1 Introduction

Crime and punishment: jurisdiction to prescribe, to adjudicate and to enforce

The relationship between universal crimes and universal jurisdiction has been disputed by statesmen and lawyers for at least 3,000 years. An incident appears in a papyrus of about 1000 BC:[1]

I [Wen-Amon, a priest of the Egyptian god Amon-Re from the temple of Karnak] reached Dor [on the coast of what is now Israel], and . . . a man of my ship ran away and stole one (*vessel*) of gold . . . four jars . . . and a sack of . . . silver. I got up in the morning, and went to the place where the Prince was, and I said to him: "I have been robbed in your harbor. Now you are the prince of this land, and you are its investigator who should look for my silver. Now about this silver – it belongs to Amon-Re, King of the Gods, the lord of the lands; it belongs to . . . my lord, and the other great men of Egypt! It belongs to you; it belongs to . . . the Prince of Byblos [apparently scheduled to be a recipient of the money in return for a cargo[2]]."

Apparently, the priest took a rather imperious line, because the Prince of Dor began his response by denying the impact in Dor of the priest's assertions of eminence. The priest records the argument in what seem honest and clear terms:

And he said to me: "Whether you are important or whether you are eminent – look here, I do not recognize this accusation which you have made to me! Suppose it had been a thief who belonged to my land who went on your boat and stole your silver, I should have repaid it to you from my treasury, until they

[1] James K. Pritchard, *The Ancient Near East* (5th edn., Princeton University Press, 1971) 16*ff*., translating an Egyptian papyrus of the eleventh century BC. This tale appears to be part of the background that inspired the Finnish author Mika Waltari to write his international bestseller, *The Egyptian* (1949).

[2] Pritchard, *Ancient Near East* note 3.

had found this thief of yours – whoever he may be. Now about the thief who robbed you – he belongs to you! He belongs to your ship! Spend a few days here visiting me, so that I may look for him."

Apparently, the priest regarded the theft of religious property to be what today would be called a "universal" crime. In his view, the Prince of Dor had a legal obligation to find the thief and punish him, and to reimburse the priest for his losses. But the local ruler, the Prince of Dor, refused at first to apply to a person of the priest's ship the law that would be enforced had the accused been within Dor's legal authority based on residence ("nationality"?) or territorial jurisdiction to prescribe. Apparently, the Prince argued that the violation of Egyptian law in an Egyptian vessel is not a violation of the law of Dor, where he was the dominant or sole law-making authority. The argument is not wholly clear, but then the priestly author writes with indignation and cannot be taken as an objective reporter of law or fact and it is certainly no mark of disrespect to suggest that the modern translator was apparently not trained in ancient Egyptian and modern international law. In a compromise seeking to preserve the pretensions of both parties, the Prince of Dor offers to seek out the thief and hand him over to the traveling priest to administer whatever law the priest thought best, Egyptian imperial law or divine law.[3]

A later episode in the same papyrus clarifies the jurisprudential assumptions:

[Zakar-Baal, the prince of the port] said to me: "On what business have you come?" So I told him: "I have come after the woodwork for the great and august barque of Amon-Re, King of the Gods. Your father did (it)[4] your grandfather did (it), and you will do it too!" . . . But he said to me: "To be sure, they did it! And if you give me (something) for doing it, I will do it! Why, when my people carried out this commission, Pharaoh . . . sent six ships loaded with Egyptian goods . . . [W]hat is it that you're bringing me[?] . . . If the ruler of Egypt were the lord of mine, and I were his servant also, he would not have to send silver and gold . . . As for me . . . I am not your servant! I am not the servant of him who sent you either! . . . [W]hen Amon founded all lands, in founding them he founded first the land of Egypt, from which you come . . . and learning came out of it, to reach the place where I am. What are these silly trips which they have had you make?"

And I said to him: "(That's) not true! What I am on are no 'silly trips' at all!

[3] Ibid. The priest's narration of the particular episode stops there; the final disposition of the affair is not known.

