

International pluralism and the rule of law

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Does international law have a place in a world being reshaped by globalization? Sceptics argue that international law belongs to a world order, based on relations among sovereign states, that is rapidly receding into history. But such a claim itself invites scepticism. Globalization is a journalist's term—a rough tool for making sense of what appears to be a trend toward a more integrated international economy and its attendant cultural homogenization.¹ Academics who use the term link it to the proliferation of intergovernmental organizations and transnational interest groups concerned with human rights, the environment, or economic issues, and to the emergence of a new normative framework, distinct from classical ('Westphalian') international law, for 'global civil society' and 'cosmopolitan democracy'.² Whether these trends will continue and how they might affect familiar political arrangements is not yet clear. It is possible that international law will disappear along with the pluralist system of sovereign states that the new global order is said to be replacing. It is more likely, however, that the old system will continue in a new form, and that there will be a place for international law in the new order. In this article, I discuss the character of law in the international system, on the assumption that globalization will not destroy that system. But even if international law does vanish, perhaps to be replaced by a different system of world law, the issues I consider here will remain relevant because they are inherent in the idea of law itself.

Democracy, if it is to be more than a tyranny of the many, requires a specific kind of legal order. It presupposes an order governed by the rule of law—one that limits as well as empowers collective decision-making.³ Because 'the rule of law' is more often invoked than understood, the meaning of that expression cannot be taken for granted. Accordingly, those who are concerned with shaping the emerging global order could profit from a careful effort to reconstruct that idea. I hope the reader will bear this in mind in working through the argument of this article.

We can begin by distinguishing two modes of human association, the first a relationship based on laws governing the transactions of independent, formally

¹ It is common to identify globalization with cultural uniformity and to contrast it with difference. See, for example, Benjamin R. Barber, *Jihad vs. McWorld: How Globalism and Tribalism are Reshaping the World* (New York: Ballantine Books, 1996), and Thomas L. Friedman, *The Lexus and the Olive Tree: Understanding Globalization*, expanded paperback edn. (New York: Anchor Books, 2000).

² See, for example, Michael Walzer (ed.), *Toward a Global Civil Society* (Oxford: Berghahn Books, 1995) and Daniele Archibugi, David Held, and Martin Köhler (eds.), *Re-imagining Political Community: Studies in Cosmopolitan Democracy* (Oxford: Polity Press, 1998).

³ A constitution can serve both these purposes, but constitutional government is not identical with the rule of law. A constitution can be the enemy of the rule of law and the rule of law can be realized without a constitution.

equal legal persons, the second a relationship based on force in which ‘the powerful do what they can and the weak suffer what they must’.⁴ These modes are not particular, historical realities; they are abstract alternatives, both of which are realized to some degree in any actual association. They reflect the fundamental categories, law and force, in terms of which politics has been theorized for as long as there have been political theorists. The contrast between law and violence, between civility and barbarism, is a recurring theme in Thucydides’ history. Aristotle distinguishes the *polis* from despotic regimes in similar terms: a polis is a legal association of citizens, ‘fellow subjects’ of its laws, despotism a coercive association between master and slaves.⁵ But because the rules by which masters coerce slaves are sometimes called ‘laws’, we have somehow to resolve the ambiguity that arises when the word ‘law’ is used comprehensively for the rules characteristic of both modes of association. One way that theorists have attempted to resolve this ambiguity is through the idea of the rule of law. When they want to distinguish what I am calling a relationship based on laws, a relationship of fellow subjects, from a despotic relationship, a relationship in which the strong use the weak and in which law is merely their instrument, they sometimes speak not of ‘law’, which refers ambiguously to both, but ‘the rule of law’.

How does the rule of law apply to international relations? International law is not a single, coherent practice or institution. Like other kinds of law, it is a miscellaneous aggregate of rules, principles, procedures, decisions, orders, policies, precedents, and other normative elements. The international legal system, as it exists, serves different ends and reflects different conceptions of international order. For these reasons, the idea of international law is ill-defined and ambiguous. As with law generally, the chief ambiguity here is between international law as a tool used by the powerful to coerce the weak, and international law as a body of rules constituting an ‘international society’ whose members, states, are fellow subjects of its laws. (To keep things simple, we can ignore the fact that persons, corporations, and other entities are sometimes treated as subjects of international law.) Something important is lost when we fail to distinguish relations between states as members of an international society, possessing rights and duties under its rules, from relations between states as ‘powers’ coercing or being coerced by one another according to their relative power. Both kinds of relationship exist in any actual international system, but this does not mean that they cannot be distinguished analytically. And it is important to distinguish them because law is understood differently in each mode. Where the rule of law is the mode of association, states recognize and respect one another as independent agents. What this means, fundamentally, is that a state is barred from coercively using other states for its own ends, though it may use coercion, within limits, to defend itself or others against those who violate this principle of respect.

One way of distinguishing these two modes of interpersonal and international association is to identify the kind of relationship defined and regulated by non-instrumental rules as a ‘moral’ relationship and to identify the law that governs this relationship as a kind of ‘morality’. In a moral relationship, those related recognize one another as ‘persons’ pursuing ends of their own, and entitled to pursue those

⁴ In the words of the Athenian generals at Melos, according to Thucydides, *The Peloponnesian War*, trans. Richard Crawley (New York: McGraw Hill, 1989), book 5, ch. 89.

