

ON THE ORIGINS AND GROWTH OF LAW AND MORALS

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1. Preliminaries

Human conduct, politics and social life generally are, or are at least commonly claimed to be, governed by all sorts of rules and norms, by more or less binding customs and mores, legal procedures, rights and duties, as well as by ethical imperatives and moral prescriptions. These constitute, it is said, the fabric of civilized society, and the foundation of order, peace, and security in human affairs. Where they are absent, on the other hand, society is bound to degenerate into a nasty and brutish state of nature, as would seem to be characteristic of much of international life, at least at first blush.

In this article I shall enquire into whence this complex, to be provisionally subsumed under the heading 'law and morals', originates; what causes it to evolve and grow and what renders it effective in regulating man's affairs — if at all. But before proceeding any further it is well to briefly pause in order to consider which problems can be, and have been, but will not here be, raised with respect to the phenomena under discussion. Such a delineation and definition of problems is all the more necessary as we are dealing with matters both 'factual' and 'normative', always providing excellent opportunities for disastrous misunderstandings. Also, one would expect, and from a brief perusal of the relevant literature it would indeed seem to be the case, that the problem to which I will address myself here would have occupied the center of attention of legal theorists, as well as the historians and philosophers of law. Closer scrutiny reveals, though, that this is not really so, and it is important to see where the present analysis is to differ from theirs.

Too much ink has already been spilt over what amounts to but very little more than a logical trifle, *viz.* that one cannot derive a 'normative' proposition, one which tells us what we *ought to do*,

from a purely 'factual' one, merely telling us what *is the case*. It is rather trite in the sense that, as a matter of elementary logic, one can only derive a statement about something, 'X', or of the sort 'X', from *other* statements about 'X', or of the sort 'X'. So, if one wishes to derive, or 'prove' a normative statement, one can do so only from other normative statements, the (normative) axioms or postulates of the argument or theory¹.

Now one of the difficulties of our subject is precisely that it seems to 'mix' these two sorts of statements or modes of analysis. For law and morals, in the wide sense of those words already indicated, are naturally and inevitably of a *normative* nature. They are concerned with what people *ought* to do or not to do in certain situations. But *our* problem here is of a purely '*factual*' nature: *the actual occurrence and evolution of these normative phenomena*. This does not make our enquiry a normative one. For we are not concerned with *judging* the quality of the law and morals studied, that is, with saying which laws or morals were better or worse than others, which should or should rather not exist.

Neither will this 'factual' enquiry detract from the essentially normative nature of the subject. For, clearly, investigating the actual occurrence and evolution of law and morals does not at all imply the conclusion that they were nothing but observed behavioural regularities — as 'realistic' theorists and philosophers sometimes seem close to maintaining². Law and morals, while being of a normative nature, are yet to be investigated like any other empirically existing phenomenon.

By the same token we will not be concerned here with what seems to make up the bulk of the legal and moral philosophers' writings: such questions as 'When is a rule, command, norm or law deserving of respect and obedience?', or 'When ought a law or a moral rule be followed?', 'What to do when norms, rules or laws seem to conflict?', 'Whence do legal or moral obligations, rights or duties, derive?', etcetera. These and similar questions are again of an essentially normative character. They are concerned with the ethical or legal sources of law and morals, their evaluation and justification, but not with what makes them occur and 'work' effectively in *actual fact*.

It is with such 'actual fact' *i.e.*, with law and morals as they actually exist and grow in human societies, too, that the legal or moral historian is concerned. And surely their work is an indispensable source of facts or empirical observations for the theoretician. While it cannot be said that theories are *built from* such observations, these do pose the problems to be solved by the

theorist, thus stimulating his creativity; and, not least importantly, they constitute the supreme instance controlling the adequacy and validity of the theoretical imagination. Typically, however, the historian seeks to *describe* the actual occurrence of law and morals and their historical development, refraining from *explaining why* they so occurred and grew. And inasmuch as he does attempt to answer the latter questions he tends to limit himself to rather partial, informal, and incidental explanations in terms of the immediate and clearly "visible" historical circumstances. But he does not ordinarily seek to unravel the general mechanisms underlying historical occurrences and their evolution, and to view these as but particular instances of more general phenomena and developments. It is precisely this, on the other hand, which will interest us in the present article, that is, the general dynamics of legal and moral development.

This way of putting the problem, however, immediately raises another preliminary question, namely: What exactly is a legal or moral rule, taking them again in the very wide sense indicated? Are we to concern ourselves with the rule as formulated or enunciated by lawgiver, judge, scholar, or moralist, or with the rule as it manifests itself in actual human behaviour? As we are basically interested in the regulation of actual human affairs, the *prima facie* answer should seemingly be that we ought to study the rule as manifested in actual behaviour. The rule would then be reduced to a mere empirical behavioural regularity, however. And from such behavioural regularities one cannot conclude that some rule exists: regularities may be caused by all sorts of other things. A mere study of actual conduct and interaction will not reveal the law or morals of society³. And if one would seek the characteristic feature of such rules in the fact that the conduct in question calls forth a certain probability of a sanction, as does *Geiger*, then one ought to recognize that almost all interactions are characterized by some such probability⁴: In a sense, as we shall see below, threats or promises of (negative) sanctions or rewards, respectively, constitute the essential mechanism of interaction and politics generally.

If, on the other hand, one should turn one's attention to the rule as formulated, one must recognize that it does not necessarily mean very much as far as actual conduct is concerned. The formulation or enunciation of a rule may be governed by quite different considerations than the control of behaviour. Perhaps it is merely to cloak such behaviour in a garb of respectability, to provide a legitimation or justification for it without it being in the least meant to be taken seriously. At any rate, many laws and moral rules, both nationally and internationally, even though formally established and

accepted are nevertheless far from effective. And the study of *such* laws and morals does not produce much insight into the actual regulation of human affairs. Besides, one may well doubt whether a rule need always to be explicitly formulated in order to exist: behaviour can be judged, sanctions can be provided, against the background of a standard or model of behaviour which, although not formulated and openly acknowledged, yet functions effectively in this normative capacity.

It would seem, then, that it is not a matter of choosing between real alternatives: studying the rule either as manifested in actual behaviour, or as explicitly enunciated. Surely, we are to be concerned with actual behaviour and interaction, but against the background of some standard or model acting as a norm, which, however, need not even be explicitly formulated. And while we are interested above all in how the rule effectively regulates conduct and interaction, about which its formulation and enunciation do not tell us very much, yet are we to recognize that such formulation and enunciation may represent a not unimportant stage in the growth of the rule and from which independent effects may flow.

These preliminary considerations bring us quite close to the matter of the definition of law and morals; and a more precise definition of our subject-matter would perhaps be the natural thing to expect at this place. However, as a merely terminological convention a definition is to function within, and derives its actual significance from, an empirical *theory*, that is, ultimately, a matter of axioms or postulates, laws or hypotheses, about empirical phenomena. As a consequence, there is no sense in trying to define our subject when we do not yet know in what theory, or in conjunction with what empirical axioms, this definition is to function. Our first task, then, is to provide that theory, or at the very least to sketch its outlines.

As law and morals are concerned with the regulation of human action and interaction, it is first of all a theory about *these* phenomena which we need, and from which or upon which a theory about laws and morals is to be constructed. Accordingly, it is with the theory of action and interaction, of behaviour and political process, that we shall be concerned in the next section (2). In section (3) we shall then proceed to define the subject of our enquiry. Section (4) will be devoted to the analysis of what makes law and morals effective in regulating human affairs as well as to the problem of legal decisions and proceedings. The next section (5) will then investigate how law and morals emerge and grow, and what governs their evolution. Section (6), finally, will conclude with some brief observations on the related topic of institutionalisation and integration.

2 *Essentials of human action and interaction.*

2.1. *On human behaviour*

*Human behaviour, any behaviour, will here be defined to be the selection of one alternative course of action from among a set of such alternatives in a particular situation*⁵. It is not necessary that the individual be aware of his choosing, that he be or feel free in doing so, or that he knows the alternatives before him⁶. After all, this conception of behaviour is not meant to *describe* what goes on in the acting individual's head, and neither is it meant to exclude coercion — a rather important and extended class of actions! It is nothing more nor less than a construction made by and for the *investigator* so devised that *he* is able to explain some individual's behaviour — regardless of the latter's own ideas on the matter.

The next problem before us is such action's *explanation*, *i.e.*, to say or predict why, which alternative from a given set of such alternatives in a given situation the individual will actually choose, or, rather, to predict the (relative) probability of the several alternatives' being selected.

It will be assumed, then, that *the probabilities of such alternative actions are to be explained by their relative 'attractiveness' or 'utility' as 'assessed' by the individual in question.* More specifically it will be assumed that an action's probability is proportional to that attractiveness or utility. Again, such 'estimates', 'assessments', or 'appreciations' do not necessarily imply consciousness, knowledge, or awareness — even though our ordinary language, heavily laden with precisely such notions, makes it hard to avoid some such impression. As a consequence there is nothing typically 'rational' about such behaviour, setting it off against some other sort of supposedly 'non-rational' behaviour, an idea of which rather much is made in the contemporary political and economic literature. Here we will have to deal with any sort of behaviour, 'rational', 'irrational' or 'non-rational', 'self-interested' or 'altruistic', 'healthy' or 'perverse', 'social' as well as non-social' or 'anti-social'. We will have to start from the individual as we find him in actual fact, stupid, ignorant, dangerous, and irascible though he may be; from the alternatives as they exist for him, *i.e.*, from the situation as defined, even though perhaps wrongly or inadequately, by him; and from *his* 'notions' of attractiveness or utility, even though they be queer, self-destructive, or perverse, and as they are revealed by his behaviour.

Now all this does not yet tell us very much. For the attractiveness or utility of the alternatives still remains in the dark. Some light at

least is shed upon this matter by an additional and slightly more complicated axiom relating an action's utility to (i) the individual's *preferences* with respect to the outcomes, events or occurrences 'expected' to be associated with or to follow from the action in question (including, of course, the pains or pleasures inherent in performance itself); and (ii) the *likelihood* with which such outcomes are expected to occur. As follows : (1) if we prefer such an outcome to occur rather than not occur, *i.e.*, when it is a *benefit* to us, then an action's utility (and, therefore, probability) increases with our *preference for it as well as with the likelihood with which we expect it to happen*; (2) if, on the other hand, the outcome or event in question is a *sacrifice* or a *cost* to us, that is, when we prefer it not to occur rather than to occur, *then the action's utility decreases with decreases in our preference for it, as well as with increases in its expected likelihood*. In other words : *the greater and the more probable the benefit, the greater utility and the action's probability will be, whereas a greater and more probable sacrifice implies a lower utility or a greater disutility*. Thus, to the extent that I value money and (a higher) monetary remuneration results more certainly from working, my working, or doing a particular job becomes more probable — as against stealing or begging, for instance. On the other hand, the heavier and the more likely the punishments meted out on my stealing the less likely such stealing will become. Of course, there will normally be attached more than one outcome to any course of action, and its actual utility will be made up of a balance among all such individually and often conflictingly computed utilities. But we need not here go into these matters.

2.2. A brief note on human learning

All this explains human behaviour *given the individual's relevant preference and probability 'judgments'*. But except by way of example nothing substantive has been said about these. In view of the infinite variety and variability of human taste and expectations, and of the fact that these will much depend upon actual circumstances, there can be no question of exhaustively enumerating the preferences and expectations actually guiding human conduct⁷. Instead a hypothesis or axiom about the formation and adoption of such 'judgments' in actual circumstances will be introduced here, explaining at least part of the relevant processes.

It will be assumed, then, that *people will come to prefer things and events to the extent that they 'expect' them to aid in, or conduce to (to be 'instrumental' to) the realisation or acquisition of*

*other outcomes which they did already value, positively or negatively*⁸. The advantages of this hypothesis are clear enough. For while it tells us something about the formation of preferences in all people and all circumstances, *it does so without having to stipulate any concrete preferences*, merely assuming that there will be such. It allows us to derive preferences with respect to new or unfamiliar outcomes in new or unfamiliar circumstances, and to take account of changes in circumstances which are instrumental in bringing about changes in the relative order of preferences.