[4] Apparently referring to supplying Lebanese cedar-wood to the religious institution in Egypt. See Pritchard's introduction, *Ancient Near East*, 16.

There is no ship upon the River which does not belong to Amon! The sea is his, and the Lebanon is his, of which you say: 'It is mine!' . . . You are stationed (here) to carry on the commerce of the Lebanon with Amon, its lord. As for your saying that the former kings sent silver and gold . . . they had such things sent to your fathers in place of life and health! . . . If you say to Amon: 'Yes, I will do (it)!' and you carry out his commission, you will live, you will be prosperous, you will be healthy, and you will be good to your entire land and your people!"

But the priest apparently recognized that his divine law argument was not carrying the weight he thought it should have. He yields:

Have your secretary brought to me, so that I may send him to . . . the *officers* whom Amon put in the north of his land, and they will have all kinds of things sent. I shall send him to them to say: "Let it be brought until I shall go (back again) to the south, and I shall (then) have every bit of the debt still (due to you) brought to you." So I spoke to him [italics *sic*].[5]

The priest's model of the world order rests on "divine law," a notion of Egyptian imperial law and an identification of property rights with universal morality and universal "law." The "Prince of Dor" and Zakar-Baal accept the divinity of Amon, but in Dor the authority of the priest to dictate local police action on the basis of that divinity is denied; the Prince accepts Egyptian imperial pretensions but denies the authority of the priest to represent the Pharaoh directly; accepts the notion of universal property rights but denies that the concept is significant to an event happening solely within an Egyptian vessel; and seems to take a territorial view of his own authority to make and enforce law, allowing an equivalent authority in the priest, but drawing territorial lines between the enforcement authority of the two. The resulting compromise adopts the prince's model by proposing a cooperation of the two law-enforcers, each acting within his own sphere of authority. Similarly, Zakar-Baal denies the authority of the priest even while admitting the authority of Amon; denies that past behavior of his princely ancestors is binding on him as customary law; apparently rejects the priest's gloss that made the true exchange one of cedar for Amon's favor instead of for property of equivalent value. Ultimately, the priest gets his cargo by promising both Amon's favor and property in exchange. Both sides maintain their models of legal relationships.

With many variations, the same argument and the same capacity to maintain inconsistent models while getting on with real life has been going on in one form or another for 3,000 years. Theorists of the law,

[5] Ibid., 19–21. This fascinating tale goes on; the disputes over authority go on, but this is enough for present purposes. The interested reader is advised to read the original.

priests and lawyers, have been seeking to expand their own authority to determine substantive law and require the holders of territorially based authority to enforce it for them; "princes" have been seeking to maintain their authority to determine the law as well as to enforce it free of the moral, religious, or political dictates of those whom they regard as competitors for that authority.

Words and reality

It seems "natural" for every person to construct in his or her own mind an abstract model of reality. We all do it. Without an abstract model (a "paradigm," in the academic jargon of my youth; "ontology" in current philosophical jargon) to give order to our perceptions, every perception would be unique and we would see no order in the world. Of course, it is possible that there is no order in the world and that we deceive ourselves in supposing our models to be useful. But our brains, the intellectual hardware with which we are born, seem to be "wired" to think in terms of generalities and relationships, and we each accept for our own purposes the abstractions and connections that we find enable us best to understand and interact with the world we perceive around us. We label everything, concrete or abstract, things or relationships, with "words." By usage, we find that our conceptions of what the words stand for in the perceived world seem to come sufficiently close to what we take to be the perceptions of others that communication between people seems possible.