⁵ *Politics*, book 1.

ends without hindrance and therefore without hindering one another. (A moral relationship can exist between collective or artificial persons, like corporations or states, as well as between natural persons.) What is essential in a moral relationship is that persons treat one another as ends and not merely as a resource for satisfying their own desires.⁶ Whatever the difficulties of this conception, it expresses how moral relationships are best distinguished, within the tradition of 'natural law', from power-based relationships.

Natural law theory is conventionally understood as an alternative to 'legal positivism', which can be defined in this context as the view that laws, properly speaking, are rules laid down ('posited') by a ruling authority and backed by effective enforcement, and that any authoritative and effective system of rules must be counted as law, no matter what its moral qualities. The idea of 'the rule of law' allows us, however, to distinguish law and force as modes of association without relying on this conventional understanding of the distinction between natural and positive law. To put it differently, the idea of the rule of law allows us to distinguish these modes of relationship within legal positivism as well as within natural law, for the laws that are enacted to govern a particular human community can be *either* non-instrumental ('moral') constraints on the conduct of its members *or* instrumental rules used by of those members to coercively impose their purposes on others. The idea of the rule of law serves to emphasize that rules of the latter kind are mere instruments of force, rules that lack the moral qualities we usually associate with lawfulness or legality. If this is correct, the debate between natural law and legal positivism over the definition of law, as that debate is usually understood, is misconceived. True law, natural *or* positive, belongs to a mode of association constituted by rules of a certain kind, non-instrumental rules that govern transactions between independent agents who understand themselves to be fellow subjects of a common law.⁷ In the circumstances of international relations, then, the rule of law identifies a kind of relationship that exists in so far as states observe the non-instrumental laws that define and regulate international society. Such a mode, which excludes relations based solely on power, is (to repeat) a *possible* mode of relationship that is only partly actualized in any historic international order. International law as it exists includes instrumental rules that have permitted governments to unjustly coerce other governments, or to oppress their own subjects, but such rules do not express, and are in fact antithetical to, the rule of law.

To make these conclusions about the international rule of law intelligible, never mind plausible, is not an easy task. I will begin by reconsidering the debate between natural law and legal positivism, focusing on how law is understood within each of these traditions. With this as a foundation, I will explain how the rule of law in any legal order, including the international legal system, can be defined and defended in a way that draws upon both traditions. Finally, I will consider the implications of this explanation for an international order that is being reshaped by globalization.

⁶ This is how morality is understood by Kant, whose 'principle of respect' is one version of the fundamental principle of morality. Immanuel Kant, *Foundations of the Metaphysics of Morals*, trans. Lewis White Beck (Indianapolis: Bobbs-Merrill, 1959), pp. 66–7.

⁷ Richard Friedman, 'Some Thoughts on Natural Law and International Order', in David R. Mapel and Terry Nardin (eds.), *International Society: Diverse Ethical Perspectives* (Princeton, NJ: Princeton University Press, 1998).

Natural law

The modern idea of natural law can be traced back to Stoicism, a school of thought that emerged in Greece after the Macedonian conquest in response to the disappearance of the polis. As interpreted by Cicero and other Romans (most of the original Greek texts having been lost), Stoic ideas became part of the intellectual inheritance of modern Europe.

Central to Stoicism is the idea of an eternal and immutable law governing all motion and change in the universe (the ‘cosmos’). This law establishes a rational order that can, in principle, be understood by human intelligence. Human beings are themselves part of this rationally ordered universe and their conduct is governed by its law, ‘natural law’. But because they can choose to disobey it, natural law does no more than set a standard for guiding and judging conduct. And because of their shared character as rational beings—beings whose potential, and therefore essence, is to be rational—all human beings are citizens of a single, ideal community: a universal community or ‘cosmopolis’ whose law is this rationally-knowable natural law. The Stoics did not deny that every person is also a citizen or subject of some particular state with rights and duties under the laws of that state. Their point is that human beings have rights and duties as members of this rational cosmopolis that are distinct from those they enjoy as citizens of a polis, and that they have a law to guide them, even if they are not citizens of any polis.

For the Stoics, the cosmopolis is an ideal model for all man-made political communities, whether cities, kingdoms, or empires. Such communities may be considered ‘just’ in so far as they are true copies of the cosmopolis (the argument here draws on Plato). Natural law, which is the law of this ideal cosmopolis, provides a universal criterion by which to determine the justice or injustice of local human laws and institutions. It is the standard for measuring the moral rightness of positive law. In the tradition that springs from these Stoic ideas, morality is not a system of laws or customs, actual or possible, that is practiced by some community of human beings. It is a standard according to which all such systems are to be judged and according to which every human being should live, regardless of the laws and customs of his community.

The Stoics understood this morality to be ‘the true and divine law’, a law willed by the gods as well as required by reason. But the idea of divine will is in fact incidental to morality understood as natural law. The Stoics argued that the content of natural law, though divine, can be discovered by reason without directly invoking the will of the gods. Adopting this Stoic principle, Christianity came to distinguish between a divine law that is binding on all human beings as rational agents and divine commands addressed to the members of particular communities, for example, to Christians or Jews. A problem in Christian ethics is therefore to distinguish the commandments obligating only believers from those obligating all human beings. When Grotius set out in 1603 to consider whether the Dutch had a right to make war on their rivals in the East Indies, he wanted a universal answer, one based on principles applicable to any state. He therefore did not look either to the Bible or to Dutch law. Scripture does not contain universal law—divine commands to be obeyed as law by all human beings. The law revealed to the Hebrews is law only for them, and Christian doctrine is not law but divine advice about how to be a good

Christian.⁸ According to this view, observance of many of the precepts that Jews and Christians assert to be ‘moral’ is required only of those who wish to live a full Jewish or Christian life. It is not required by morality understood, as it is within the tradition of natural law, to be a set of precepts binding on all human beings as rational creatures—precepts that can in principle be known, not because they have been specially revealed, but through the use of reason.