In particular, if one could identify certain outcomes thus being instrumental to *every* other valued outcome, one could indeed derive certain general preferences. Such would indeed seem to be the case with respect to things like 'resources' or 'energy' (human, non-human, or mental) and 'position', (strategic, political, etc.) as these may be argued to be essential to the realization of every other outcome. Thus, every action may reasonably be supported to consume energy or resources; and the better one's position, the higher one's chances of success in reaching one's goals or the less energy one has to spend in doing so. Accordingly, the acquisition of energy or resources, or the improvement of one's position would count as (high) benefits, their expenditure or loss as (high) sacrifices. In this fashion one could similarly explain such familiar and generally recognized preferences for survival, strength, power, social appreciation, popularity, esteem, prestige, money, etc.. For all such things are, in their own way and in many situations eminently instrumental to wide classes of other outcomes. Of course, and as indicated above (fn. 8) there are other forces at work, too. Yet, the above suffices to do the very limited job required of it in the present article.

The probability judgments made by people will have to be viewed to be of the relative frequencies of certain observations. That is to say, *that the more often, relatively speaking, something has been observed to be the case, given some action or occurrence the higher the likelihood with which it will be expected to be the case in the future, given that same action or occurrence*⁹. This postulate shows how human information grows from actual observations, allowing for the possibility of 'vicarious observation' through the communication of someone else's observations, and of the construction and derivation of such observations or expected observations through theories. Ultimately, then, the expectations about which alternatives produce which outcomes with what probabilities, are matters of 'historical' experience; clearly, too, such knowledge will also be corrected under the influence of further experiences, in a continuous

process of revision and adaptation of estimates based upon a continuously growing body of observations and theory.

The two axioms on the formation of preferences and probability judgments clearly show that we are concerned here with processes of historical experiences and learning. For the judgment whether and to what extent it will indeed aid in the realization of other outcomes, too, is a matter of probability judgments and thus to be explained by (sequences of) historical experiences — direct, vicarious, or theoretical. Of course, all this does not yet amount to a full and adequate theory of the nature of these learning processes as indicated already. For our purposes they are important not merely because they show how the purely behavioural theory can be made to work in actual fact, but also because the development of law and morals seems to be at least in part a matter of the growth of certain 'values' and 'attitudes' in people. And these are again matters of both information and evaluation, of preferences and of probability judgments.

2.3. The nature and mechanism of politics and interaction

So far, then, we have sketched the essentials of an explanation of human behaviour. While important enough in itself (after all, law and morals deal with individual conduct), it also provides us with a sufficiently strong base from which to analyse the nature and mechanism of human interaction and political process

In all cases politics or interaction generally (and in a sense the two are identical) consists of humans acting upon others, of human actions somehow influencing other human actions, of effecting changes in the behaviour of others — whether expressly so willed, intended, recognized or not. This is relatively easily recognizable in ordinary inter-individual exchanges and transactions, in relations of friendship or enmity, of family life and of enterprise, of buying and selling as well as of professional relationships. There is interaction if and to the extent that the behaviour of different individuals or groups is related to one another through mutual influence and adaptation. But in the relations between larger collectivities, too, in their bargaining and their often violent struggles for power and position, in their wielding of political power and influence, in the sphere officially recognized as that of 'politics', whether at the national or at the international level, we meet with this phenomenon. And the 'behaviour' or policies of such larger groups, in their turn, are products of interaction and political relations, of fights and debates, processes of influence and adaptation *within* the group, just

as the foreign policies of a state are the product of domestic politics and political relationships.¹⁰

The results of such processes, their outcomes, be it some form of collective behaviour or merely a sort of *modus vivendi* among competing individuals or groups, can always be viewed as particular configurations of actions which have acquired some stability. International boundaries, spheres of influence, organisations and alliances; national tax policies, foreign policies, the crime rate, and the business cycle, etc., etc., — all are ultimately nothing but certain configurations of more or less coordinated actions. Of course, in common politics we tend to be interested most of all in, if not obsessed by, specific *phases* of the process only, notably, as in most of contemporary political science, by that of bargaining over official agreements, resolutions, laws or decrees, and taking the rest of the process, its 'execution', mostly for granted. But, as we all very well know, there can be vast differences between the law or decree, the agreement or treaty, as negotiated and enunciated, even with full agreement of the parties, and actual practice, i.e., behaviour and conduct. And just as we tend to be obsessed with the words and 'theories' in which people cloak their actions, so, too, we tend to limit our attention to the more easily recognizable, verbally expressed phases of the political process — in both cases quite wrongly so, as, ultimately, it is action and actual conduct we are interested in, even when recognizing fully well that words do first and foremost represent action.

Our problem then is twofold at the present stage of enquiry : (1) to say something about why and how people seek to influence the conduct of others; and (2) why and how some sort of stability, and outcome or result, will be attained in the ensuing processes of mutual attempts at influencing conduct.

The first question is concerned with what I have termed '*demand behaviour*' : *action which influences the action of another individual or set of individuals*. It can do so, and it can do so *only*, according to our behavioural axiom, by manipulating certain costs and benefits for the other party in relation to specific behavioural alternatives : by offering him what he likes, and threatening him with what he dislikes.¹¹ In this fashion the demanding agent increases or decreases, respectively, the utility of the action he wishes to call forth, or to prevent — though not necessarily sufficiently so. The effect of such demand behaviour, its '*weight*' can thus be easily seen to be determined by : (1) the '*access*' of demand behaviour, i.e., the probability that it will actually 'reach' the other party, that the outcomes manipulated will actually be associated to the other party's

actions; (2) the height of the costs or benefits thus manipulated as estimated by the addressee of the demand behaviour; (3) the credibility or prestige of the demanding agent, meaning the extent to which the addressee really expects those outcomes, threatened or offered, to be forthcoming in conjunction with the actions concerned.

Normally politics will consist of *sets* of individuals and groups addressing more or less conflicting demand behaviours to one another, and reacting more or less violently to the demand behaviour addressed at them. The problem then is to explain how such process will produce a more or less stable outcome or result and settle to a more or less stable level.

It is to be recalled that demand behaviour consists of associating valued outcomes to the other party's alternatives, and that its weight is dependent upon the extent to which it does so, as well as upon the height of the benefits and sacrifices manipulated. It follows that *the actions in the group or society concerned will stop changing and, accordingly, a political outcome or result will be produced when the total weight of the relevant demand behaviours stops changing*. Of course, this does not mean an *end* to the political process. For such an end occurs if and only if all parties stop addressing demand behaviour to one another. Rather it is a matter of reaching a sort of equilibrium in which the total demand weight connected with the several alternatives becomes constant. And this normally occurs if the parties stop increasing their investments in demand behaviour, when they stop intensifying it. Again, as a consequence of our behavioural postulates, we may expect this to occur when, for all the participants, some balance will have been reached between, on the one hand, the relative attractiveness of the outcome itself, and, on the other, the costs and risks to be incurred in changing it, including, of course, the threat of retaliation by the others. And how long the outcome will last, is determined by the stability of this balance, in its turn a matter of the relations of strength and dependence as well as of preferences among those concerned¹².

It is both necessary and feasible to pursue the analysis one additional small step in order to investigate *which aspects of the relationships between the parties concerned* have a bearing upon the occurrence and weight or success of demand behaviour between and among them. First of all, then, it will be recalled that demand behaviour occurs to the extent that the agent deems some particular action on the part of his partner, opponent, or counterpart, either desirable or undesirable thus inducing him to try to bring the action about or to prevent it, respectively. This, in its turn, will be the case

if and to the extent that such an action is deemed to serve the agent's interests — whatever these may be. But this does seem to be precisely the essence of the notion of *dependence or interdependence*: parties are (inter)dependent to the extent that their actions are instrumental to each other. Thus we have reached the conclusion that the more interdependent parties become, *i.e.*, the more strongly so and in the more respects, the higher the chances that they will invest (more) in demand behaviour. It will also be clear that the more dependent A is upon B, the greater the latter's 'leverage' will be with respect to the former, as he does command outcomes valued by the former. We can thus see that the gradual rise in both the scope and intensity of politics, nationally as well as internationally, is rooted in the generally increasing interdependences between people and groups at all levels of society as a result of technological, economic, and military developments — the 'industrial Revolution(s).'

Similarly, the (relative) *strength* of parties is an important determinant of the political process, *strength* denoting the amount of outcomes valued by others and investable in demand behaviour the agent possesses — in particular resources. For the stronger one is, the more one can invest in politics, thus insuring success as against weaker parties, so that such action will thereby also become more probable. Also, reinforcing this argument it would seem that the stronger one is, the smaller sacrifice will be represented by the investment of a given amount in political action, so that, again, it will be the more likely. *Position*, too, in the form of easy access, of small physical distance, of good strategic location, etc, makes demand behaviour both less costly and more successful — so again contributing to the likelihood and intensity of demand behaviour.

Ignoring such factors as (political) information and skills, an important rôle is clearly to be played also by the way the preferences or interests of the parties relate. For the better they 'fit', or, as I shall call it, the greater the *degree of congruence among them*, the less inclination the parties will feel to invest (much) in demand behaviour: there simply is no need to change each other's behaviour, as it will harmonize rather automatically.

Now, for the sake of convenience in argument and exposition, these relations will henceforth be referred to collectively as '*relations of power and interest*' among and between the actors concerned. As they largely determine relative demand weight, and thus the nature of the outcomes to be produced by the political process, in particular: how attractive these will be, it follows that these relations themselves must come to constitute the objects of strongly felt, or high preferences. That in itself would be sufficient to explain

their constituting the occasion for highly intensive political processes concerning the defence or strengthening of relative position of the parties in the network of such relations.

Another reason is that such relations of power and interest, and the parties' relative status therein, cannot be determined or 'measured' fully objectively and acceptably. Yet such determination is absolutely necessary for any stable political outcome to be achieved, and, more generally, for stability, predictability, and peace in the political system. There remains, then, little but defining such relations by actual trying them out, by 'empirical testing' as it were. It will be clear, though, that in view of the importance of such 'measurement', as well as of the high interests at stake therein for all concerned, it will be especially these 'power-political' issues which lead to highly intensive political processes, as is exemplified with particular force by the history of war and revolution.

The preceding exposition of a theory about human behaviour and interaction or political process had of necessity to be rather general and abstract, as well as rough and incomplete. Yet it does identify the terms in which to phrase the problem of law and morals, and it allows us to discover at least some of the more central factors governing their occurrence and evolution.

3. *Law and morals : definition*

As has already been intimated in the introductory section, law and morals, *i.e.*, norms, rules, binding mores and customs, formal laws, procedures, and legal conventions, etc., are of an essentially *normative* nature. That is, they are standards of behaviour : particular orderings of alternatives, including demand behaviour of course, as well as political outcomes or configurations of actions, against which conduct or politics is to be evaluated or judged as good, better, or worse, to which actual behaviour ought, or is expected to conform, or which it ought to approach as closely as possible. Such standard orderings, configurations or outcomes need not necessarily be explicitly formulated. And it will be clear that this conception includes *all* sorts of rules and norms, legal as well as conventional ones, common etiquette just as much as statute law, international law as well as legal usage and convention, political or legal procedures just as much as technical rules for making good carpentry or solving mathematical equations. There are surely many differences between such categories of rules, for example as regards the sanctions attached to them, the importance people ascribe to them, the precision with which, if at all, they are formulated, etc..

Still, from a general behavioural viewpoint they are all what I shall generally call 'rules': *sets or configurations of behavioural probabilities to which actual human conduct or political outcomes are to conform or approach or against which such conduct or outcomes are judged — as defined for a particular set of people and situations* Thus the rule which forbids us to kill our brethren is in effect saying that for everyone, in a situation in which killing is at all a physical possibility, such killing is to have a lower probability than every other alternative — unless, of course, there were another rule prescribing still lower probabilities for other alternatives.

