Chapter 2

Consequences of the Logical Image of Right

(a) Defining acts and defining relations

1

By the term *right* we signify the individual demand or request that follows from some *Law*. The word Law (*Dikaion*) indicates a system of statutes or regulations governing the conduct of the individual and the organisation of common life.[1]

The concept of Law has priority and is presupposed for the formulation of the demand for a right. Modernity's self-evident perception, however, concerning the rights of the individual that flow from the Law does not seem to accompany the concept of Law in every historical period. Both the ancient Greek version of justice and the fuller version systematised in Roman Law have no knowledge of the content that we give today to the granting of individual rights.[2] Is some special meaning of the concept of Law presupposed from which the demand for a right also flows?

1. See Hans Kelsen, *General Theory of Law and State* (Cambridge, MA: Harvard University Press, 1949), p. 3; Hans Kelsen, *Hauptprobleme der Staatsrechtslehre* (Aalen: Scientia-Verlag, 1984), p. 33 ff.
2. See Manitakis, *To hypokeimeno tōn syntagmatikōn dikaiōmatōn*, p. 69 ff.; P.D. Dagtoglou, *Atomika dikaiōmata*, vol. 1 (Athens: Sakkoula, 1991), pp. 16-17.

2

The word *Dikaion* (Law) is an abstract noun. The rational functioning of language allows us to infer that the abstract noun emerges from an adjectival definition, in this case from the adjective *dikaios* (just), which defines a *mode* of conduct or relation. The *just* mode is objectified in the regulative principles and statutes that constitute the Law.

Does the Law refer to matters of individual conduct or to the dynamic of relations?[3] Does it define and judge acts or relations? Is the subject of the Law human existence as an undifferentiated social unit, as an individual homogeneous whole, or as an active agent in an event of relation that on each occasion is unique and dissimilar?

It is evident that the response given to each of these questions will also differentiate the concept of the Law. And that is not all. How we judge the comprehensive definition of the functioning of a society, its institutional organisation and structure, the entire political phenomenon, depends on the answer.

3

Empirical observation should suffice to persuade us that the human behaviour of individuals is always referential, always constitutes relations. There is no act of the human subject without dynamic referentiality. Consequently, the just mode of conduct, before being objectified in self-complete actions and being made autonomous in an abstract manner in individual actions, is necessarily a mode of relation.

The just mode of relation presupposes the power of many kinds of relations, or at least the possibility of a non-just (or unjust) mode. It is evident that what is initially presupposed for legal judgement to operate also in the case of human relations is the subjective power of choosing the mode of relation: the freedom that a human being has to shape the relation.

When is a relation just, and when is it not just? The whole of the world's animate and inanimate reality is constituted as a totality of active relations. We have never thought, however, to define whether the mode of these relations is just or not. Evidently this is because in objective nature no subject exists of modal power, no agent of the mode that possesses the power of choice. Only metaphorically, at the

3. This is based indirectly on Hans Kelsen, *Théorie pure du Droit* (Paris: Daloz, 1962), pp. 2-3.

beginnings of Greek philosophical thought, did Anaximander attribute the characteristic of the just mode to the alternation of the coming-to-be and the destruction of existents.[4]

If we make the supposition that Anaximander's metaphorical image reflects a primordial definition of the just mode of relation, we then have a hermeneutic proposition that is very suggestive for our discussion. Since the destruction that time brings is a penalty for injustice that has taken place, then a just mode of relation is that which does not lead to destruction, which does not alienate the terms and the agents of the relation. Conversely, we can define as unjust the relation that violates existential integrity, which changes and falsifies one or both of the terms of the relation.

In developing this concept positively we must characterise as just the relationship that preserves (and manifests) the existential integrity or otherness of the related terms and every expression of fundamental otherness: the otherness of their needs, of their activities leading to production and exchange or, more generally, the power of self-determination of the terms of the relation within the context of every form and mode of the sharing of life. Then what is just will be the mode that constitutes the sharing of relations that is productive of the creative manifestations of subjective otherness.