In the later Stoic tradition, ‘nature’ came to mean reason and nothing more. The law of nature applies to human beings because of their nature as rational beings, not because what it forbids is ‘against nature’.⁹ The expression ‘natural law’ is unfortunate because it invites this misunderstanding, and also because the word ‘nature’ obscures a categorical gap between the realm of intelligent thought and that of not-intelligent processes, between the intentional world of human action and the extensional world of natural processes. Morality belongs to the former realm, so it is confusing to identify it by a name that evokes the latter. But no name can forestall misunderstanding. Seeking to avoid the connotations that have accrued to the expression ‘natural law’, the philosopher Alan Donagan has revived the Stoic expression *koinos nomos*, which he translates as ‘common morality’. The problem with this expression is that it is easily misconstrued as a name for moral precepts recognized in (and therefore common to) many different societies, although Donagan is concerned only with precepts that can in principle be understood by human beings and are binding on all. The failure to distinguish widely recognized principles (*ius gentium*) from universally binding principles (*ius naturae*) has led to recurrent confusion.

One important strand of natural law thinking runs from Aquinas through the Spanish neo-scholastics of the sixteenth and seventeenth centuries. It is a strand picked up again in our own time by John Finnis and other theorists of ‘the new natural law’.¹⁰ Another and equally important strand of natural law thinking can be found in the works of Grotius, Hobbes, Pufendorf, Locke, and the eighteenth-century Scottish moral philosophers.¹¹ In each of these traditions, the law of nature is more than a set of precepts; it is a system and much effort has gone into analysing its systematic character. Aquinas, for example, can be understood as systematizing the insights of his predecessors. Grotius, in his unpublished manuscript on the law of prize, derives a system of natural law from a set of primitive assumptions. This system, parts of which Grotius borrowed from Suarez and other neo-scholastics, defines the school of natural law in the seventeenth and eighteenth centuries. Pufendorf worked out an especially systematic and, for a time, influential version of

⁸ Hugo Grotius, *Commentary on the Law of Prize and Booty*, trans. Gladys L. Williams (Oxford: Oxford University Press, 1950), pp. 10–11.

⁹ Alan Donagan, *The Theory of Morality* (Chicago, IL: University of Chicago Press, 1977), p. 6.

¹⁰ John Finnis, *Natural Rights and Natural Law* (Oxford: Clarendon Press, 1980) and ‘The Ethics of War and Peace in the Catholic Natural Law Tradition’, in Terry Nardin (ed.), *The Ethics of War and Peace: Religious and Secular Perspectives* (Princeton, NJ: Princeton University Press, 1996); Joseph Boyle, ‘Natural Law and International Ethics’, in Terry Nardin and David R. Mapel (eds.), *Traditions of International Ethics* (Cambridge: Cambridge University Press, 1992).

¹¹ Knud Haakonssen, *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment* (Cambridge: Cambridge University Press, 1996).

it, giving careful attention to its implications for international relations. But the most powerful theoretical reconstruction of natural law is Kant's.¹²

According to Kant, what unites the precepts of common morality into a coherent system is a single fundamental principle: act always so that you respect every human being, yourself or another, as being a rational creature.¹³ In other words: it is impermissible not to recognize and treat every human being as a thinking, choosing agent. This principle, an improvement on 'the Golden Rule' as the fundamental principle of morality, supports a body of precepts that are 'categorical', that is, independent of contingencies. They are not 'hypothetical' precepts like 'if you want to be healthy, get some exercise regularly'.

The natural law tradition attaches special importance to the distinction between precepts forbidding actions that violate the principle of respect and those requiring us to bring about good outcomes, if we can—that is, between absolute ('perfect') and contingent ('imperfect') duties. Moral conduct means acting within a constraining framework of principles that are independent of consequential considerations. This does not mean that agents have no duty to bring about good consequences. But doing so is not the ultimate criterion of right and wrong in conduct. We can seek to bring about good outcomes for ourselves and others, but only by morally permissible actions. It is this priority of principles forbidding wrong over injunctions to produce good ends that distinguishes common morality as a moral system. Unlike consequentialist systems, which appeal to good outcomes to justify particular acts or practices, an appeal that can lead to the violation of moral prohibitions, common morality must give priority to its prohibitions. Because its fundamental principle categorically forbids violating the respect owed to human beings as rational, common morality must condemn any action or practice that violates that respect.¹⁴ This reasoning is sometimes distilled into a formula like 'the end does not justify the means' or 'evil is not to be done that good may come'. However one puts it, the prohibitory precepts of common morality are absolute; they may not be violated for the sake of promoting the good of one's own self or of others.