As we all know, there are hardly any rules without exceptions, and no rule is fully 'effective' in that actual behaviour and outcomes precisely conform to what the rule says, granted even that many rules afford some margins of doubt and error, as is probabilistically speaking quite in order. It seems natural, then, to measure a rule's 'effectiveness' by the difference between what the rule prescribes and what obtains in actual fact. *Such effectiveness, then, is again a set of probabilities, and the greater the differences are, the lower the rule's effectiveness obviously is* Or, and applying somewhat different words, the rule's effectiveness is measured by *the probability or probabilities of 'deviant behaviour'* which are associated to the rule. Thus the effectiveness of a state's penal law is to be measured by the (inverse of the) crime rate.

Incidentally, we see here that the category 'deviant behaviour' is clearly a product of the existence of a rule in the sense that it is *defined* by it. Without rules there simply cannot exist any 'deviant behaviour', and some conduct which was perfectly normal in the absence of a rule immediately becomes 'deviant' as soon as there emerges a rule. 'Deviant behaviour', then, is strictly relative to a pre-existing rule, recognizing that some conduct may be defined in several different sorts of rules at the same time, of course. Thus, killing is hardly a crime in international society in that there exist almost no *legal* rules against it (but think of the rules embodied in many treaties of extradition, for one thing). But there may still exist, at least in some international systems, moral rules or conventions in which such killing is indeed defined and prohibited though most probably in somewhat looser terms than in domestic penal law.

That deviant behaviour is *defined* by a rule, moral or legal, does not mean that the rule also *causes or explains* such behaviour. After all, deviant behaviour is behaviour like any other behaviour. This means that the fact that a legal or moral rule defines some conduct as deviant, does not imply that the behavioural scientist, too, would have to it in a special category; or that for *him* the action in question

were also to be considered as 'deviant'. The literature on crime and delinquency and on 'deviant behaviour' generally, though, makes a rather strong impression to the contrary, *viz.*, that such conduct does indeed require special theories and explanations. From the point of view of a behavioural theory, however, most crimes and immoral actions, murder and robbery, rape, blackmail and terrorism constitute perfectly 'natural' conduct — reprehensible and intolerable though it be.

A moment ago it was argued that for our purposes it is not necessary to distinguish between the many and variegated forms of rules. At this point, however, it may be useful to briefly dwell upon the matter of 'procedural' vs. 'substantive' rules. The latter fix and establish the contents of the 'rights' and 'duties' of people as group. The former are concerned in particular with how one may or should act in order to establish change, defend, deny or fight such (claimed or alleged) rights and duties. It is a distinction which is not without significance in legal literature. For our purposes, though, it can largely be ignored.

It is important to see that both procedural and substantive rules are first and foremost *rules* in the sense indicated. Thus, the law ruling property rights defines, for the relevant situations and individuals, a set of prescribed and proscribed actions; that is, it defines a model or standard of behavioural probabilities: I may use my property as pleases me, but restricted by the condition that a number of such are strictly forbidden, while others are allowed only on condition of permission of third parties; others have to respect my possession and use of my property, while certain actions on *their* part, *e.g.*, using or possessing it, are again strictly forbidden, or require my permission, etc., etc.. Procedural rules, on the other hand, define, both for me and for others, which actions are allowed, prescribed or proscribed in case we wish to change existing rights and duties and how to act in case our claims or wishes contradict one another.

Such procedures invariably consist of (sets of) actions on the part of those concerned, *e.g.*, litigants, counsel and judges in civil law cases, defendants, prosecutor, counsel, juries and judges in penal law cases, aimed at affecting and changing the behaviour of one another so as to bring about a more stable and viable, even a 'just' outcome. In effect, then, procedural rules concern the regulation of political processes. They define in particular what (sort of) demand behaviour is forthcoming or allowed on the part of the parties concerned. They prescribe the manipulation of certain benefits or sacrifices in demand behaviour, as violence, blackmail, or bribery. They tell us *whose*

demand behaviour is to be allowed as in the case of legal representatives in certain court proceedings, or of the duly elected representatives in parliament, and they prescribe which demand behaviour is to be addressed where, *i.e.*, who will have access to whom (which court will hear which cases, or which groups will be allowed to reach which political organs or international conferences).

Procedural rules also often perform a second task, namely to prescribe how, given the occurrence of demand behaviours as allowed or prescribed, outcomes will have to be built from them, how a compromise or settlement is to be made. This can be done in many ways. For example, in court proceedings and to some extent in arbitration, the final outcome is defined by an individual or set of individuals, the judge(s) or arbitrator(s), in which case execution is sometimes assured as the deciding agent can set in motion some sanction apparatus to support his decision, in other cases, as in parliamentary proceedings and in much decision-making by committees the outcome is defined by voting. That is, the relative demand weights to be mobilized behind the duly defined alternative outcomes are to be measured by the number of 'ayes and nos' they can marshal behind them. In yet other cases this phase of the process is not or hardly regulated at all, while mixtures also occur — as when juries or judicial bodies vote.

Legal proceedings and judicial decision-making, then, emerge quite clearly as political processes in the sense defined here. They are to be viewed as very 'stylized' examples of such processes in that both the nature of the participants, the nature of their demand behaviours as well as the outcomes and their 'production' are comparatively strictly defined. This is important enough, of course, and the question of why and when such forms of regulation, such strict organization of politics become possible at all and can work effectively, shall have to occupy us during much of the present essay. Yet, *qua* political processes they are clearly continuous with all other political processes, up to and including violent conflict in international life. To what extent these juridically stylized and regulated processes are influenced or determined, even produced by other political processes at different, higher or more inclusive, levels, as by the relations of strength, dependence and congruence existing there, remains to be investigated, of course.

So far, then, rules, legal and moral or technical, have been defined in terms of behaviour, rather : behavioural probabilities. The latter, however, are, as we have seen, to be explained by the individual's 'estimates' of the relative utilities of the alternatives concerned. One might, accordingly, also define rules, legal and especially moral or

ethical ones, in terms of such *evaluations*, and, at one remove, of the relevant *preference* and *probability judgments*. In fact, in moral philosophy in particular, but also in actual law and legal judgments, a certain, not unimportant rôle is often played by the individual's 'intentions' and his subjective state of knowledge and information, 'intentions' referring to the outcomes the individual in question attached to the action involved, his 'purposes' or 'goals' and how he evaluated them — at least to the extent that he *says* so, or is, or dares be, aware of them.

To define (another sort of) rules, then, in terms of utility judgments, or of preferences and subjective expectations of likelihood, would seem to be perfectly right and proper. It is to be recognized, though, that *such* rules do represent a quite different problem from those defined so far. For they constitute problems of human learning. Here, then, such 'deeper' rules will not be discussed any further.

4. Law and morals : their effectiveness

4.1. A 'naturalistic' approach

Before going into the question of how rules emerge and evolve, it is necessary to enquire into the matter of what makes rules effective regulators of human conduct. In other words, we must first of all know how a rule actually 'works' in human affairs before we can investigate its growth. Our first problem, then, is: What renders a rule effective, or What determines the rule's degree of effectiveness? This problem will be analysed from two different though strictly complementary angles : (1) as a problem of individual behaviour, and 2) as one of regulating interaction or political processes in the wide sense of that term here used.

Before going any further, however, it should be recognized that rules do not in the least detract from the working of a 'natural' theory of behaviour and politics. That is, law and morals do not carry conduct and interaction into another sphere, and do not break through the normal conditions of human affairs. Rather, they have to function and to work within the constraints imposed by these conditions, while their occurrence and evolution, too, will have to be explained as a 'natural' product of human life and society.

That this 'natural' character of law and morals quite commonly tends to remain clouded from our view may well be caused by a natural tendency to *justify* law and morals on supernatural grounds. In order to enhance the effectiveness of the rule, moralists, rulers or

lawgivers and society at large have always stressed its rather special origins and legitimacy as being detracted from the normal play and trappings of power, passion, and desire which it was precisely destined to control in the first place. This has most often taken the form of a justification or ‘justificatory explanation’ by means of myth and religion. The rule is then presented as deriving from divine commands, transgression calling forth the wrath of mythical forebears or the god(s). In less religious times, too, there is a strong tendency to present the rule in supernatural terms. We meet with this when law and morals are viewed as emanating from nature, embodying or realizing reason and enlightenment, progress, justice, (revolutionary) conscience, etc., etc. — all of which somehow place the rule beyond the pale of ordinary human affairs. As hinted at already, this tendency in itself is natural enough. It seeks to define obedience to the rule as particularly commendable, even imperative, and of transgression as noxious, abhorrent, irrational, distasteful, anti-social, and so on. But it also precludes taking an open and clear look at these phenomena, as natural human phenomena among others. It might also entail a tendency to ignore the real problems they pose, and notably of easily *assuming* the effectiveness of law and morals, of taking it for granted as if such effectiveness would somehow *inhere* in them.¹³

4.2. *Rules and human conduct*

To begin with, then, I will analyse rules in relation to individual conduct.

4.2.1. *‘Self-interest’*

As a rule is merely a prescribed behavioural probability or an ordered set of them (depending upon the rigour and completeness of its definition), it immediately follows that it will be followed to the extent which conforms to its utility. That is, *a rule will be followed the more probably, the smaller the distance between the action’s initial utility and the utility commensurate with the required behaviour*. In other words: a rule will be the more probably followed the closer it conforms to the individual’s ‘self-interest’. It does not say, however, that such self-interest were the only reason for the rule’s effectiveness.

4.2.2. *‘Sanctions’*

For, in the second place, if there is, as rather naturally occurs, a certain discrepancy between prescribed behaviour and the individual's initial utility judgments, this distance can be bridged by offering certain 'rewards' or threatening certain 'punishments'. *That is, the discrepancy can be corrected if there is an agency or some other party (in particular the other side in interactions), who, in his turn, attaches certain valued outcomes to the behaviour in question thus lowering or heightening its utility to the level required.* Rule behaviour, then, may be induced by some other party's demand behaviour. It may be a special agency or institution, like the government in national states, in which cases we speak of sanctions in the normal or legal sense of the word. But 'sanctions' may be provided by every other party, too, including the individuals with which interaction occurs. The essential point is whether there occurs demand behaviour of sufficient weight to uphold or effect the rule.

From our analysis of demand behaviour and what determines its weight it is apparent that the effectiveness of 'sanctions' in inducing rule behaviour does not rest only upon the height or value of the sanctions themselves, the magnitude of the reward offered or the gravity of the punishment threatened. *Rather, its effect is equally a matter of the demand behaviour's access as well as of its credibility — and on an equal footing with the magnitude of reward and punishment.* Especially in discussions concerning the magnitude of punishments in penal law, this last point is often ignored. In practice, the effectiveness of the law is just as much a matter of the magnitude of such punishments as of the reliability with which the offender is made to 'expect' them to be meted out, and of the effectiveness of the police forces in detecting crimes and criminals. To be sure, a concentration upon punishments is quite understandable inasmuch as it is easier and cheaper to increase punishments and change the law than to increase the efficiency of the police apparatus, especially in the conditions of modern society.

This also shows the probability of sanctions to be applied as well as their reliability and magnitude to be matters of the relations of power and interest between the parties concerned. For as we have already seen with respect to demand behaviour generally, this is determined in part by how relatively strong the parties are. For instance: How strong and how strongly determined is the government with respect to (organized) crime? And what are the possibilities of the criminals to fight back the government? In practice, the crime rate can be viewed, then, as reflecting a sort of *modus vivendi* between the government, in particular the departments of justice and the police forces, and (organized) crime,

sometimes going so far as to lead to formal treaties of peace and mutual non-intervention¹⁴ — abhorrent though all this will be to the law-abiding citizen.