The arguments are endless about the meanings of words, their interrelationships, the structure of communication in particular languages and in general, and the connections, if any, between the words we use to represent reality and reality itself, assuming there is any reality behind our individual perceptions.[6]

[6] Every worker in this field seems to believe that his or her personal insights are universally valid. Since at least the days of Aristotle, philosophers seem to have preferred to focus more on the patterns of logic than the relationship of words to reality. The beginning of currently fashionable analyses of logic is probably George Boole, *An Investigation of the Laws of Thought* . . . (1854, Dover edn., 1958). The interested reader might prefer to start with a more recent introductory text like Hans Reichenbach, *Elements of Symbolic Logic* (1947, Free Press Paperback, 1966), or W. V. Quine, *Methods of Logic* (Harvard University Press, 1950, 4th edn., 1982), and proceed through Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* (London and New York: Routledge & Kegan Paul, 1922, corrected bilingual edition, 1933) and his superseding work, *Philosophical Investigations* (G. E. M. Anscombe, translator) (New York: Macmillan Publishing Co., Inc., 1953, revised 3rd edn., 1968). On the connections between logic and

Assuming that word-based abstract models of reality are necessary for social thought, and words are the best tools we have for people to communicate their abstract thoughts to each other, some basic agreement as to the processes of logical thinking is also necessary.

Most "logic" seems intuitive and in legal argumentation much more is owed to the influence of models posed by Plato,[7] Aristotle,[8] Cicero[9] and the scholastic philosophers of the high middle ages than to mathematical models or semiotic theories of reality. It was not until the middle of the fourteenth century that a rule was proposed that seems to express the fundamental assumption relating logical thought to reality. *Essentia non sunt multiplicanda praeter necessitatem*: Nothing should be posited unless necessary. This intuitive, unprovable, self-referring rule is "Occam's Razor," the non-logical basis of all logical analyses of reality. It demands that superfluous assumptions be cut out of a proposition; that a model purporting to reflect reality must be the simplest consistent with the

"reality," see W. V. Quine, *Philosophy of Logic* (Harvard University Press, 1970, 2nd edn., 1986). The connections between logical thought and perceptions of reality are too many and too complex to be ignored in any serious work involving jurisprudence. Since at least the days of Plato, philosophers have posed models representing the connections they saw between perceptions and reality. The most famous is probably Plato's myth of the cave: *Republic*, Book VII. Plato suggests the existence on a metaphysical level of ideal conceptions perceived only with distortions by fallible human senses. Plato's ideal "reality" does not necessarily exist on a physical level. The impact of his model and various interpretations of it on Western (and some non-Western) philosophy has been incalculable. A relatively new field of study, "semiotics," has been popularized by the novel, *The Name of the Rose* (1980, English translation, 1983), by an Italian academic, Umberto Eco. Eco's more serious works, *Semiotics and the Philosophy of Language* (1984), or his short essay, "Language, Power, Force", in Eco, *Travels in Hyperreality* (1986) at 239, are readily available for those to whom this subject seems interesting. It is only peripheral to this study. Those wanting a provocative foreshadowing might find it amusing to re-read Charles L. Dodgson (Lewis Carroll), *Through the Looking Glass and What Alice Found There* (1861). In the seventh square, the White Knight distinguishes between the name of a song, what the name is called, what the song is called, and reality: the song itself. See *The Annotated Alice* (Martin Gardner, ed., New York, 1960) 306, note 8.

[7] Platonic works addressing the art of rhetoric directly include *Cratylus*, where Plato's protagonist, Socrates, suggests that only a "legislator" has the authority to give "names" to things; and *Phaedrus*, in which rhetorical argument is dissected. There are other Platonic (not necessarily Socratic: Socrates does not appear in *Laws*) dialogues pertinent to a full study, but the subject is only peripheral to this essay.

[8] Aristotle's six treatises on logic are grouped together as the *Organon*. But *Rhetoric*, which deals with forensic argument and appeals to emotion, persuasion, is indispensable to those who would understand the processes of legislation. See below.

[9] Particularly Marcus Tullius Cicero, *De Legibus* [*On Laws*], which contains a much-quoted description of "*vera lex* [true law]," identifying "law" with moral conviction. This will be discussed below.

perceived facts and contain the fewest possible exceptions.[10] It is a fundamental assumption of lawyers and jurists. It is frequently forgotten in the enthusiasm of some to create a model of reality that leads to desired results; by jurists whose approach is normative rather than descriptive, but who prefer to reach their conclusions by making them appear implicit in the system rather than the product of their discretion in accepting unstated assumptions.[11]

"Naturalism" and "positivism"[12]

As illustrated in the tale of Wen-Amon, two major schools, usually denominated "naturalism" and "positivism," have dominated juristic thinking from earliest days. They are different models elaborated, sometimes brilliantly, by scholars and urged by groups of scholars for general adoption as operating models for judges and statesmen of all societies.