Natural law thinking has many implications for international affairs. If what is right and wrong is independent of the moral beliefs and practices of this or that community, for example, there is a direct challenge to cultural relativism. Acts that violate common morality cannot be justified on the grounds that morality is culturally specific. Natural law therefore provides a way of arguing for human rights against the practices of particular communities where the two are in tension, and for action to protect those rights when they are violated. Communal autonomy must be respected, but it does not authorize a state to violate the moral rights of other states or of its own inhabitants. It follows that there is a moral foundation both for the

¹² I disagree with readers who take his criticism of the natural law theories of his day as proving that Kant cannot be considered a natural law thinker. By arguing that true morality springs from personal autonomy, not the authority of a superior, Kant can be seen as putting natural law on a more secure foundation. The meaning of 'natural law' is not determined by what it meant in the seventeenth and eighteenth centuries. For another view, see J. B. Schneewind, *The Invention of Autonomy: A History of Modern Moral Philosophy* (Cambridge: Cambridge University Press, 1998).

¹³ Immanuel Kant, *Foundations of the Metaphysics of Morals*, trans. Lewis White Beck (Indianapolis: Bobbs-Merrill, 1959), pp. 66–7.

¹⁴ Donagan, *Theory of Morality*, p. 154. I recognize that interpreters of Kant differ on the implications of the principle of respect, but the issue is not one I can consider in this article.

non-intervention principle and for exceptions to that principle, including coercive action by those outside the community in response to gross violations of human rights. In the natural law tradition, what we have come to call 'humanitarian intervention' is derived from the duty to protect the innocent from violence, which is in turn derived from a duty of beneficence that requires us to assist others when we can, provided we can do so at reasonable cost and without violating anyone's basic moral rights.¹⁵ International law has in the past not required such assistance and in some cases even forbidden it, but this does not mean that this law cannot be altered to accommodate a concern for human rights or an ethic of beneficence.

The word 'law' has acquired different meanings in the course of its long career. It can mean principles of natural order, like those of Aristotelian teleology or the causal laws of modern physics. It can mean principles of human conduct, rules to be obeyed or disobeyed as a matter of conscious or intelligent choice by human agents. And it can mean rules deliberately enacted within particular human communities: laws made and applied by human beings that reflect not universal reason but contingent will. The expression 'natural law' today is best understood, in other than historical contexts, as a synonym for 'common morality'. The systematic structure of common morality, as theorized in the natural law tradition, can help us clarify the purpose of law in human society and distinguish the rule of law from other modes of relationship identified by the name 'law'.

Legal positivism

To understand the idea of positive international law, it is helpful to consider the contexts in which the expressions 'positive law' and 'legal positivism' are normally used. Given my aims in this article, an appropriate place to start is with the context provided by early modern discussions of how common morality might be actualized both within and between states, for this is the period during which the modern European international system and the modern idea of international law emerged.

The ancient conception of law as a body of rules enacted by a superior, human or divine, acquired new significance in debates about the locus of supreme legal authority ('sovereignty') in the emerging territorial states of early modern Europe. The modern view that law 'properly so called' is positive law springs from the judgment, widely understood since the sixteenth century, that because religious disagreements were unlikely ever to be decisively resolved, theologically or philosophically, a way had to be found to prevent these disagreements from escalating into civil war. And this view, cogently articulated by Hobbes, was that an authoritative and effective power was required to manage the consequences of religious disagreement. Where there are differences over the interpretation of law, there can only be law where there exists an authoritative procedure for choosing among interpretations. A legal order implies a single agreed system of law, a body of 'common law' within which persons holding different religious beliefs, and believing themselves to be guided by different divine laws, can coexist.

¹⁵ I consider these natural law arguments historically and philosophically in 'The Moral Basis of Humanitarian Intervention', a working paper distributed by the Center for Global Peace and Conflict Studies, University of California, Irvine, 2000.

At the core of ‘legal positivism’, then, is the view that laws are rules enacted and enforced by a superior but this-worldly authority, a sovereign ruler. Since reason and revelation generate a diversity of competing ‘laws’, a choice among them must be made by some person or assembly (the ‘sovereign’) authorized to make this choice. True law, positive law, results when a sovereign declares a putative obligation to be law. Law, in other words, is created by an authoritative act of will. In time it came to be understood that sovereignty could be an attribute not only of a person or an assembly but of the larger community from whose will a monarch or legislature derived its authority (‘popular sovereignty’), or even of the procedures by which lawmakers were chosen and laws were validated. From the theory that law is the command of the sovereign, legal positivism evolved into the theory that law is a particular kind of social practice, one that is distinct from other practices (like morality, religion, etiquette, games, and so on) in which conduct-governing rules are discerned and used. Twentieth-century legal positivism distinguishes law from morality by the presence of authoritative procedures for recognizing and applying rules, as in H. L. A. Hart’s theory of law as a ‘union of primary and secondary rules’.¹⁶

Clearly, defining law as the command of a sovereign creates a problem for international law. Hobbes, for example, concludes that legal order is possible only within a state and that relations between states are relations of force, not law. For if by ‘law’ we mean enacted law, international law, which is not in any straightforward sense enacted, fails to meet the criterion. For positivists, international law is not really law but ‘positive morality’.¹⁷ One response to such doubts is to argue that there is a sense, intelligible though hardly straightforward, in which international law *is* enacted. It is enacted by an imaginary collective sovereign that comes into being when the actual sovereigns of the world are in agreement. This is Wolff’s theory of the supreme state (*civitas maximus*), according to which all states taken together must be imagined to hold a kind of sovereignty over each individual state.¹⁸ Wolff offers a version of what international lawyers later called the ‘consent theory’, according to which international law is composed of rules to which states have given their consent. Because no sovereign can submit to the commands of another, international law is binding only by consent. Civil law is a sovereign’s will expressed internally in legislation, international law the joint will of several sovereigns expressed either in treaties (which make their agreement explicit) or custom (which expresses their tacit agreement).