This reference to typically 'international' notions as 'treaties' and 'non-intervention' is not at all fortuitous. For in this respect the two spheres are quite similar, as the effectiveness of international law inasmuch as it exists at all, as well as of all sorts of agreements and treaties is very clearly a matter of the extant relations of strength and dependence between the states. It is to be observed, incidentally, that the relatively unproblematical nature of most 'technical' rules, procedures and methodes resides precisely in the fact that there exists a high measure of congruence between the rule and the individual's self interest: the method normally is the best, most efficient and sure way to attain the desired for result, whether in carpentry or in mathematics. Also, non-observance of the rule is self-sanctioning in that it immediately and visibly costs resources, time, energy, and materials.

From this perspective, too, it follows that the nature of punishment, typically administered after the fact, does not reside in some sort of 'revenge', nor even in betterment or the righting of wrongs — even if it can perhaps also be made to serve those purposes. Perhaps that some lust for revenge, some feeling of abhorrence at the crime committed, indignation at feelings of moral propriety being hurt, are indeed to be viewed as 'biological' mechanism for insuring the occurrence of sanctions. It cannot be denied that from the point of view of a rule's effectiveness, punishment after the fact is not important in itself, neither for the wrong done, the crime committed, nor for the criminal.

Rather, it serves to inculcate a certain expectation of that outcome, the punishment, being associated to that criminal action in the other members of society. In this capacity it clearly works *via* our assumption concerning the formation of such expectations of likelihood in people. That is, such belief is ultimately determined by the relative frequency of the punishment being actually administered. And it is perhaps precisely our 'animal' lust for revenge and retaliation borne by our moral indignation which serves to do things, *viz.*, to mete out punishments, which are otherwise quite senseless, but which, if left undone, would otherwise lead to the non-observance of the rules, in situations in which the initial utility judgments would not automatically or not sufficiently square with the desired or undesired behaviour.

At the same time, no (expectation of) harsh punishment can ever guarantee that the distance between an individual's initial utility

estimate of an action and the (socially) desired behavioural probability will in fact be bridged. For most probably there will, for a greater or lesser number of people, always remain a number of cases in which the utility of the morally or legally desired or undesired action is too low or too high, respectively. That is, most probably every rule will know its share of crime or deviant conduct — a consideration which strengthens the argument concerning the necessity for every society to find a sort of *modus vivendi* with its proper crime and criminals. This will be the more so as retaliation and the discovery and punishing of such behaviour will cost resources which 'society' will be the more unwilling to bear the relatively greater they become and the relatively smaller the effect upon a further reduction of the crime rate, a further increase of the rule's effectiveness.

A further question to be asked is : Why are sanctions normally of a 'negative' nature in that they impose sacrifices upon people rather than offering rewards for compliance ? For behaviour can just as well be controlled by offering people rewards for complying with the rules. The answer would seem not to reside in the relative effectiveness of positive over negative sanctions, an issue about which the psychological literature is quite undecided. Far more simply it seems to be a matter of relative costs and benefits in effectuating the (expectation of) sanctions to occur. To begin with, the more common some behaviour is, or rather the 'propensity' to behaviour, *i.e.*, the higher (or, in the reverse case, the lower) initial utilities are, the greater the resources and effort required to bridge the gap between them and the desired behavioural probabilities. Conversely, a society will normally make and sanction rules only concerning actions which are in themselves already not too probable and common. But by the same token, to provide sanctions with respect to the very much larger class of permissible actions would be much too great a burden.

In other words : rules and sanctions normally will concern only the relatively exceptional case, providing positive inducements only for desired actions whose initial utility is normally much too low, while providing negative sanctions in those cases in which initial utilities are normally too high. Whether a society will concern itself with the first or with the second category would seem to reflect the measure of control it has already achieved over its members. It would indicate the extent to which seeking to steer people and society in a given direction was a successful proposition — which of course it was not in most of historical and contemporary societies, which therefore had to rest content with merely seeking to limit or exclude a

relatively limited sphere of unwanted or harmful actions.

What the nature of the sanctions will be, is a matter of what people in a given society and a given epoch define as benefits or sacrifices as we have seen with respect to demand behaviour generally. There is of course some room for cultural and historical variability here, while the actual political relationships in the society concerned play their own rôle in that they determine which sanctions, against whom, and in which cases can be effectively carried out. Such variability can indeed be observed in actual fact. The basis will normally always be formed by a relatively constant class of outcomes basically and generally instrumental to men: things like offering monetary or other resources to people or threatening to deprive them of these, as in confiscation or fines of various sorts, or the threatening of life as in the death penalty or in the deprivation of liberty as in imprisonment — a relatively late development, incidentally¹⁵. Also, especially in earlier societies one will find supernatural forms of punishment, or the threat of such sanctions (including of course also positive ones like those awaiting the hero of the faith in paradise). Normally, however, such sanctions will have been characterised, too, by rather more concrete benefits or sacrifices. For one, very important, thing such sanctions will have had very deep consequences for the social position of those concerned: ridicule, tabu, and social ostracism in the one, general status or prestige in the other.

Again, one should not think of sanctions as always being provided for by some more or less official or governmental agency or organ, nor that they will always be or have been of a very visible and tangible form. For instance, the rules of common etiquette and morals, the customs of ordinary discourse, are not ordinarily protected by the law and government, and neither will retaliation by others, the party of the exchange or the public, be immediate or easily visible. Yet sanctions very often do exist, involving the (un)willingness of others to interact, to help in one's advancement, to protect one's position, or to abstain from harming or attacking it, and so on. They exist and they work — even if only visible with difficulty and in the longer run — if upholding the rule is still deemed worthwhile by others, or if they can indeed allow to mete them out. Given existing relations of 'power' between them, that is. For etiquette and politeness, too, are in large part a function of the extant relations of strength, dependence and purposes in a society, and not only among governments in international society.

Even without any explicitly political analysis the above considerations do already suggest that rules will be the more effective

the better they reflect the relations of power and interest within society, and the better they serve the interests of the more powerful. For on the one hand it is these (and among which the government itself counts of course supreme) which are to have a sufficient interest in the rule to induce them to sanction non-rule behaviour. Otherwise no sanctions will be forthcoming or be effective at all. Conversely, if the relatively powerful do not 'judge' the rule in their interest, they will be able to disregard it effectively (while the disregard of the less powerful is for that very same reason the less important), so as to effectively destroy the rule. To return to the example of common as well as international diplomatic etiquette, they both clearly embody and reflect assumed or standardised relations of relative status, prestige, and position and precedence. Also, they become possible only with the crystallization of such relationships as well as their open and explicit recognition and acknowledgment. They are to go when such relationships undergo radical changes¹⁶.

4.2.3. 'Legitimacy'

So far we have merely discussed the chances for some rule being effective on the basis of the given utility judgments associated with the behaviour to be ruled itself, or the rule's *extrinsic* costs and benefits. But there may also be certain costs and benefits associated with the rule itself, or the rule may constitute a (dis)value in its own right. And it is with these, the rule's *intrinsic* utilities, that we will now have to deal, denoting them by the term '*legitimacy*' : *the extent to which the rule itself is considered a benefit (or, conversely, a sacrifice)*.

It is to be noted that we are dealing with what seems to be the central element of most *behavioural* or *political* and *sociological* conceptions of legitimacy, *not* with the legal or juridical notion which is rather concerned with the extent to which the rule conforms to the canons of the legal or moral system of which it is a part. In this latter sense a rule, or decree or law, is legitimate if it has been enacted in the legally proper sense, and conforms *qua* substance to the other rules of the system. Legitimacy in the political sense is quite different and only concerns the question whether the rule, law or decree, is considered an intrinsically good one. The two notions of legitimacy may of course be related when legal legitimacy is considered a sufficient condition for political or behavioural legitimacy, as may sometimes be the case.

Political legitimacy may be defined with respect to all sorts of

rules, moral as well as legal, in which the rule can be distinguished from the extrinsic benefits and sacrifices to be got from the conduct-to-be-ruled itself. It is often concerned with systems of such rules as well. Thus one can speak of the measure of legitimacy of the present system of government, of democracy, of the system of international organisation, of the United Nations, of the penal law, of property, but also of the constitutional rules and bylaws of all sorts of smaller, private associations and organisations, in business enterprise and in other spheres of life.

It is not difficult to see why the notion of legitimacy is to be such an important one in the explanation of a rule's effective operation. For clearly, *to the extent that the rule itself is considered a benefit, the utility of acting in accordance with it, of strengthening, maintaining or upholding it in the face of opposition or potential transgression will be the greater. And the more legitimate the rule is the greater the chances will be of its being effective.* This does not mean, of course, that the extrinsic utility of the rule as indicated above, *viz.* the utility of the conduct concerned as reckoned in terms of the outcomes attached thereto, will also and necessarily be positive in case the rule is (highly) legitimate. The two categories of benefits and sacrifices are to some extent independent of one another. Whether or not the rule will be followed in actual fact depends upon its *total* utility, measured both by its legitimacy and by its extrinsic benefits and sacrifices, including the sanctions attached to it by others. And legitimacy, whatever its height, does not at all automatically guarantee the rule's being actually obeyed, and does not render its effectiveness independent of the extrinsic costs and benefits associated to the conduct in question. Rather, such legitimacy as there is does act as a sort of reservoir of goodwill for the rule which may cushion and protect it against transgression in cases of relatively small disadvantages or disutilities to be got from them.

Here, incidentally, we meet with a possible second reason why law and morals are so seldom considered as problems for empirical theorizing, and why it often seems as if there would inhere something in the rule itself causing it to be obeyed as a matter of course. This could well be traced to that fact in many or even most cases, especially in the well-established states from which lawyers, sociologists, and (legal) philosophers tend to come, one is normally concerned only with rules, moral as well as legal, which do indeed seem to be legitimate and which are, therefore, obeyed relatively independently from the extrinsic costs and benefits involved in the conduct itself, so that obedience to the properly defined rule does

indeed seem to be a matter of course. By the same token it would explain why deviant behaviour and crime, would seem to be so often considered such a special problem of social and individual pathology, requiring special theories and explanations.

Our problem now obviously is to explain why and when a rule will acquire a measure of legitimacy, that is, why and when that particular standard (configuration) of behaviour defined for specific people in specific circumstances will indeed come to be constituted a benefit. Generally speaking, it follows from our (limited) assumption on the formation of human preferences that *a rule will come to be preferred to the extent that it is expected to serve the realization or acquisition of other valued outcomes.*

To begin with, this leads to the discovery of a second avenue *via* which 'self-interest' increases or co-determines the effectiveness of the rule. We have already seen that it does so inasmuch as the rule's effectiveness will be the greater the better the initial utility of the conduct in question conforms to that which is called for by the rule. *Now we see that, in addition, the more such rule-behaviour does indeed realise a higher utility, benefits or the avoidance of sacrifices, the higher the legitimacy of the rule will become, and, again, the more effective it will be.* Of course, this is a process requiring time in that it is determined by the formation of the relevant probability estimates upon the basis of observations as we have already indicated.

In this connection it is to be observed, too, that sanctions attached to the rule in order to render it more effective, even force and coercion as the case may be, may well contribute to the rule's legitimacy. For if they are applied with sufficient predictability or reliability, such outcomes, too, determine the utility of the conduct in question to a relatively high extent. And inasmuch as actually following the rule does contribute to gaining some positively valued outcomes, and avoiding the negative sanctions, the rule will indeed gain legitimacy. To what extent this will actually occur is, of course, determined by other factors also. Not only will it be a matter of the reliability of the sanctions being forthcoming (clearly another instance of the social or political determination of the rule's effectiveness), but also such other learning-theoretical factors as we have briefly hinted at (fn. 8) will play a rôle here. One may think here especially, it would seem, of the rule's *consistency* with other, perhaps more basic, rules and criteria in the system within which the individual operates. Such terms as 'conscience' or '*Rechtsbewusstsein*',¹⁷ the individual's 'values' or society's 'culture', 'morals' or 'morality' and 'ethics', too, in a somewhat deeper sense than here

used, all seem to refer to this aspect of the matter, *i.e.*, the rule's embeddedness in larger systems of rules.