"Naturalism"

"Naturalism" in jurisprudential jargon is the system that assumes that rules of human behavior derive ultimately from sources outside the will of mankind. The "nature" that creates those rules has been argued in

[10] William of Occam (or Ockam, occasionally Ockham), *c.*1300–1349, is reputed to have first uttered this famous phrase. I have translated it in a modern sense, using "basic assumptions" as equivalent to the neo-Platonic and scholastic notion of "essences." A concise summary of Occam's achievement is the article by T. M. Lindsay in 19 *Encyclopaedia Britannica* (11th edn., 1911), 965.

[11] An example of the use of Occam's Razor to analyze competing legal formulae, showing the philosophical unacceptability of a purported rule of international law by which merchant ships were considered inherently exempted from being the object of self-defense actions in time of "legal" peace, accepted by many notable publicists as "conventional wisdom" in the 1920s and the 1930s, is Alfred P. Rubin, "Evolution and Self-Defense at Sea," in 7 TSA 101 (1977). The formula preferred by those who wished to establish as a dominant legal principle the immunity from military action of merchant vessels on the high seas in time of peace is shown to require many exceptions, a notional violation of law without legal consequences, and derogations from the law of "self-defense" which many publicists and nearly all statesmen must reject in practice.

[12] There is much confusion in this common branch of jurisprudential analysis which I have tried to disentangle in a short article focusing on how the perceived source of the rule, natural law in one or another of its guises, positive law, or some other normative system, affects the enforcement of the rule. I tried to show that attempts to use the tools of the positive legal order to enforce rules derived from some type of "natural" order either fail or involve making "judges" of particular cases into legislators for society in general. Alfred P. Rubin, "Enforcing the Rules of International Law", 34(1) HILJ 149 (1993) (hereinafter cited as Rubin, "Enforcing").

classical writings to derive actually from at least three very different sources: physical nature; value-based "morality" or "ethics" (which word depends on whether the Latin or Greek conception is being implied); and "divine law." A possible fourth source is social pressures and amoral custom. A fifth is a mixture of the others developed by various scholars with varying weights given to each of the asserted sources of "law."

Aristotle grounded his "naturalist" model of the legal order in physical facts (the Greek word for "nature" is "*physis*"); in the animal nature of mankind, the inherent need to have children, protect them and the family, provide a more efficient economic basis for survival than subsistence farming and pattern a social organization to fit the innate capacities of its members.

> Because it is the completion of associations existing by nature, every *polis* exists by nature, having itself the same quality as the earlier associations from which it grew . . . From these considerations it is evident that the *polis* belongs to the class of things that exist by nature, and that man is by nature an animal intended to live in a *polis*.[13]

But Aristotle did not carry this categorization wholly over to the field of law because he did not believe that the sociological and community relationships established by nature always coincided with the relationships demanded by a sense of "justice."

> One part of political justice is natural: another is legal. The natural part is that which has everywhere the same force . . . The legal part is that which originally is a matter of indifference, but which ceases to be indifferent as soon as it is fixed by enactment . . . Some hold that the whole of justice is of this [natural] character. What exists by nature (they feel) is immutable, and has everywhere the same force: fire burns both in Greece and in Persia; but conceptions of justice shift and change. It is not strictly true that all justice is legal, though it may be true in a sense . . . True, all our human justice is mutable; but that does not prevent some of it from having a natural origin.[14]

[13] Aristotle, *Politics* 1252b and 1253a, taken from Ernest Barker (ed. and translator), *The Politics of Aristotle* (Oxford, 1946, paperback edn., 1975) (hereinafter cited as Barker, *Aristotle*) 5.