4

The event of dynamically activated otherness means or signifies the freedom of the subject: the subject's power to be *that which it is*, an existential identity that is unique, dissimilar and unrepeatable, that is to say, an otherness with regard to everything that is not itself – an existence not bound by any necessity of general predetermination, of common characteristics, of dependence, change and alteration. Freedom is the opposite of necessity and is therefore the non-predetermination of choices, the power of controlling or even rejecting needs, the otherness of activities. Meanwhile, otherness is the freedom

4. The extant fragment of Anaximander is given by H. Diels and W. Kranz, *Die Fragmente der Vorsokratiker*, vol. 1 (Berlin, 1906), p. 89: 'And the source of coming-to-be for existing things is that into which destruction, too, happens, "according to necessity; for they pay penalty and retribution to each other for their injustice according to the assessment of Time"' (trans. Kirk, Raven and Schofield). For interpretations of the passage, see G.S. Kirk, J.E. Raven and M. Schofield, *The Presocratic Philosophers*, 2nd edition (Cambridge: Cambridge University Press, 1983), pp. 118-22.

from necessary homotropy (sameness of character), community and homoiomorphism (likeness of form) of the mode – freedom from predeterminations of activities.

We are thus led from Anaximander's metaphorical image to formulate a proposition for interpreting the just mode of relation that concerns the existential authenticity or truth of the subject. That is to say, we attribute to the just mode an *ontological* content: It is the mode that preserves (and indicates) the integrity or identity of the related terms as existential otherness, as the dynamic activation or realisation of freedom.

5

For the theoretical clarification of the just mode to be formulated as a system of Law, however, it must be objectified in regulative principles and statutes. The Law must have (and is created to have) a regulative character. If we accept as the content of Law the guaranteeing and emphasising of the otherness or freedom of every human subject, does not any regulative ordinance of whatever kind constitute a contradiction? Is it not opposed to the priority of freedom? The question brings us to the following dilemma: does the Law define and judge actions or relations – does it operate on the level of the abstract activity of the self-complete individual or on the level of this activity's social functionality?

If the Law defines actions on the level of individuals, then it clearly limits non-presupposed self-moving activity, the actual self-definition of the subject in practice – the Law is manifestly incompatible with the freedom or otherness of the subject. (It could of course be objected that the legal limitation or moderation of subjective self-moving activity ensures the balanced objective possibility of the moderation of freedom for all – less freedom, but for all, not unrestricted freedom for a few with the unavoidable non-freedom of the rest. Before we resort to this utilitarian compromise, however, let us also examine the second leg of the dilemma: the definition of relations not acts.)

If the Law defines relations, then its regulative character lies in the exclusion of the possibility of the alienation of the relation and of the terms-factors of the relation. The Law defines and distinguishes relation from non-relation, that is, from its alteration to an event of the dependence, submission and control of one or more subjects by other subjects. The dependence, submission and control in turn signify the imposition of necessities, and consequently the alienation of the existential freedom of the terms of the relation. Thus the rule of

Law becomes the reciprocity of the communion of persons free from necessities, the priority of the sharing of life as the freedom of making choices, the freedom to prioritise life's needs. Relation is defined with regard to every differentiation and decay of relation: fundamentally with regard to every individualistic-egotistic defensiveness, which is a product of self-interest, a using of others, exploiting them, dominating them, tormenting them. Egocentric priorities, self-interested aims, self-regarding defensiveness – the avoidance of the risk entailed by relation – would then be capable of being countered by the Law, not fundamentally as actions manifestly unjust in themselves, but as factors that surreptitiously undermine the event of relation and cause the terms of the relation 'to be destroyed': they change them into factors that are non-constitutive of relation, into active demands or passive acceptances of necessity, an explicit or implicit submission and dependence.

6

Freedom is exercised as relation, but every relation is not necessarily an event of freedom. When we say that the Law can aim at the definition of relations, we should, rather, clarify that the definition refers to the *mode* of relation, to the determination and safeguarding of the just mode.