Most positivist theorizing today rejects the view that international law is binding on a state only by its own consent, and rightly so, since one must postulate antecedently-authoritative rules of international law to explain how the consent of states can come to be binding. Applied to international relations, the broader conception of legal positivism (that law is a social practice distinct from morality, religion, and other practices) yields the view that international law rests on the customary practice of states and on their agreements with one another. As an autonomous normative system, its rules are determined by examining evidence drawn from practice and not by reasoning directly from moral principles. The law of

¹⁶ H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).

¹⁷ John Austin, *The Province of Jurisprudence Determined* (London: Weidenfeld and Nicolson, 1955).

¹⁸ Christian von Wolff, *The Law of Nations Treated according to the Scientific Method*, trans. Joseph D. Drake (Oxford: Oxford University Press, 1934), Prolegomena, §§ 7–21.

nations cannot be regarded simply as natural law applied to the relations of states. This new view of international law, which can be found in a handful of seventeenth-century works, had by the end of the eighteenth century become the standard view of international lawyers. Because it rests on concrete state practice, not abstract reason, international law must be distinguished from natural law.

There is disagreement, then, within the positivist tradition about the moral character of international law as well as about whether it is really law. Some argue that international law is deficient because there is no legislative body to enact laws, no judges to apply them in particular disputes, and no power to compel obedience. The institutions for authoritatively declaring and applying rules are so rudimentary as to preclude the possibility of an international legal order. Foreign policy, for these sceptical realists, takes place in a realm of power, not law, and must be guided by prudence, not principle. Other legal positivists believe that legal order can exist without such institutions. For them, the criterion of law lies in the reasonably consistent, reliable, and impartial application of common rules, not in the particular institutions by which this is accomplished. And they argue that the rules of international society are applied in ways that meet the criterion.

The positivist tradition is agreed, however, that the validity and obligatory character of legal rules is determined according to procedures that are internal to the legal system. Positive law is a set of rules distinguishable from common morality as well as from revealed divine law and the accepted moral beliefs and practices of a given society. A legal system may exemplify or explicitly incorporate moral principles, but whether a rule is valid as law does not depend on its satisfying a moral criterion. Nor does it depend, as utilitarians, realists, and other instrumentalists sometimes argue, on its consequential desirability. As John Austin famously put it, 'the existence of law is one thing; its merit or demerit another'.¹⁹ To take this position is not to deny that international law departs in significant ways from common morality, but to recognize that all positive law, because of its procedural character, must develop in ways that separate it to some degree from morality. Law is in this respect like democracy: each is premised on a moral conception, but neither can preserve the purity of that conception against the contingencies of practice. Critics of modern international law who forget this are rightly accused of utopianism.

A recurring objection to legal positivism is that in emphasizing that law is an autonomous normative system, it begs the question that a legal theory is supposed to answer, which is how human beings can coexist justly with one together. Those who see natural law not only as a source of moral guidance but a source of law sometimes argue that positive laws that deviate from natural law are not really law: 'That which is not just seems to be no law at all', says Augustine, and Aquinas adds: 'Consequently, every human law has just so much of the nature of law as it is derived from the law of nature'.²⁰ What is being claimed here is not necessarily that the moral character of a given rule straightforwardly determines whether or not it counts as law, but rather that law as a mode of relationship would appear to have moral qualities that distinguish its rules from the edicts of a despot. To deal adequately with this objection, legal positivism must distinguish positive law from

¹⁹ Austin, *Province*, p. 184.

²⁰ Thomas Aquinas, *Summary of Theology* I-II, q. 95, a. 2.

the mere exercise of power. What positivism needs, to meet the natural lawyer's objection, is not merely a definition of law but a conception of legality that is distinct from effective power. The idea of the rule of law can be seen as a proposed solution to this problem within the limits of positivist legal theory.

The rule of law

Because the rule of law is itself a contested concept, it cannot without further clarification be used to resolve disputes about the meaning of law. The concept is often presented as a list of criteria for evaluating a legal order: there should be no secret or retrospective laws, no obligations other than those imposed by law, no arbitrary exemptions or private laws, and so on.²¹ But such a list is of little value, theoretically speaking, unless it rests on a coherent account of the place of law in a social order. The rule of law, as an analytical concept, belongs to the effort to distinguish one particular kind of social order from the diversity of orders to which the name 'law' might be applied. In the tradition of theorizing that is concerned with this project, the rule of law is viewed as a moral practice distilled into a system of non-instrumental rules and augmented by institutions for identifying and applying these rules. Understood in this way, the rule of law can be seen as reflecting the concerns of both natural law theory and legal positivism.

From the perspective of natural law, the rationale of a legal system is that it offers a way to realize the ideal of a moral relationship among human beings in the contingent circumstances of actual communities. Furthermore, if the purpose of law is to get people to behave morally, moral limits must be imposed on the conduct of public officials as well as on that of ordinary citizens. And this means imposing constraints on ordinary lawmaking as well as on the arbitrary, extra-legal use of political power. For the natural law tradition, the rule of law expresses the inherently moral character of true law and the superiority of common morality to mere positive law.