[14] Aristotle, *Nichomachean Ethics*, 1134b18, in Barker, *Aristotle*, Appendix II at 365. The translation by H. Rackham for the Loeb Classical Library, Aristotle, *The Nichomachean Ethics* (Harvard University Press, 1939) uses the word "conventional" instead of "legal" in the first sentence. In the original Greek, it says: "*Ton de politikon dikaion to men physikon esti to de nomikon*": Ibid., 294 (Greek)/295 (English). Aristotle carefully distinguishes between "*dikaion*" (justice?) and "*nominos*" (law?). But a full analysis of Aristotle's conceptions of "law" and "justice" and the relationships between them would fill libraries (indeed, they already have filled libraries). In general, it is wise to beware of translations, but a study such as this could not be made without using them.

Obviously, Aristotle considered "law" to include conceptions in the positive order; a product of human discretion. Otherwise his remark about the legal part being morally ("ethically"; in what follows I shall use the two words interchangeably) "indifferent" until fixed by "enactment" would make no sense. He also used the Greek word "*nomikon*," normally translated "laws," to refer to the physical "laws" of nature. Not only do conceptions of "justice" shift and change, thus differentiating the moral laws binding society from the physical laws of non-human nature, like the law of gravity or the law that requires fire to burn the same way in both Greece and Persia, but some of the "natural" relations that seemed obvious to Aristotle as a sociologist seem quaint (indeed painful) today, and many of the laws that Aristotle supposed derived from the "nature" of political societies now seem far less the product of physical nature than the product of human discretion falsely attributed to nature. For example, Aristotle derived the conformity with nature of the Greek patriarchy from the supposed nature of women and the inborn characteristics of those best fitted by nature to be slaves (apparently including all members of societies defeated in war and the possibly brilliant and independent-minded children of "nature's" slaves).[15]

Nonetheless, the identification of physical nature and its phenomena with "law" and this "law" with "justice" popularized (among scholars) a confusion of terminology with implications for legal argument today despite Aristotle's own perception of the differences of the two sorts of "law" and the dangers of attributing identity to concepts that only partially overlap. Aristotle certainly saw human, positive laws improving natural social institutions, like the *polis*. But he did not suggest that natural sanctions, like starvation or physical misery, were superseded by human law. And neither the natural law nor the human law need have anything to do with "justice," which is not "law" in the same sense, but a moral or (using the Greek root) "ethical" notion.

A second category of "natural law" system rests on identifying moral insight with "law" and finding the "moral law" to be superior to human prescriptions in a model in which both "moral" and "human" law are presumed to be part of an undifferentiated whole "law." The great formulator of this view was Cicero. He described the "*vera lex*," the "true law," as:

> [R]ight reason in harmony with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts

[15] Aristotle, *Politics* 1253b*ff*., 1259b, in Barker, *Aristotle*, 5, 8*ff*., 32–33.

from wrongdoing by its prohibitions . . . We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it.[16]

The first part of this eloquent statement of personal honor and responsibility has been frequently applied to assert the existence of eternal, universal and constant rules of "law" that bind others who, under the last phrase, must nonetheless serve as their own expounders and interpreters. The notion that all who reason "rightly" must come to the same conclusion on a matter of moral values has had an immense impact on the intensity of both moral and legal argumentation.

Obviously, the Ciceronian assumption of universal, constant and eternal rules of "true law" is inconsistent with Aristotle's assertion of shift and change in conceptions of "justice" unless "true law" and "justice" are differentiated. There seems to be no surviving school of jurisprudence built on such a differentiation. The surviving influence of Cicero's statement seems to rest on its use by naturalist jurists to attribute universality to the rules they discover in their own consciences. Introspection is not regarded as an exercise in discretion, but in the discovery of rules with which all reasonable people must agree; rules which exist independently of human discretion but rest on the nature of mankind and our God-given capacity to reason "objectively." There is much disagreement among scholars as to whether those rules, including such moral imperatives as charity, good faith and honesty, can ever be particularized to cover real situations; and, if they can, whether all reasonable people would apply them in the same way; and, if they would, whether those rules can properly be called rules of "natural law" without confusing them with rules of discretionary, human (positive) law; and, if they can, whether the moral "natural law" should be conceived to nullify the human law in the legal orders erected by human societies.[17]