Naturally, in a theoretical analysis a non-just relation cannot be defined as a relation, since it constitutes some sort of dependence, submission or pact of necessity. In our everyday language, however, the concept of relation refers to a dynamic of the broadest dimensions: unquestionably to the reciprocity of love, to disinterested friendship, to erotic self-transcendence, to sacrificial self-offering. It nevertheless also refers to acts of utilitarian communicative practice, of procedural cooperation, of inter-subjective passive consent, of simple coincidence of the wills of individuals, etc.[5]

The Law that relates to the defining of relations rather than actions does not aim at circumstantial modes of relation, nor can it function as such. It can only function as a system of criteria distinguishing the just from the non-just mode of relation. A regulative principle for the formulation of the criteria is the definition of the circumstances of necessity, that is, of the denial of freedom. For us to succeed in producing a statutory definition, we accept freedom fundamentally in

5. See, for example, Jürgen Habermas, *Theorie des kommunikativen Handelns*, vol. 2 (Frankfurt: Suhrkamp, 1981), p. 304 ff.

a negative sense (or 'apophatically')[6] as non-necessity, as fundamentally an identifying of the possibilities of its limitation – the limitation of the existential otherness and self-determination of the subject. The Law that aims at defining relations can only be a Law of apophatic definitions, an apophatic Law.

The Law's apophaticism with regard to relations does not exclude the cataphatic (positive) character of the criteria defining freedom. Personal otherness and self-determination is a first positive definition of freedom. Freedom as productive of the social event, an event of the sharing of relations, is also a positive definition. Certainly otherness and self-determination can be understood as definitions of subjective freedom in itself before any other event of relation – they can be located in the awareness of daily life, in the positive or negative responses of the subject. Such an understanding, however, would be absolutely non-empirical, seeing that the otherness and self-determination of the subject is realised and manifested only through acts of relation.

Only from acts do we apprehend, as an empirical assurance, the otherness and self-determination of the subject, or the subject's submission to conditions of necessity, and can judge the justice or injustice of the act. Every act of the subject, however, is an ek-static movement (by every act the subject 'stands outside of' himself or herself) – the act is movement that creates relation to what is 'outside of' the subject. The just *mode* of this relation is the realisation and manifestation of the otherness and self-determination of the subject, whereas the non-just *mode* is submission in practice to necessities of alienation.

7

The application of the criteria of the distinction between the just and the non-just mode of relation cannot be anything other than also an event of relation: a unique and dissimilar unrepeatable relation of the one who judges with the judged terms of the relation, and of the judge with the parties to the action. A legislator is inevitably placed

6. We call *apophaticism* or apophatic method the approach to knowledge through negations, not affirmations – we define what the defined *is not* with a view to making manifest what it really *is*. By extension we describe as an *apophatic* attitude the refusal to exhaust the knowledge of what is signified simply through understanding the signifiers – the refusal to exhaust the truth in its formulation.

outside of the event of relation, since he or she only defines general criteria by which a just or non-just mode is evaluated. In contrast, the judge who administers the law cannot be satisfied with a subjective understanding of objectivised marks of the relation under judgement, because in that case he or she would be failing to appreciate the given otherness of every relation, an otherness of the terms of the relation, and would therefore be judging intellectual schematisations unrelated to the actual situation, not the real acts of existent subjects.

Moreover, every impersonal subjection of the subject to objective outlines of the evaluation of a just or non-just relation gives priority to conditions of homotropy – that is, of necessity – not to personal otherness. Consequently, what results is the impersonal subjection that alienates the subject: it applies to the subject *a priori* those conditions of existential alienation that it is called upon to evaluate and judge in the subject's relation that has been presented for judgement.

The Law that aims at defining relations rather than acts cannot function as a casuistic codification of the practice of relations, but only as a system of *criteria* distinguishing the just from the non-just mode of relation. The use and application of the criteria is also a personal struggle to achieve a just relation: a judgement and evaluation that respects the priority of subjective otherness.

(b) Defining truth and defining utility

1

Legal respect for personal otherness is a demand for the objective assurance of an existential event or *mode*: that the laws or statutes should respect and defend the unique, dissimilar and unrepeatable mode by which every human being exists, the active expression of this otherness in interpersonal relations.

For such a goal to be achieved there must first exist an understanding of Law and system of Law that transfers what is by definition its relative character from the level of the evaluation of *action* alone to the level of the evaluation of *being*. What is first required is fundamentally that the Law should judge not the utilitarian advantage or disadvantage of the standardised acts of individuals, but the authenticity or alienation of the mode of existence that personal otherness creates.