We need not go more deeply into it here, however. The above does suffice to show, though, that there need not at all exist such a deep gulf between legitimacy, and the voluntary obedience to law and morals following from it, on the one hand, and the application of force and coercion in inducing conformity, on the other. In a general sense, the growth of legitimacy, then, is also an aspect of people's continuous adaptation to the facts of (political) life, in which they (must, if some measure of balance is to be acquired) come to value what they cannot avoid or change, and which process is surely not ruled only by what they initially like or dislike. The above does indeed explain how initially coercive and unlawful regimes, legal systems, or religious morals imposed by force and coercion, may indeed acquire a measure of legitimacy over time, and how, historically, people have apparently found so many different rules, sanctions and regimes, legitimate.

One important advantage always associated with an effective rule is, of course, the predictability of the behaviour of others it entails. That is, *to the extent that a rule is indeed effective, it renders the behaviour of those others with whom one is to interact or trade, predictable.*¹⁸ This is indeed an advantage in that it allows for more efficient behaviour. First it means a considerable *lowering of the information* costs involved in all interaction : to 'investigate', to 'test' or 'assess' what the other party or parties will actually do, and how they will react to one's own doings. How important this factor is can be observed from our everyday lives especially when we have to enter into unfamiliar and new situations. This becomes still more visible in ordinary politics, and in particular in international affairs. These occur in largely unregulated milieus in which the behaviour of the others is not or not sufficiently precisely predictable, and which induces states (but also political parties and interest groups) to invest considerably in intelligence activities of all sorts. Indeed, the political process itself, with its manoeuvres and counter-manoevres, can very well be viewed as a complicated process of discovering, by actually testing, of the parties' relative strengths and weaknesses, of their intentions or preferences, of what they are prepared to sustain and to endure to offer and to threaten — as all these things are normally quite unknown (also to the parties themselves, to be sure), yet determine the outcomes of their interactions, and the modalities of their mutual adaptations.

Related to this limitation of information costs entailed by effective rules, is, secondly, the fact that *predictability limits the*

dangers of errors and faulty investments in interaction, of providing the wrong benefits or sacrifices to the wrong people in connection with the wrong alternatives. In such cases the investment itself will be lost, the energy uselessly spent, while it may, on the other hand call forth quite undesired retaliation from the other parties. Effective rules quite obviously diminish such losses and waste.

4.2.4. *The dynamics of rule-effectiveness*

But it will be clear that *the predictability the rule entails, and thus its legitimacy and effectiveness are, in their turn, consequent upon its very effectiveness itself.* For it is only to the extent that the rule is effective in governing the behaviour of all concerned that it does make conduct predictable. In fact, this applies also to the *extrinsic* advantages of the rule. Here, too, the benefits to be got from the rule (or the sacrifices to be avoided by it) will, inasmuch as the rule is concerned with interaction or social situations, indeed be forthcoming only when the others for which the rule is defined also act in conformity with it. And any sacrifice in following the rule must naturally be made good by some corresponding benefit, which is contingent upon the other parties' behaviour¹⁹.

It appears, then, that, excepting externally provided sanctions, a rule's effectiveness is a matter of a self-stoking cycle. Its observance by individuals, and thus its effectiveness, is a product of its legitimacy as well as the extrinsic benefits to be got from it. But these, in their turn are again determined by the extent to which the other individuals concerned do indeed obey the rule in question, *i.e.*, by its effectiveness? And even externally provided sanctions are not entirely distracted from this mechanism. For their application is the more probably the more important it is deemed to be, which is again partly a matter of its being effective. Also, the more legitimate and effective the rule is, the smaller sanctions need be, and the less often to be applied, so the less costly and hence the more probable they will be. In this way, however, they clearly contribute again to the rule's effectiveness.

All this goes a very long way to show that effective rules may be expected to arise only in rather special conditions, and to emerge only with great difficulty as the dynamism described above clearly works also in the reverse direction: the less effective the rule, the less reason to obey it and the less incentives to apply (much too costly) sanctions. This seems to accord rather well with the historical evidence about the growth of law in the state, indeed with the

emergence of the state as an example of such regulation itself, and with the difficult evolution of international law. Clearly, too, purely technical rules, methods and procedures, as indicated already several times, represent marginal cases in that (1) they are not, for the most part, concerned with human interaction, but with the relationship between man and matter, and (2) the associated advantages and disadvantages are generally immediately visible and easy to estimate.

How special law and morals are can also be seen as follows. For a rule to be effective the total utility of obeying it must, for all those concerned, in all relevant situations, exceed that of all non-rule alternatives. Or, conversely, the rule will be effective to the extent that no one will be in a situation to profit from non-conformity. In fact the situation is somewhat more complicated in that, as we have already seen, the rule's legitimacy is a matter of time and sequences or series of behaviours. And this means that a rule will not gain legitimacy for those who reckon to *consistently* gain by non-conformity rather than conformity. And if, on the basis of previous experience, one expects *consistently* to profit from the non-observance of the rule, the conformity to the rule is not very likely — as legitimacy will also be absent as we have seen already. All this means, in fact, that *a rule will be effective only to the extent that for none of the parties concerned the utility of non-observance is consistently higher than that of following the rule.*

Here, too, we meet with a situation which will be largely dependent upon the relations of strength, dependence and congruence among the parties. Thus, the rule not to kill, to take this relatively prominent example, will, in normal interactions, be mostly effective as people are of about equal strength and have about equal abilities and possibilities of mortally harming one another. This means that only very few or relatively few individuals will consistently profit from killing others. With respect to this same commandment, however, a radically different situation obtains in much of international life and, of course, in society's marginal and criminal subculture. Traffic rules provide another example: while it may be as in the case of murder and manslaughter, *occasionally* advantageous to disregard the red traffic lights or the one-way signs, no-one can *consistently* hope to gain any advantage therefrom — not because of the police, but even more because of the accidents which would occur to him.

In some cases, *e.g.*, those of a strong dictatorship, of an international empire or strong hegemony, rules may be made effective by coercion and force, that is, by external sanctions only, so it would seem. This does not speak against the preceding analysis

which consistently covered sanctions, too. It does depict a relatively marginal case, though, in which, while disobeying the rule would be rather advantageous to everyone and consistently so, this discrepancy were to be bridged by external sanctions alone. It will be immediately clear that, while of course possible, an exclusive reliance on such external sanctions would be unbearably costly.

4.3. *Rules and the political process*

As indicated, it is necessary to complement this analysis of rules in relation to individual behaviour by one which is concerned with rules inasmuch as they represent political phenomena. In the preceding analysis we have at several occasions met with the influence of 'political', or 'power-political' relationships upon rules and their effectiveness. In this subsection, however, we will seek to discover why and when rules will be effective in regulating politics, rather than individual behaviour.

We have already seen that in so far as rules are to regulate interaction or political processes, they may concern both the occurrence of demand behaviour, its nature, form, intensity, and access, as well as the outcome to be achieved. Now it is important to realize that inasmuch as it is to be exhibited by *individuals*, the preceding section's analysis is fully relevant. That is, we need not especially enquire into the case of individuals addressing demand behaviour to one another. In many cases, on the other hand, demand behaviour is by collectivities as when states address foreign policies towards one another, or when pressure groups voice their demands. In that case we are faced by a special problem, namely that of collective behaviour. We have also seen that such collective behaviour is always the outcome of the interactions, political processes, going in within the group or collectivity in question. Accordingly, when we seek to discover how demand behaviour by collectivities, the foreign policies of states, the actions of parties, governments, interest groups etc., is regulated by rules, we really ask for the regulation of specific political outcomes. In this subsection, then, we can limit ourselves to the problems of the regulation of the political outcomes to be concocted from sets of demand behaviours.

To begin with, we have already seen that the outcome of a political process represents a situation of equilibrium in which, roughly, no party will increase the intensity of its demand behaviour. This situation naturally occurs when, for all the participants to the process, such action becomes too costly and too risky in view of the relatively small chances of success expected in securing a change of

the outcome then reached. This applies, as we have already had occasion to observe, irrespective of whether the process is or is not governed by rules.

But whether or not, or at what moment, such an equilibrium will occur is, in its turn, determined by the extant relations of power and interest among the parties, which relations are *not* determined by the rules, but which conversely, largely define the room within which the rules will have to work. It means that the extent to which rules will indeed be able to regulate political processes, to determine how when and what outcomes will be reached does constitute a grave problem. Generally speaking, they will do so only if and to the extent that they are in accord with the power relations indicated between the actors, a conclusion already foreshadowed in the preceding section.

Using, and slightly adapting a conclusion from the preceding subsection, a political outcome as defined by law or rule will actually occur if and to the extent that none of the participants will expect to consistently gain by disregarding the rule. Now the more powerful in terms of strength and (in)dependence will naturally be able to let the outcomes to be reached reflect *their* preferences better than the less powerful can. And hence an outcome is stable to the extent that such 'reflection' does indeed take place, assuming that the relations of power will also remain stable. But this, in its turn, means that *the rule must indeed be so formulated as to take cognisance of the relations of power and interest — if it is to be effective, that is*²⁰ This, implies, *inter alia*, that, inasmuch as they function in practice, rules may well be rather complicated affairs, prescribing and proscribing different things for differently powerful actors. Conversely, when the rule is framed in a very simple way, one can expect it either to be ineffective (like the rule of state equality in international politics), or restricted to situations in which power varies randomly and is therefore irrelevant to any concrete result as in much of the civil law of states. Or, the rule as phrased so simply is not the rule as it functions in actual fact.

Thus, voting does effectively regulate a large part (though by no means all) of decision-making in democracies precisely because (1) the rule does take cognisance of and respect differences in the power of parties and coalitions, in fact 'measuring' their relative power by this device; and (2) because and inasmuch as the process is indeed concerned with individuals as such, more or less randomly constituting the several coalitions possible. In other words, voting as a decision-making rule works to the extent that it does indeed *effectively* measure the relative positions of those participating in the process — at least so accurately so that no one can consistently

improve upon the outcomes thus reached. In contradistinction to this situation, characterizing some advanced industrialised states in the world, voting as a decision-making rule does hardly function effectively in international politics. It does not do so because neither votes by states, nor votes by populations, nor indeed votes as weighted in any other fashion, can be made to accurately reflect the real relations of power and interest. As a result, precisely those strongest in the system and upon whose cooperation any outcome must necessarily rest to the greatest extent, can indeed consistently gain better results by other mechanisms. And if they agree to accept voting as a rule, one can be pretty sure that the result will in any case be harmless or that they expect to command a majority respecting their position.

Similarly, that, in well-established states, the civil and the penal law are so effective, *i.e.*, that the interactions, conflicts or political processes concerned can indeed be effectively brought to a conclusion by court proceedings, is to be explained by similar considerations of power and interest. It rests upon the circumstance that the outcomes in question are supported by an overwhelmingly strong actor, namely the government. This cannot be taken for granted, though. For it rests upon (1) the fact that there is such an overwhelmingly strongest party willing to commit its strength to the effectuation of the outcome; (2) related to which is the circumstance that such legal proceedings mostly concern individuals only, *i.e.*, relatively weak actors; (3) that they regard issues of mostly limited interest, *i.e.*, not conducing to the formation of new and powerful political agents; while (4) the rules in question allow people to pursue their central interests relatively freely, that is, they involve only relatively small restraints. But even in the strongest, most integrated national states the civil or penal law tends to become ineffective when, for example, the government is incapacitated by internal strife and dissensus, especially when large, organised, *i.e.*, powerful, groupings are concerned as in the case of the unions and the employers — as is clearly manifested by the virtual impossibility of legally regulating strikes and lockouts, or of the failure of a legal solution to labour troubles by the courts. Still more we meet with this phenomenon in corruption and the (selective) ineffectiveness of law and police protection, as well as in the peculiar *modus vivendi* existing between organised crime and the police in such states as the United States as well as many others.