From the standpoint of legal positivism, however, it seems clear that a legal system can serve the purpose of institutionalizing common morality only if the obligations it imposes are determined by its own internal criteria of validity. Law is as an invention designed to remedy the inability of morality to settle disputes about the interpretation of rules by providing agreed procedures for determining their meaning, and thereby distinguishing rules that are valid as law from those that are not. Such procedures make it possible to establish the validity of a disputed rule in a given system in the face of disagreements regarding its moral rightness or consequential desirability. Whether a rule is morally justified may remain in dispute, but

²¹ Lon L. Fuller, *The Morality of Law*, revised edn. (New Haven, CT: Yale University Press, 1969), p. 39. See also Lawrence B. Solum, 'Equity and the Rule of Law', in Ian Shapiro (ed.), *The Rule of Law* (New York: New York University Press, 1994), pp. 121–2, and András Sajó, *Limiting Government: An Introduction to Constitutionalism* (Budapest: Central European University Press, 1999), pp. 205–23.

the moral question has been separated from the question of legal validity.²² For the legal positivist, then, natural law is deficient as a theory of law because it cannot distinguish the legal validity of a rule from its moral rightness. In transforming a body of moral rules into a system of effective law, the first problem is to know what the rules are, that is, to establish which rules are to be recognized as authoritative and therefore as law.

In an association governed by the rule of law, laws retain their moral quality as rules regulating the coexistence of individual or collective persons, each pursuing its own self-chosen goals, by prescribing obligations to be observed in that pursuit. Like the categorical precepts of common morality, the laws of a community governed by the rule of law are rules, not commands. And the most fundamental of these are non-instrumental rules that constitute the community and regulate the transactions of its members, not instrumental devices for securing the satisfaction of particular, substantive desires. A legal system may include instrumental rules but these must be compatible with the non-instrumental rules on which the system rests, and which may be found in its written or unwritten constitution. Non-instrumental rules are concerned with the propriety of actions, not their usefulness in achieving particular outcomes. The authority of such rules rests on their character as law, as determined by whatever procedures a legal system has for determining this character, not on their instrumental value. That is why an association whose government is conceived as an instrument for achieving collective goals by issuing orders cannot be said to be an association governed according to the rule of law. The rule of law thus provides an alternative, within positivism, to the view that any expression of sovereign will counts as law.

Emphasizing the non-instrumental character of law does not entirely resolve the problem of the relationship between morality and law, however. Because conduct can be judged both morally and legally, it is not clear what justice requires where moral and legal considerations are in tension with one another.

Some in the positivist tradition, following Hobbes, have argued that the justice of a law is nothing other than its validity as law. But because it makes law the sole standard of justice, this argument leaves little room for moral criticism: whatever is legally valid is also just. But we don't have to accept Hobbes's conclusion on this point. We can, along with Hart and many other legal positivists, regard the justice, the moral rightness, of a law as distinct from its validity as law.²³ By doing so we make room for the moral criticism of law. But we also keep moral criticism separate from legal interpretation. On this view, the justice of a law is unrelated to the procedure by which it was made. A just law, here, is not one that has been properly enacted but one that is proper to have been enacted.

To avoid subverting the rule of law, moral criticism of a legal system must draw upon principles of justice that are already recognized, at least in part, within that

²² A legal system can include moral considerations among the criteria used to determine the validity of legal rules, but in that case such considerations have been incorporated into the law and are no longer external. On this point, see Jules L. Coleman and Brian Leiter, 'Legal Positivism', in Dennis Patterson (ed.), *A Companion to Law and Legal Philosophy* (Oxford: Blackwell, 1996), p. 243, and the literature cited therein.

²³ H. L. A. Hart, 'Positivism and the Separation of Law and Morals', in *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), and Michael Oakeshott, 'The Rule of Law', in *On History and Other Essays* (Oxford: Blackwell, 1983).

system. If we identify justice with universal moral standards that are entirely independent of the legal culture of a community, as some moral theories do, justice becomes an alternative to law. The effect of this identification is to subvert the rule of law because it results in two distinct standards of conduct, positive law and abstract justice. A legal order can avoid being forced to choose between law and justice only if it already embodies the moral standards that are used to criticize it. An appropriate standard by which to evaluate the justice of a particular legal rule is therefore one that is already implicit in the system to which that rule belongs. Such a standard, which reflects concern for the integrity of a legal system, rules out, as a practical criterion for determining the justice or injustice of particular laws, the requirement that they should conform to extra-systemic moral principles. The frequent invocation of such principles—under the name of God's will, natural law, human rights, utility, or social justice—as an alternative to law is a sign not of the flourishing of the rule of law but of its decay.²⁴

This understanding of the rule of law is easily extended to the international level. The rule of law, as a mode of association between states, cannot be identified with international law as it exists. International law is a mixture of instrumental and non-instrumental rules. Like any other body of law, it contains agreements, decisions, policy goals, administrative orders, and other devices designed to further particular goals and confer benefits on particular recipients. But these instrumental devices often represent an obtrusion of interests and power upon the rule of law. Though international law can without injustice be used to achieve substantive purposes, to be concerned with the rule of law in international relations is to be concerned with ensuring that the members of international society treat one another justly, not with producing or distributing particular substantive benefits. This is not, of course, as political realists concerned with security or idealists concerned with global distributive justice or sustainable development remind us, the only concern states might have with respect to one another, but where the rule of law prevails it is one that constrains the pursuit of other concerns.

