussi mené à Rousseau',[24] it would seem at least to the outsider that in France, even more than elsewhere, law is still under its influence.

SUPPLEMENTARY NOTES

1. Sten Gagnér, *Studien zur Ideengeschichte der Gesetzgebung*, Uppsala 1960, pp. 208 and 242, shows that the terms 'natural law' and 'positive law' derive from the introduction by Gellius in the second century A.D. of the latin adjectives *naturalis* and *positivus* to render the meaning of the Greek nouns *physis* and *thesis*. This indicates that the whole confusion involved in the dispute between legal positivism and the theories of the law of nature traces back directly to the false dichotomy here discussed, since it should be obvious that systems of legal rules (and therefore also the individual rules which have meaning only as part of such a system) belong to those cultural phenomena which are 'the result of human action but not of human design'. See on this also chapter 4 above.

2. Herr Christoph Eucken has drawn my attention to the fact that the contrast that is drawn in the opening sentence of Herodotus' *Histories* between what has arisen from [the actions of] men (*ta genomena ex anthrōpōn*) and their great and astounding works (*erga megala kai thōmasta*) suggests that he was more aware of the distinction here made than was true of many of the later ancient Greeks.

[24] Albert Sorel, 'Comment j'ai lu la "Réforme Sociale",' *Réforme Sociale*, 1st November, 1906, p. 614, quoted by A. Schatz, *L'individualisme économique et sociale*, Paris, 1907, p. 41, which together with H. Michel, *L'Idée de l'Etat*, 3rd ed., Paris, 1898, is most instructive on this influence of Cartesianism on French social thought.