And since the definition of existential authenticity is always extremely difficult (being subject to the variations of ideological or transcendental interpretations), the Law is obliged to ensure this au-

thenticity 'by antithesis': it is required to defend by the use of regulative criteria the non-alienation of personal otherness, the non-subjection of the subject to the necessities of standardisation, to involuntary or simply passive applications. The Law is required to judge the activities of the mode of otherness that are *relations* of the subject: to assure the non-alienation of the terms of every interpersonal relation.

2

However, the aims of a system of Law do not emerge fundamentally from theoretical analyses. They usually express priorities of needs, collective orderings of needs that are commonly accepted by a community of human beings. If then the legal respect for personal otherness presupposes a system of Law that defines and judges interpersonal relations, not impersonal individual acts, such a Law could emerge only from a specific collective need: it is *truth* (the existential authenticity of human beings) and not *usefulness* (collective utility) that fundamentally needs to be ensured.

The word *truth* does not of course refer to idealistic or transcendental illusions, as is often believed in the culture of modernity. The priority of truth over usefulness can emerge as a social demand only with reference to the primary significance of the words, before any differentiation, whether ideological or transcendental, of the meanings or the concept – before any theoretical or specialised content that any specific cultural paradigm gives to the words. The word *truth* refers primarily to a 'logical space' that may be considered a point of common acceptance. This 'logical space' is one of non-change or alienation, and so *truth* refers 'by antithesis' to existential authenticity.

To be sure, in the language of contemporary biology – which has clearly affected the positivistic tendencies of the social sciences – even the concept of the 'real' seems arbitrary, since deviations and variations from the stable prototype (that which is regarded as 'real') are not degenerations, but constitute the indispensable substance for evolution and development. It is precisely to this reservation that the primary reference of *truth* to the 'reality' of otherness, of active existential uniqueness is opposed, not to some stable and comparably given prototype.

It is beyond doubt that the primary signification of *usefulness* is obvious: it refers to a utilitarian benefit for the satisfaction of relief of life's necessities, the serving of a need, of the practical demands of everyday life. Thus whenever the collective need arose historically that

fundamentally *truth* should be ensured, not *usefulness*, it understood usefulness in a rather similar way, but did not confine itself simply to the primary semantics of truth.

3

Aristotle, for example, in his relevant analysis, opposes the *useful* and the *necessary* to the *noble* and the *free*.[7] He does not reject the former in favour of the latter but simply sets them in order of priority, declaring that 'to be always seeking after the useful does not become free and exalted souls'.[8] For that reason he also opposes a liberal and noble education to a *useful* and *necessary* one.[9] The noble or the good (*ta kala*) for Aristotle are identified with the desirable (*ta haireta*),[10] and are consequently a concept that completes that of what is *free*, just as the concept of the *useful* completes that of the *necessary*. The good (*to kalon*) constitutes the free choice of a *mode*, the mode of 'order and symmetry and definiteness',[11] that is, of the *rational* assembly of existence as a *cosmos*, an ordered decorous system.

This choice of a *rational* mode of existence presupposes human beings who are magnanimous and free. The concepts of *magnanimity* and *freedom* are presupposed with a self-evident axiological excellence against utility and necessity, clearly because for Aristotle – and consequently for his social environment – the grading of needs implies the effort to achieve magnanimity and freedom as superior to subjection to utilitarian determinism.

The word *magnanimous* (in Greek *megalopsychos*) refers directly to the concept of a soul (*psyche*) capable of aspiring to great things (*ta megala*) – not to be satisfied with what is small and insignificant. A bountiful person (*eleutherios*), meanwhile, is one who behaves as someone free, one who seeks that which is suitable and fitting for free human beings, for those who are not subject to necessities but are masters of their own needs. The semantics of the words must surely presuppose clearly defined social presumptions – what the 'soul' is, and what 'greatness of soul' is, what smallness and insignificance is,