Furthermore, if the rule of law is to be the basis of international relations, the moral considerations used in the criticism of international law must be restricted to those inferred from the customs and usages of international society. Utopian conceptions of international justice have little to contribute to the practical reform of international law. Criticism of the international order that reflects a concern for sustaining the rule of law must draw on principles that are sensitive to the kinds of obligations that are appropriately imposed by international law, given its particular character as a system of law—that lawmaking and adjudication are decentralized, for example. Such criticism will avoid the temptation to import, into discussions of what international law is or should be, abstract conceptions of justice that are incompatible with, and therefore subversive of, the basic principles of international society.

The idea of the rule of law is a delicate construction designed to avoid the extremes of legal positivism, which makes conformity to law the criterion of justice, and natural law, which makes justice into a criterion of legality. Against positivism, it denies that scepticism regarding moral claims must end in the conclusion that justice can have no meaning apart from law. Against natural law, it reminds us that

²⁴ Oakeshott, 'Rule of Law', pp. 140–4.

legal order is grounded on recognition of the authority of laws, not on abstract moral judgments of their justice or injustice. Law can supply a community's need for common rules only where the authority of particular rules as law is established according to antecedently-authoritative legal procedures rather than by direct appeal to their consequential desirability or moral rightness. The rules of international law should have moral content and they are subject to moral criticism, but their authority as law does not rest on moral criteria.

Preserving international pluralism

Pluralism, in the globalization literature, is usually identified with cultural particularism: with the 'tribalism' represented by religious or ethnic attachments. But the kind of pluralism sustained by the modern international system is different, for that system is composed of states, not religious or ethnic communities. States often privilege particular religious faiths or ethnic cultures, but the state itself is a legal construct. It is an association of persons organized by a common body of laws. In the modern period, the state has been the primary locus of lawmaking. The transformation of sovereignty in response to economic and social changes in an emerging confederation like the European Union does not disprove this observation: if sovereignty were to be decisively transferred from France, Germany, and so on to the Union, it would have been acquired by an entity that had, as a consequence of this transfer, become a state. A super-state, whether small (like the Swiss confederation) or large (like the United States), is itself a state. The character of the states system is not altered by unions of this kind. And it must not be forgotten that states can also disintegrate—sometimes unexpectedly, as in the case of the Soviet Union or Yugoslavia. It is ironic that the Soviet Union was originally imagined as the beginning of a transnational socialist society and that political theorists not long ago celebrated Yugoslavia as a model of trans-ethnic civil society and participatory democracy. The making and unmaking of states is a persistent, but nevertheless incidental, feature of the pluralist international system.

Is globalism generating forms of human association that will ultimately replace the modern state and system of states? Many globalists argue that the international system is giving way to a world order in which states are replaced by other, non-legal, forms of human community, and that this change is desirable and should be encouraged. Their arguments, which resemble those once made by Marxists, anarchists, libertarians, and other antinomian visionaries, take a variety of forms.

According to one such argument, globalization is producing a world order regulated not by government but by the market.²⁵ In this new order, the territorial state is an anachronism. Today, a government's constituents are not only its subjects, who live in its territory, but its bondholders, who might live anywhere. The market is both more rational and more powerful than government, which has become a reactionary force by defending functions that are often better performed by private enterprise. But far from replacing law, global governance via the market presupposes it. The

²⁵ Friedman, *Lexus and Olive Tree*, reporting (and, in ch. 9, criticizing) a view common among economists and members of the business community.

global market, especially, demands undistorted information and financial predictability, and this means that communities that do not wish to be excluded from this market must have laws that guarantee professional accounting standards, a free press, a judicial system capable of controlling corruption, and other institutions that depend upon the rule of law.

A second antinomian argument holds that democracy is possible without the state because modern communication technologies, including the Internet, are providing people with new ways to interact with one another. It is suggested, for example, that unlike traditional democracy, which is linked to decision-making within a territorial state, 'discursive democracy' is possible in many different kinds of community. A 'discursive community' is a network of individuals united to achieve a common goal. A transnational advocacy organization like that devoted to banning land mines is an example of such a non-governmental, non-territorial network.²⁶ Critics of the states system argue that such non-territorial communities can substitute for the political communities of the past: that 'civil society' is possible without the state and that 'governance' is possible without government. But, we must ask, what are the rules by which this governance will proceed? How will rights be preserved and unjust coercion limited?

Such antinomian arguments fail to appreciate the place of law in providing a framework for deliberation. They ignore what Habermas calls the 'internal relation' between democracy and the rule of law, a relation I would formulate as the proposition that democracy presupposes laws that define the community whose members are to make decisions and upon whom these collective decisions are binding.²⁷ The idea of 'governance' equivocates between collective decisions made in voluntary associations and those made in coercive associations like the state. Conceptions of democratic governance that dispense with the rule of law also dispense with justice. An interest group can without injustice pursue purposes shared by its members, but it cannot without injustice impose those purposes on persons who do not share them. Such conceptions are frightening because they point toward a world in which power is everything and law nothing. Democracy, strictly speaking, is a way of deliberating about rules that the members of a community are justly compelled to observe. The idea of discursive democracy without law misunderstands the point of democracy because the discourse it postulates is disconnected from decision-making. Democracy, properly speaking, is a method of rule, a way of making enforceable decisions in a community. Democracy is not necessarily linked to a defined territory but it *is* linked to defined membership: it presupposes rules that distinguish citizens from non-citizens, and thereby identify those on whom democratically-reached decisions are binding.²⁸ If deliberation does not result in binding rules ('laws'), democracy is not a form of government but only a metaphor.