But in order to let a rule 'reflect' the extant relations of power and interest, these relationships must be known with sufficient clarity. But as mentioned before, this constitutes a grave problem in

international affairs and in states during the earlier phases of their formation, as well as in well-established states with respect to a host of special issues and actors. For these relations cannot generally be 'measured' in any sufficiently precise form, except by actual 'empirical testing'. If these relationships are momentarily clear and recognised by all concerned, *e.g.*, as a result of a critical test of strength as in war or revolution, then it becomes indeed possible to let the political processes henceforth be regulated by fixed rules; the winner typically promulgates new laws or a new constitution. Accordingly, the rules can also be said to codify and recognise the new relations of power and interest.

The public codification of the new relationships between the actors as embodied in the (new) rules, does increase their clarity and makes for predictability. Of course, the rule need not be entirely accurate in every single instance. It suffices to be so in the longer run, as we have already seen, so as to carry over minor discrepancies and not making it really worthwhile to the parties to consistently disobey it. Accordingly, the rule requires a large measure of political stability²¹. For instability means precisely that, with respect to the changing relations of power and interest, it is too often, and too much so, inaccurate.

Historically, the development of the national legal system in all its aspects has clearly been a concomitant of the growth of the state itself²². But the growth of the state means precisely that the power and interest relations mentioned, settle, stabilize and crystallize. And to the extent that such clarity was indeed produced, legal development, and the explicit recognition and fixing of the various social relations, procedures, practices, rights and duties, became possible to an increasing extent. This also applies to the field of international law. It must be recognised, though, that here the relations of power and interest are generally very much less clear and defined — it clearly constitutes the less integrated part of the world's political system. Accordingly the measure of effective law and morals here is still very much less than in a relatively well-integrated national state. Still, such weaker forms, rules or organs as diplomatic practice and courtesy, international etiquette and the recognition of rank relationships, and the civility of diplomats *vis-à-vis* one another — it is all a product of relative political stability, not to be expected in times of fundamental transformations going on in the system.

All this means that, in contradistinction to much common sense, rules and laws cannot, in general, be made simply by treaty or agreement, or promulgated by government or lawgiver. An impression to the contrary may be the product of bias, the natural

bias of those living in well-ordered states with powerful governmental mechanisms and where, indeed, political conditions have evolved so as to allow much more scope for governmental lawmaking based upon parliamentary or other political compromises. But it is to be recognised that this, more generally : the state as the supreme source of law, is itself a product of political conditions not at all realised in most of the world. And, one might say, it is only because and insofar as the outcomes to be attained in political processes in a 'natural', unregulated fashion do not differ too much from what the rule prescribes them to be, that the rule does indeed work. To determine this, however, (and such determination is imperative for rules to be formulated at all), will not generally be possible in less integrated states nor in international affairs. That is why such things as international organisations (an important aspect of legal evolution), collective security, disarmament, obligatory arbitration, legal settlements of disputes by courts, but also non-aggression treaties, peace — or security systems, treaties to abolish warfare, and so on, are almost bound to remain relatively ineffective. It is to be noted, incidentally, that all this does not in the least rest upon a supposition as to the stupidity, irrationality, depravity, or anti-social character of man²³.

5. Law and morals : emergence and evolution

5.1. A matter of 'definition'

In the preceding analysis, especially in its latter part, we have repeatedly touched upon the problem of the historical growth and development of law and morals. The reason is, of course, that the two problems : the *effectiveness* of rules and their *occurrence and evolution* are intimately connected. For one might presume that what cannot be effective will stand little chance of occurring or developing. What, however, does it mean to say that a rule 'emerges' or 'occurs' ?

We have met with this problem before, in particular in the context of the necessity of distinguishing between the rule-as-behaviour, and the rule-as-enunciated or -formulated (section 1). But we have also seen that it is not necessary for an effective rule to exist to be also explicitly formulated. Rather, the rule has been defined as a standard against which behaviour and political outcomes are *in fact* judged. Explicit formulation and 'definition' are to be seen therefore, as a stage in the evolution of the rule, rather than as manifesting its occurrence. In other words, our problem is : Why and when will

some conduct or outcome be 'defined', *i.e.*, when it gets 'established', though not necessarily also formulated or expressed as such, as a standard for judging actual conduct or outcomes, implying that the latter should conform to the former, of course ?

Now defining such a rule is behaviour like any other behaviour; hence it becomes the more probable the greater the benefits and the smaller the sacrifices attached to it, taking account of subjective probability expectations, of course. We have also seen in the previous section that a rule will come to constitute a benefit (*i.e.*, it will become legitimate) if and to the extent that it serves the realization of other benefits. Now we have also seen that a rule primarily does so in that it increases the predictability of the social environment in which man is to act, given the extent to which the conduct in question serves to produce gains rather than losses.

This argument then shows already that rules may be expected to be defined, *i.e.*, to occur:^{2 4}

(1) To the extent that the predictability of the environment, *i.e.*, of the behaviour of others, is indeed considered a benefit. For while predictability will be estimated so in all cases, it will not be so to the same extent, it obviously depending upon what is substantially at stake.

(2) To the extent that such definition will indeed *effectively* increase predictability as expected by the individual(s) in question. But this means, in its turn, that the definition or occurrence of rules is partly determined by its expected effectiveness and thus by the same conditions which determine that effectiveness in the first place.

(3) (With special regard to the substance or contents of the rule to be defined) to the extent that the conduct in question does indeed serve the substantive interests of those concerned; that is, that there is congruence between the utility judgments as called for by the rule and those initially connected to the conduct in question. This means that my defining a rule will be the more unlikely, even if application to others sometimes results in benefits, when its reciprocal application of it against me will harm me — provided, of course that I cannot insure against that by virtue of my unilaterally *imposing* the rule upon them and protecting me against their applying it against me.

It is to be realised that while the above is phrased in terms of individual action, *i.e.*, of the individual's definition of the rule, this is but one side of the problem. For a rule emerges in a certain social milieu or group to the extent that it is so defined by (a significant proportion of) its membership. That is, the greater the proportion of the group's membership which defines a rule, the greater the

'measure of definition' of the rule, the 'more it exists'.

But, of course, this is not a matter of mere numbers. It will make a great deal of difference *who* defines the rule, the politically weaker, or more peripheral members of the group or society, or its weightier part. In the first case the chances for the rule's effectiveness will be much smaller as compared with the latter case — which, in combination with the reasoning developed above does definitely seem to suggest that in the more peripheral sections of the group the norm-definition will be generally less than in its more central parts.²⁵ Thus we should say that in a given group or society *a rule is the more defined, exists to a greater extent, the more and the more important members of the group or society have so defined it.*

5.2. Power and interest

The above will now be elaborated and rendered somewhat more specific thereby by turning our attention to each of the relevant factors in turn²⁶.

5.2.1. Interdependence

To begin with, then, a rule will occur to the extent that, for more and more powerful or central members of the collectivity, predictability of the environment, *i.e.*, of interaction and political processes within the system concerned, represents a (higher) benefit, in its turn, and as follows from our learning-theoretical and political analysis, this will occur to the extent that those members will interact more frequently, and with respect to their more central interests, with their environment. In a general sense this has been seen to be a matter of the growth of interdependence relations between the people concerned. Thus, to the extent that, for instance as a result of technological or economic developments, of the growth of population and of military means and weaponry, the network of interdependences existing within a certain social system intensifies and increases in scope, we may expect the number and variety of rules to grow concomitantly. And, in fact, the growth of the several national legal systems, of international law, even of common etiquette, as of state and international organisation themselves, in the history of at least Western civilisation shows ample proof of this²⁷. If, as I do, one sees this growth of interdependences as in its turn caused ultimately by the development of science and technology as well as of population, then legal growth is an evolutionary adaptation to (the changing means of coping with) man's environment²⁸.

5.2.2. 'Power politics'

But we are to be concerned with *effective* predictability, or, rather, with the effectiveness of the rule as expected by the (more and the more powerful) members of the collectivity in question. That is, *rules will the more probably be defined or emerge as they are judged to stand a better chance of being effective.* And in its turn this means again that rules will emerge to the extent that they embody more precisely measured and more stable and dependable relations of power and interest.

Now these factors need not at all work in the same direction. On the contrary, there would seem to be *prima facie* reasons against assuming their easy cooperation. *For while growing interdependences are consequent upon changes in population and technology, these very same changes mean instability and measurement difficulties in the realm of power and interest.* That is, while the *need* for rules grows, the *difficulties* in making them effective do likewise. It is no coincidence that the development of historical political systems in the throes of such developments, as they have been during the last few centuries everywhere in the world, is normally accompanied by much and violent turmoil. By means of such struggles, warfare and revolution, new power relationships are created or existing ones more precisely defined. And it is normally in the wake of such upheavals that new rules and legal systems are brought about, thus boosting legal, if not moral evolution. It required the French Revolution to introduce an effective and unified, more 'rational' law which was to be better adapted to the needs of the dawning industrial age. Similarly, the development of international organisation, the efforts to more tightly and dependably regulate European politics by means of the creation of new, partly 'supranational', institutions followed upon and were much stimulated by disastrous international conflagrations²⁹. And, ironically, if somewhat lugubriously, but fully in accord with the theory, efforts to bring such increased regulation about *before* (and in order to forestall) such disasters, have always been characteristic failures.

The actual evolution of the rules, then, can be viewed as an ongoing adaptation to changing relations of power and interest. This does not mean anything so primitive as that 'might makes right' or similar simplifications. It means that only such rules can (effectively) emerge as do indeed adapt to (changes in) the power-political potential of groups. Thus, in the context of the European states, the growth of the bourgeoisie, to adopt for once this simplifying notion, did mean an increase in the potential power of new groups and

interests and the law had to change with that situation, *viz.* violent revolutions in some, almost peacefully and orderly in other cases. Similarly, much of the legal development of the nineteenth and twentieth centuries can be seen as a response to the growth of the labour movement, *i.e.*, the development of new political forces based upon social-economic strata hitherto powerless. It is the crux of what has been called the 'socialization' of law, meaning thereby the tendency as exhibited since the nineteenth century of having the law take cognisance of interests hitherto unrepresented, notably of the 'weaker' strata of society.³⁰

Internationally, one might see the emergence of such *fora* as the General Assembly of the United Nations, as reflecting a recognition of the power mobilizing potential of small countries, hitherto there being hardly any need to pay attention to their wishes and interests. Ignoring them in modern circumstances, in a system faced by such an immensely increased load of political problems to cope with, faced with the vastly increased number of smaller states which, while weak enough considered individually, can easily be mobilised into larger coalitions, would be much too costly and uncertain a strategy for the great to follow with sufficient assurance of success. More clearly still, the present stage in the development of the law of the sea represents changed power relations. Not only that modern military technology renders effective sovereignty over much greater expanses of water possible than in any previous period; not only that, in view of modern technology the sea becomes increasingly exploitable and plays an ever larger rôle as a medium of transport; but at present no state or permanent coalition of them is so strong as to guarantee the measure of freedom of the seas as was characteristic of much of the past. Hence, the difficult period of change and adaptation which we are now witnessing.

5.2.3. *Congruence*

The emergence of rules is also governed by the extent to which they serve or agree with the parties' pursuit of their own interests. To begin with, this leads us naturally again to the degree of interdependence existing or growing between them. For the extent that parties are interdependent, their more important interests are or come to be involved, especially their 'economic' and 'power-political' interests.

However, (growing) interdependence does not at all guarantee that the parties' more important interests will in fact be served by the rule or rules. While interdependence implies that more important interests

are at stake between parties, for the emergence of an effective rule it is crucial that interactions (as regulated by the rule) do indeed consistently and reliably produce a satisfactory result. Only in that case will a rule actually be followed. But here again an important rôle will be played by the relations of power and interests between the parties, as these determine which results they can normally expect to get from the interaction. Conversely, it is these relations which determine the extent to which parties can hope to successfully transgress the rule and gain an advantage thereby. *Accordingly, then, rules will emerge only inasmuch as they do indeed take cognisance of the relations of power among the actors. But for this to happen with any degree of success these relations themselves must be known in a reliable and recognized fashion. Again: rules will occur only in situations of stability.* This, then, is an additional reason why the growth of law is a concomitant of the evolution of the state or, internationally, of such systems like the Roman or the British Empire.