[16] Marcus Tullius Cicero, *De Re Publica*, III, xxii, 3: "recta ratio naturae congruens, diffusa in omnes, constans, sempiterna, quae vocet ad officium iubendo, vetando a fraude deterrat . . . nec vero aut per senatum aut per populum solvi hac lege possumus, neque est quaerendus explanator aut interpres eius . . ." in Cicero, *De Re Publica* and *De Legibus* (C. W. Keyes, translator) (Loeb Classical Library, 1928, 1977) at 210 (Latin)/211 (English). The view that virtue is the result of education, that evil is a product of ignorance, and that all knowledge is inborn, the function of education being merely to help the individual organize his thoughts in a reasonable way, traces back at least as far as Plato's *Protagoras* and *Crito*.

[17] For an argument that the two (indeed, many more) "legal" orders must be conceived to exist side by side and that vindication in one does not mean vindication in another any more than violation of one means violation of others, see Yasuaki Onuma, *Conclusion: Law Dancing to the Accompaniment of Love and Calculation* in Yasuaki Onuma

There is another major problem with Cicero's famous formula. It is that "reason" in his phrase "right reason [*recta ratio*]" has little relationship to deductive, inductive, analogistic, or even rhetorical reasoning. Instead, it seems to involve isolating factors affected by proposed rules, weighing the values implicit in each, and affirming the dominance of the value(s) whose enhancement seems worth the degradation of other values. Decisions are made by intuition usually based on an analysis of predicted social consequences. Ultimately an intuitive judgment is made as to what social consequences are more desirable (to the analyst) than others; how far to accept the diminishing of some values in action by enhancing others, and which should be enhanced at the expense of others to be ignored or diminished. The conception has little or nothing to do with modern analyses of logic and seems to be used often to mean the opposite of what it says if "reason" is taken to imply logical thought processes. It seems to call "right reason" that which is grasped intuitively with little or no "reasoning" involved, but instead a weighing of moral values about which "reasonable" people frequently disagree.

A third confusion must be noted. "Moral reasoning" is itself a concept about which eminent moralists differ. One pattern of moral reasoning consists of a search for a "golden mean."[18] At times, this reaches almost ludicrous proportions as moralists search for extremes between which some apparently *a priori* desired mean can be located.[19]

Some moralists reject the "golden mean" and elevate a single religious, social or personal value to the level of a litmus test against which action can be measured, attributing governing authority to that particular value, making it the sole measure of virtue or "law."[20]

(ed.), *A Normative Approach to War* (Oxford: Clarendon Press, 1993) 333 at 340 and fig. 11.1 at 342–43 setting out in graphic form Onuma's analysis of Grotius's conception of overlapping orders pertinent to an understanding of the overall international legal order in the middle of the seventeenth century. Onuma finds this differentiation among "orders" at the heart of Grotius's analysis of the international legal order. For some independently derived elaboration on this theme as applied in the late twentieth century, see Rubin, "Enforcing".

[18] Aristotle, *The Nichomachean Ethics*, 1106a25*ff.* (Book II, chapter 6*ff.*).

[19] E.g., ibid., 1108a19 (Book II, chapter 7) finding a "truthful sort of person" to be the mean between boastful exaggeration and mock modesty.

[20] This is particularly common in discussions of so-called "human rights," where some particular "right" is held the touchstone of "law" without analysis of other values that might be affected by the rules derived from this approach. See Alfred P. Rubin, "Are Human Rights Legal?", 20 IYBHR 1990 45 (1991). A memorable short story by Mark Twain exposes the contradictions into which single-value moralists fall when elevating a single value, in the story: "truth," to the pinnacle of argumentation. See Mark