²⁶ J. S. Dryzek, 'Transnational Democracy', *Journal of Political Philosophy*, 7 (1999), p. 44, and Richard Price, 'Reversing the Gun Sights: Transnational Civil Society Targets Land Mines', *International Organization*, 52 (1998), p. 615.

²⁷ Jürgen Habermas, 'On the Internal Relation between the Rule of Law and Democracy', in *The Inclusion of the Other: Studies in Political Theory* (Cambridge, MA: MIT Press, 1998), p. 261. Writers on global, cosmopolitan, or transnational democracy—the vocabulary of this discourse has not yet stabilized—often assume a relationship between law and democratic politics without specifying the character of that relationship. Barber, *Jihad vs. McWorld*, ch. 19, is illustrative.

²⁸ Robert A. Dahl, 'Procedural Democracy', in Peter Laslett and James A. Fishkin (eds.), *Philosophy, Politics and Society*, 5th series (New Haven, CT: Yale University Press, 1979).

Democracy without law means discussion but no framework of laws to guide that discussion or to be altered by it.²⁹ And democracy without the rule of law means a discussion unacceptably distorted by unconstrained power.

There is a vision of globalization that does preserve the rule of law, but it is also one that is compatible with the continued existence of a pluralist international system. Thinkers since the time of Gibbon and Kant have understood the states system, with all its imperfection, to be the guarantor of communal freedom (political independence) and therefore, indirectly, of individual freedom. The problem that Kant tackles in 'Perpetual Peace' is how to diminish this imperfection by actualizing the rule of law not only within states but universally. His well-known solution is to imagine an arrangement in which rule-of-law states ('republics') unite to form a federation, itself governed by the rule of law, in which they retain their independence. The rule of law will become universal when all states have become republics and then members of this federation.³⁰ Although it includes no very clear conception of the rule of law, John Rawls's recently proposed 'law of peoples' essentially reiterates this Kantian conception of a pluralist international order. For Rawls, law governs conduct within and between 'well-ordered states' (states whose governments respect basic human rights and are democratically elected or at least consult in some manner with the people they govern). States that are not well-ordered are regulated by coercion, not law, and because such states do not respect international law, they are 'outlaws' against whom other states are entitled to use force.³¹ For both Kant and Rawls, then, justice at the global level presupposes the continued existence of a plurality of independent political communities and of an international law to regulate their coexistence and cooperation.

Despite arguments like these, the idea of law is on the defensive within as well as between states. All law is being eroded by distrust of law and scepticism about the foundations, religious or rational, of moral knowledge. Contemporary thought does not leave much room for belief in law as an authoritative constraint on human activity. It sees law as an instrument of human purposes, a set of tools for getting things done. This is not law as it was once understood: a constraint on the pursuit of all human purposes. Scepticism regarding this understanding of law goes beyond the man-made laws of the modern state, positive law. It also undermines the idea of morality as a body of higher law, natural law. The attack on the state, and therefore on a global order organized through states, is only one manifestation of these doubts about law. International law is in trouble not because of its alleged defects as law but because it has come, like other kinds of law, to be regarded as an instrument of human purposes rather than as a constraint on their pursuit. The idea of the rule of law can therefore be seen, in the context of the globalization debate, as a way of

²⁹ Similar criticisms can be made of the related literature on global civil society as an alternative to the states system. In this literature, 'civil society' is not, as it was before Hegel, a synonym for the state, but for the sphere of private relationships: a 'space of uncoerced human association', as Michael Walzer puts it. But this space, between as well as within states, is defined by laws, and only where the rule of law is respected will it be significant. Terry Nardin, 'Private and Public Roles in Civil Society', in Walzer (ed.), *Toward a Global Civil Society*, pp. 29–34. Chris Brown sceptically examines the global civil society literature in 'Cosmopolitanism, World Citizenship and Global Civil Society', *Critical Review of International Social and Political Philosophy*, 3 (2000).

³⁰ Immanuel Kant, 'Perpetual Peace', in Hans Reiss (ed.), *Political Writings*, 2nd edn. (Cambridge: Cambridge University Press, 1991).

³¹ John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999).

restating, in a modern idiom, the proposition that it is government within a framework of non-instrumental rules of coexistence, not instrumental rules of cooperation on the basis of relative power, that distinguishes a just society from a despotism and a moral international society from a quasi-despotic system of unequal powers. Of course, the rule of law may be even further from being realized between states than within them. Even so, it remains relevant as a tool for helping us to understand the conditions of justice in the emerging, but still pluralist, global order.³²

³² This article was originally written for a conference on international norms organized in 1997 by the Leonard Davis Institute of International Relations at the Hebrew University of Jerusalem. It was subsequently circulated as a working paper of the international legal theory group of the American Society of International Law. In revising the article for publication I have benefited from criticism by members of the theory group, the editors of the *Review*, and Pablo De Grieff.