7. Aristotle, *Politics* VII, 14, 1333a 36; *Rhetoric* I, 5, 1361a 16.
8. Aristotle, *Politics* VIII, 3, 1338b 2-4 (trans. Benjamin Jowett, in Jonathan Barnes, ed., *The Complete Works of Aristotle. The Revised Oxford Translation* (Princeton, NJ: Princeton University Press, 1984), vol. 2, p. 2123).
9. Aristotle, *Politics* VIII, 3, 1338a 30-2.
10. Aristotle, *Rhetoric* I, 6, 1362b 9 ff.
11. Aristotle, *Metaphysics* XIII, 3, 1078a 36.

and what is 'suitable' and fitting for freedom. The functionality of these assumptions may be questioned by criteria belonging to another cultural paradigm, criteria that emerge from different goals and different evaluations of needs of other societies or times. What cannot be doubted is the realism of the assumptions and evaluations, seeing that these refer to empirical ratification by a common acceptance. Nor can these evaluations and assumptions be graded according to their greater or lesser degree of realism, since collective needs always express, and are, the criteria of needs that vary in every cultural paradigm.

This social realism is also expressed fundamentally by the differences in systems of Law. One understanding or system of Law emerges from the social assumptions that Aristotle expresses (or even formulates), another from the assumptions, for example, of Rousseau, Hobbes and Locke. Multiple understandings of Law can even arise from the different phases of the anthropological thinking of one and the same author: one Law from the 'early manuscripts' of Marx and another from his later works.

4

The Law presents itself in every specific community and in every age as an articulation of the prevailing *anthropology*, that is to say of the common perception (the established – consciously or unconsciously – understanding) of what a human being *is*, what the particular characteristic and 'sense' of human existence is, what the goal of its physical life and daily activity is. One understanding of the Law and of what is demanded from the Law arises when we conceive of the human person as a biological unit of a homogeneous whole, and another when the existential otherness of the human subject takes precedence, an otherness that operates as a rational referentiality, as freedom from biological necessity. One kind of Law is entailed by the concept of the human subject as primarily a mammal (even if the highest link in an autonomous and adventitious evolutionary process), and another when we accept that the human subject is born and formed in the "place" of the appearance of the rational signifiers, the "place" of the transcendent Other.[12]

Every universally accepted hermeneutic of existence and of life, of the world and of history, of love and of death (every *ontological* attribution of meaning – conscious or unconscious – to the everydayness

12. 'The subject is born so long as the signifier appears in the field of the Other': Jacques Lacan, *Le Séminaire XI* (Paris: Seuil, 1973), p. 181.

of human beings) has its own expression in the particular version of the social event, in its institutional articulation and function, in the formulation of a system of Law. These differences also constitute the variety of cultures within history.

5

The ontological assumptions of any social whole do not also impose definitive answers to the ontological questions. The attribution of meaning to the existent-real and the concomitant prioritisation of human needs can never be defined as objective certainties, and it is for that reason that cultural paradigms succeed each other in history.[13] Ontology always remains for humanity an open challenge, and the constant struggle to respond to the challenge constitutes humanity's existential particularity.

If the causal principle and the meaning or end of the existent, of otherness and freedom, of the experience of the modally infinite and the private absolute, of love and death, could have found definitive interpretations in 'scientific' assertions, human beings would not have existed as rational subjects. If the 'place' of the *summons-to-relation* that presupposes the rational subject and the 'place' of the desired *end* of the relation were a given definitive Newtonian assertion, the emergence of signifiers of the desire, of the formation of reason, would have been impossible – the rational existence of humankind would not have existed.

Yet the continual and coherent posing of the ontological question in the management of the everydayness of life is neither self-evident nor easy. It demands a ceaseless personal and collective grappling with the things that are essential – a perspicacity that few societies in history have been able to attain. The more usual thing is that we human beings sidestep the task of grappling with the ontological question and resort to ideological 'convictions', to psychological 'certainties' or, more simply, to the practical priorities of finding convenient functional ways of sharing needs.

The practical solution of suppressing the ontological question appears also to lie in the objectification of the Law in utilitarian regulations designed to protect undifferentiated individuals. It is a solution that safeguards instinctual demands of individualistic psychological reassurance: rights, interest and demands obligatory on all.

13. See Thomas S. Kuhn, *The Structure of Scientific Revolutions* (Chicago, IL: Chicago University Press, 1970).