This also means that for rules to emerge some simple agreement of the parties' interests is not enough. Or: similar or identical preferences, a common culture, or perhaps a common ideology, do not automatically lead to the emergence of rules. Not only that similar or identical preferences or values may just as easily lead to violent conflict among the parties, but what is crucial is what they may expect to 'get' out of their interactions or political processes — whether measured by identical or by very different preferences does not at all matter. And what they can expect to get from the political processes in which they participate is determined primarily by their relations of power, strength and (inter)dependence.

5.2.4. *Briefly about morals*

So far I have drawn my examples mainly from the sphere of *legal* development, much less from that of morals — in spite of the title of this essay and of the claim that the theory be applicable to morals, too. The difficulty is, however, that ethics and morals represent rather vague and general sets of rules, elastically formulated and badly defined, with many loopholes, exceptions, alibis for non-observance, and contradictory propositions. As a result, it is very difficult to say anything definite about their historical development at all. True, there do exist numerous historical analyses in the field, but they are generally concerned with what ethical thinkers and moralists wrote about it, and claimed or advocated what ethics or morals *should* be like, not what actual ethical or moral rules existed

in *fact*.

Now, morals and ethics are concerned predominantly with individual action of the most general and therefore rather abstract nature. While the law relatively clearly and explicitly fixes rights and duties, permissible and non-permissible actions in rather precisely specified circumstances, morals and ethics are a matter of man's conduct in general. That is, they define, or set out to define, permissible and non-permissible conduct in every situation — and to a large extent even irrespective of the situation. In this last circumstance also lie their main weaknesses. For they inevitably degenerate into rather empty generalities. And inasmuch as they are defined more strictly, allowance must necessarily be made for a large class of exceptions. As a result it will be difficult to trace any *development* or *evolution* therein : they are so general that they can accommodate almost any change in social, natural or technological circumstances. Yet something can perhaps be said about morals — even if it be little more than speculation.

To begin with, then, morals would seem to be primarily concerned with such behaviour as (potentially) has social implications, *i.e.*, consequences for other people in the sense of inflicting harm upon them or offering them rewards. Thus rules forbidding us to kill our brethren, commanding us not to cheat, steal, or, in general to be honest, are obvious examples. Their *mutually* advantageous nature is in most circumstances clear enough : they avoid harm in cases where nobody would consistently gain from such acts. Similarly, rules concerning honesty, or those having to do with honour, can be explained from the same source, as they are centrally concerned with the reliability and predictability of behaviour, strengthened by the fact that they also define the individual's credibility and prestige. That rules would emerge concerning such eminently important matters, concerning which all people are normally more or less in the same boat can cause but small wonder.

But it should also be recognised that people are *not* always in the same boat in that transgression of the rule may and often is both advantageous and called for if one or one's group is to survive. This applies notably *between* groups as in the international sphere. And as a result it is in such relations that the rules of common morality do not or only intermittently apply. Also one is to expect differences in such morality, or rather in the precision with which it is defined, as between social strata or milieus that are wide apart socially and politically. And indeed some such differences can be discovered empirically — even though they will of necessity be relatively small given the general and abstract nature of the rules themselves.

Such differences become much more outspoken in the sphere of another sort of rules, namely those of social etiquette. It is especially with regard to these, that the work of *Elias* is so very interesting. For clearly *Elias* traces the historical development of etiquette, manners, and, in part, morals, to the growing interdependences between more and more people as over widening regions, as well as to the evolution of political relationships. Generally speaking, with growing interdependences as well as a progressive stabilization of power relations, more and more of man's activities having some sort of social consequences (if only those of witnessing one's eating, drinking, etc.) come to be regulated by rules. This is accompanied by a gradual heightening of people's 'threshold of shame or sensitivity', which may well be nothing but the emotional translation of the need to protect and maintain one's own integrity, freedom or autonomy, one's 'territory' to apply this ethological terminology here, against increasing interference caused by growing interdependences and smaller 'distances' between people.³¹

Social etiquette, too, reflects a codification of the relations of power and interest between people. Accordingly, it can be seen to disappear or change more or less drastically when those relations change, as is witnessed by the changed position of children, youth and students, as well as employees and their rather obvious and large consequences for the pre-existing rules of etiquette in modern industrial society.

Whether such developments can also be seen in the sphere of the common moral rules mentioned is more difficult to decide if only because of their very general and this 'timeless' character. Perhaps that the greater reluctance in some societies to put criminals to death, or even to enjoy public cruelty constitutes a sign of the same development. The argument of this essay then would also go far to show why such greater 'humanitarianism' will not automatically be operative in warfare when the circumstances so dramatically change. Or, it would suggest that this humanitarianism does not necessarily go very deep and is very much bound to the conditions and circumstances which gave rise to it in the first place, as well as to changes therein. At any rate, a large field for further investigations lies before us.

6. Political integration and legal evolution

At several points in the preceding discussion I have pointed to the close connection between the development of law on the one hand, and that of the state on the other. Also I have indicated that legal evolution, too, is an example of what may be called 'political

institutionalisation'. The state as well as, though in a much weaker form as yet, international organisations, represent (phases in) processes of political institutionalisation or organisation. That is, they constitute sets or patterns of organs and institutions or organisations, such as the cabinet, the bureaucracy, parliament, the judiciary, and so on, through which or with the aid of which, the (or some of the) political processes occurring in the larger system in which they operate are channeled and brought to a conclusion. Now, these political organs, institutions or organisations, whether of a typically 'political' or of a 'juridical' nature, are in their turn (small) political (sub)systems through which demand behaviours are to be made into political outcomes, quite often constituting demand behaviours in their turn, and through which they are coupled to the other organs of the system and, ultimately to its individual members.

The characteristic qualities which turn these *political subsystems* into *organs, institutions or organisations*, are that (1) *they, as well as their connections to other institutions are rather tightly regulated, functioning in accordance with fixed rules, while (2) they command resources of their own, i.e., people and material means, in order to make them function more effectively.* Now political systems obviously differ in the extent to which they are thus organised. In the first place they do so in *the number, variety, and scope of the institutions which exist*, as, f.i., the international milieu generally knows far less and less varied or elaborated institutions, with respect to a much more limited number of political problems and processes, than a well integrated modern state. In the second place, such organisations differ in their *capacity*: the extent to which, roughly, they are indeed able to quickly and smoothly bring the political processes fed into them to a conclusion. Generally speaking, too, the decision-making capacity of a modern national state as well as of its several organs and institutions is much greater than that of their international, or, for that matter, historical counterparts. They represent stages in processes of political integration. An essential characteristic of the process thus is legal evolution, for it is the emergence of rules governing the several political processes which defines the evolution of institutions and organizations.

These processes mean a stabilization of the power relationships between the parts or parties of the emerging political system, as well as the emergence of possibility of mobilising a dominant group. Struggle will go on until this result has been reached, as interaction and social life generally are possible only when the problems or disputes arising between people and groups can be solved or decided

in a predictable fashion.

Now, to the extent that this evolution proceeds such matters will come to be (legally) regulated to an ever increasing extent and (political) institutions will emerge. Thus, what starts out as a relatively loose coalition of some of the momentarily strongest parties in a system, can and will, carried by success in its self-assertion and its elimination of rivals grow gradually into regular governmental institutions. And while disputes between parties had initially to be settled by recourse to incidental, ad hoc and 'private' political processes, to bargaining and fighting, these now become amenable to standardised procedures and solutions. It is to be noted, too, that, given (increasing) interdependence the process will continue at its 'boundaries', never finished, and continuing at ever higher, 'international' levels.

Of course, this is not to say that there were no law before the emergence of the modern state^{3 2}. Surely, long before that there had emerged systems of rights and duties, procedures for righting wrongs and bringing disputes to an end. These were, however, of a 'private' nature, viewed from the perspective of the modern state, that is, both in the relations between ordinary individuals, as well as in those between politicians or political entities, as still largely between the vassals and lords of feudalism, law and the settlement of disputes was less an 'impartial' adjudication by an outside agency, over and above the parties, and on the basis of a preëxisting corpus of objective rules, than a sort of arbitration, in a contest between parties, fought by all sorts of means: oaths, witnesses, ordeals, fights and duelling, and of course, 'legal' reasoning. Such proceedings, then, represent but weakly regulated or institutionalised political processes — hence the 'private' nature of early law and legal proceedings, even in the realm of typically 'public' matters. With the emergence of stable dominance relations, however, regulation of ever more political processes is bound to occur, and notably 'public' law will make its appearance.

One of the first spheres in which the newly emerging dominant institutions, the 'government' will seek to stimulate the growth of law, will naturally be that of judicial proceedings, seeking to unify the law and, perhaps even more importantly, trying to have adjudication of disputes take place wholly *via*, or under the aegis of, the government: the law shall be administered in the name of the king^{3 3}. The law of the emerging realm is to codify and publicise the power of the newly emerging government. This government increasingly (though in practice rather slowly) comes to command the possibility to administer sanctions, and thus to steer the

development of the law in a direction which will support its own position. The government's appropriation or monopolisation of the sphere of private justice is precisely such a development. First of all, it will seek to abolish private feuds and fights, for if such fights would be allowed, a process of the gradual but progressive elimination of the weaker contestants would inevitably occur, thus leading to the formation of ever stronger actors which would threaten the existing relations of power and interest.

It is, one should presume, only very much later that the legal system of the states can be asked to serve other needs, notably those of 'justice' in a more substantive sense. The legal development of a system, as well as its gradual institutionalisation, will be so 'devised' as to primarily and firstly serve the power-political interests of the state, based upon existing relationships. It will be aimed at securing law and order in the realm, the dominance or 'sovereignty' (a notion which is, quick to make its appearance in legal theorizing) of the state organisation. The idea that the law is to serve other, more substantively defined interests, 'justice' in particular, can, in the early stages of institutional growth be little more than a pious wish — one may even doubt whether the wish or idea itself is a very old one, given its impracticability. That during the last one and a half century the law has indeed come to be concerned more and more with substantive rights and duties, that it has indeed grown to include all sorts of substantive relations and contracts hitherto beyond the pale of the law and at the discretion of parties, or, rather, to the untrammelled workings of existing power relationships — all this bears witness both to the growing degree of institutionalisation or organisation in (some) national systems, the growing power of the state, as well as to the related fact that new parties and groups have made their appearance on the political scene.

Now, what happens and happened in regard to the formation of the national states is not really different from what happens *between* such states. And rather than to posit the two spheres as fundamentally different and hermetically sealed off from one another, one should view the national systems as temporarily and geographically limited nodules or nuclei of crystallization in a much larger political system. In principle relations of interdependence do, and did, not stop at the boundaries of any legally defined entity. Struggles, politics and the necessity to determine and establish more or less stable relations of power and interest occur(ed), exist and existed throughout the system. It being a matter of relative political accident to which centers or to what spheres a particular group or region was to be drawn, *i.e.*, where the state boundaries eventually

came to be situated — accidental in the sense of being determined by shifting relations of power and interest as well as upon sheer luck in military battles. That no comparable legal system has emerged in the inter-state sphere to the same extent as that it did within the states, and that institutionalisation did not proceed as far as it did in the national states, so far at least, is caused by the limited nature of historical international interdependences as well as by the relatively high costs (relative, that is, to the gain to be had from it) of establishing or changing the appropriate power relations in that realm. It is only fairly recently that we see some evolution in the direction of an international law which is more than diplomatic courtesy and self-justificatory principles.

To those who wish to view legal development, nationally and internationally, as the progressive realization of justice and embodying ever higher levels of morality, the preceding analyses must come as a disappointment. For, although it did not start out from anything so base or materialistic, the present article definitely shows the law to be a relatively predictable product of the relations of power and interest within, between and among human groups, including societies. These relationships in their turn being largely determined by changing relationships or levels of technology, population and geography. And even though not all the ramifications of the present argument could be pursued, even though the main line of argument stands in need of further elaboration and refinement, and even though its detailed empirical testing requires much additional empirical research, partially of a relatively new character — still, enough of the historical evidence available does support the argument in order to lend it great initial plausibility. Law and morals, then, are perfectly 'natural' social occurrences, the product of, and constrained by, the vicissitudes of power and interest, and the struggle for survival of individual and group.

Bilthoven — Surubaya

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¹ Note that we are concerned here merely with an 'internal' matter of derivation or deduction, it does not mean that as behaviour and social product, *i.e.* in an 'external' sense, science were also 'value-free'. After all, one must *wish* to develop knowledge and

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insight (which, in addition, is also to meet certain standards — also a normative matter), and society must again *wish* to pay scholars, teachers, laboratories, libraries, and so on. See for a partly historical analysis of this problem with particular regard to legal literature : *Arnold Brecht*, *Political theory : the foundations of twentieth-century political thought*. Princeton University Press, Princeton 1959, pp. 165 ff. See also my “Opmerkingen over theorie en praktijk” in *Sociale Wetenschappen*, 13 (1), 1970, pp. 12-36.

² For an overview see : *H. J. van Elkema-Hommes* : ‘Hoofdlijnen van de geschiedenis der Rechtsfilosofie, Kluwer, Deventer, 1972, Ch. XII.

³ Cf. *Theodor Geiger* / Vorstudien zu einer Soziologie der Rechts — mit einer Einleitung und internationale Bibliografie zur Rechtssoziologie von Paul Trappe, Luchterhand Verlag, Neuwied a.R., und Berlin 1964 (1946), p. 214, and in particular p. 208 where he does indeed admit that it will often be quite impossible to say what the law actually is.

⁴ As *Geiger* himself, of course, knows perfectly well, Cf. *Geiger*, op. cit., pp. 59, 121. Max Weber also defines law in relation to the possibility of ‘sanctions’ : *Max Weber*, *Rechtssoziologie — aus dem Manuskript herausgegeben und eingeleitet von Johannes Winckelman*, Luchterhand, Neuwied 1960, pp. 59, 61, where he equally recognizes the wide nature of the ‘sanctions’ to be applied.

⁵ The behavioural and political theory to be sketched in the text is but an informal summary of the theory as described in my ‘A theory of human behaviour and of the political process’, in *Acta Politica*, XI (4), Oct. 1976, pp. 489-524, which is itself a synopsis of the argument of two Chapters of my forthcoming ‘Foundations of politics’.

⁶ For it is to be noted that the rather common and deeply ingrained habit of explaining action from consciousness or awareness, and to view ‘selection’ or ‘choice’ as matters of freedom and insight, of ‘rationality’ even, represents merely the application (mostly unawares, that is) of what is after all but an alternative, and weakly articulated theory.

⁷ The psychological literature abounds in more or less extended lists of standard ‘needs’, ‘motivations’, ‘drives’, or ‘preferences’. See for instance *Bernard Weiner*, *Theories of motivation : from mechanism to cognition*, Markham, Chicago, 1972, Apart from the fact that they ignore the informational component, they do not tell us how, in concrete circumstances, which ‘need’ etc. will to what extent determine actual conduct. Their value is, accordingly, extremely limited.

⁸Of course, this axiom is a relatively drastic simplification. For one thing, as preferences (and probability estimates) are strictly relative matters, we ought rather to be concerned about the growth and organisation of entire *sets* of such judgments. Other factors will then be seen to play a rôle, too, such as the measure of organization of the set, making for relatively easy or difficult choice and conduct, and the extent to which the set is consistent with other sets, or the 'distance' between it and such other sets — both in the individual's own intellectual and emotional household, and in his social environment. Still, the axiom mentioned in the text does seem to summarise the phenomenon's central features tolerably adequately.

⁹This assumption seems to come quite close to the so-called 'frequentist' conception of probability, which regards probabilities to be matters of relative frequencies, or of the 'limits' to which such frequencies approach.

¹⁰This is of course a fairly wide conception of the political. It has been developed, not only because what is at stake at the various social levels indicated is indeed one and the same thing, but also because it seemed only in this fashion possible to firmly embed the political in an articulate theory. Conversely, one of the central merits of this conception is that it is indeed theoretically defined and relevant, unlike most other conceptions advanced so far.

¹¹Assuming preferences and information to be given, that is. For these, too, can be manipulated to some extent as in propaganda. Here I will not concern myself with this side of the matter, though.

¹²The stability and viability of an outcome, then, is not, as common sense would seem to suggest, merely a matter of the measure of satisfaction with it. In a somewhat deeper sense, one may even doubt whether such satisfaction itself can be independent of the extent relations of strength and interdependence, of what individual and group can normally hope to 'get' out of it.

¹³As when the ability to regulate human affairs on the part of law is simply defined or proclaimed to exist. Cf. Alan James, '*Law and order in international society*', in *Alan James (ed.), The bases of international order: essays in honour of C. A. W. Manning*, Oxford University Press, London, etc., 1973, pp. 60-84, p. 67. Similarly, *Bart Landheer, On the sociology of international law and international society*, Nyhoff, The Hague 1966, p. 27.

¹⁴See for example *Donald R. Cressey, Theft of the nation: the structure and operations of organized crime in America*, Harper and Row, New York, etc. 1969, pp. 278 ff..

¹⁵ See on this subject *George Rusche and Otto Kirchheimer*, *Punishment and social structure*, Columbia University Press, New York 1939.

¹⁶ As can be seen from such books as *Sir Geoffrey Butler and Simon Maccoby*, *The development of international law*, Longmans Green, London 1928; *Arthur Wegner* *Geschichte des Völkerrechts*, Kohlhammer, Stuttgart, 1935; *Thomas Alfred Walker*, *A history of the law of nations*, vol. 1 : from the earliest times to the peace of Westphalia 1648, Cambridge University Press 1899; *Wilhelm Janssen*, *Die Anfänge des modernen Völkerrechts und der neuzeitlichen Diplomatie : ein Forschungsbericht*, Metzlerischen Verlagsbuchhandlung, Stuttgart, 1965.

¹⁷ It will have become clear by now that the present theory does not explain law, or morals for that matter, from any such 'legal (or moral) awareness' or 'consciousness' as, among older theorists, was done particularly by Krabbe. Neither is it assumed here that law derives primarily from pre-existing normative standards as is thought by *Stuart Nagel* in his *The legal process from a behavioural point of view*, The Dorsey Press, Homewood III, 1969, p. 5. The notion of 'legal consciousness' itself, incidentally, is a quite dubious one. Cf. *Geiger*, op. cit., *Weber*, op. cit., p. 180. If it is meant to refer to (feelings of) 'legitimacy' as defined in the text, then it should be recognized that it, too, does not simply act as a 'source' of, or a pre-existing basis for, law.

¹⁸ On the importance of this predictability, see *Robert E. Osgood and Robert W. Tucker*, *Force, order, and justice*, Johns Hopkins Press, Baltimore 1967, p. 32; also *Percy E. Corbett*, *Law in diplomacy*, Princeton University Press, Princeton 1959, p. 34.

¹⁹ This seems to be the kernel of the notion of reciprocity, so often mentioned as a central feature of effective rules. See, for example, *Alvin W. Gouldner*, *The norm of reciprocity : a preliminary statement*, in *American Sociological Review*, 25 (1960), 161-178.

²⁰ Similarly, different sectors of, or groups in, society will, even in well-established states, be differently governed by the law. Cf. *Leopold Pospisil*, *Anthropology of law : a comparative theory*, Harper and Row, New York etc. 1971, pp. 116 ff..

²¹ Cf. *Geiger*, op. cit., p. 342.

²² Hence it is not surprising that such eminent legal thinkers as *Ihering*, *Jellinek*, and of course *Kelsen* have tended to link state and law even by definition.

²³ As seems to be the upshot of what *Grenville Clark* and *Louis B. Sohn* write in their *World peace through world law*, 2nd revd. ed., Harvard University Press, Cambridge, Mass. 1964 (1958), p. XLIV'

²⁴ Naturally a rule may be observed to occur when it is explicitly so formulated, but it may also be inferred when people start to justify their judgment of others' behaviour (which judgment does not in itself require a rule, of course, but may be a matter of simple preferences) by (implicitly) referring to a standard of conduct. The present theory renders it unlikely that this should be a matter of initiative by individual 'moral entrepreneurs', as thinks *Howard S. Becker*: *Outsiders — studies in the sociology of deviance*, The Free Press, New York-London 1963, p. 147.

²⁵ Cf. for example *David Krech et al. (eds.)*: *Individual and society*: a textbook of social psychology, McGraw Hill, New York etc., 1962, Ch. 10; *Jack D. Douglas*: *Deviance and order in a pluralistic society*, in *John C. McKinney and Edward A. Tiryakian (eds.)*: *Theoretical sociology, perspectives and developments*, Appleton-Century Crofts, New York 1970, pp. 368-401.

²⁶ To view law as reflecting what are here termed 'relations of power and interest' is not new in itself, as it can be found already in a very outspoken form in *Spinoza's* works, both in his *Tractatus Politicus*, and in his *Tractatus Theologico-Politicus*, Among typically legal theorists it is to be met with in, to mention only these, *Kelsen*, *Pound*, *Ihering*, and *Ripert*. See also, for more or less outspoken traces of it, *Geiger*, op. cit., pp. 46-48, 342; *Weber*, op. cit., pp. 79-80; *Pospisil*, op. cit., pp. 116 ff.; *Corbert*, op. cit., p. 277. See also the several contributions to part III of *Darwin Cartwright and Alvin Zander (eds.)*: *Group dynamics: research and theory*, Tavistock, London, 1960, pp. 165-341.

²⁷ Cf. *Norbert Elias*, *Ueber den Prozess der Zivilisation: soziogenetische und psychogenetische Untersuchungen*, 2 Bde, Francke, Bern-München 1969 (1936), for the growth of common manners, etiquette, and morals.

²⁸ See on this in particular *Gerhard Lenski and Jean Lenski*: *Human Societies: an introduction to macrosociology*, and ed., McGraw Hill, New York etc., 1974; *Marshall D. Sahlins and Elman R. Service (eds.)*: *Evolution and culture*, University of Michigan Press, Ann Arbor 1960.

²⁹ Law, then, is made in and through struggles in which 'deviant behaviour' may even be said to have as its central 'function' to help

define what the law actually is. Cf. *Jack D. Douglas*, op. cit., in the same sense *Kai T. Erikson*, *Wayward Puritans*; a study in the sociology of deviance, Wiley, New York etc. 1966, p. 13

³⁰ See *J. Valkhof*, *Een eeuw rechtsontwikkeling : De vermaatschappelijking van het Nederlandse privaatrecht sinds de codificatie (1838)*, 2e dr., Arbeiderspers, Amsterdam, 1949.

³¹ Cf. *Elias*, op. cit., pp. 102 ff., 113-4, 142, 146-7, 278-9.

³² See for example *Rusche and Kirchheimer*, op. cit., pp. 9 ff., *Michael Barkun*, *Law without sanctions : order in primitive societies and the world community*, Yale University Press, New Haven and London, 1968; And the various contributions to *Paul Bohannan (ed.)*, *Law and warfare : studies in the anthropology of conflict*, University of Texas Press, Austin-London, 1967; or *Ronald COhen and John Middleton (eds.)*, *Comparative political systems : studies in the politics of pre-industrial societies*, Natural History Press, Garden City, 1967.

³³ Cf. *Joseph R. Strayer* : *On the medieval origins of the modern state*, Princeton University Press, Princeton 1970, pp. 29 ff.