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Law and Ethics in Jean-Jacques Rousseau's Works

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Obligation in Rousseau: Making Natural Law History?

Michaela Rehm

I. Introduction

Is Rousseau an advocate of natural law or not?¹ At first sight, his thinking exhibits some of the right characteristics: It is historically situated in a period which thought is still highly preoccupied with the natural law tradition, and many citations and hints demonstrate Rousseau's familiarity with the proponents of this tradition such as Grotius, Hobbes and Pufendorf.² What is more, it presents a social contract theory, and reflections on the pre-political state of man, both of which are standard frameworks for the presentation of natural law doctrines during the early modern period. Still, the question tends to be answered in the negative: Interpretations focusing on a mainly rationalist view of natural law claim that Rousseau's thinking is so strongly characterized by an emphasis on the limitations of rationality that such a sceptic could hardly be counted among the party of natural law philosophers. Readings with a voluntarist take upon natural law stress the fact that Rousseau rejects the idea of divine lawgiving and does not come forward with any principles in the form of laws. They imply that political norms have to meet the standard that is set by the natural laws. Given the lack of law-like principles in the state of nature, it seems Rousseau cannot model the state according to pre-political standards, and according to such interpretations that is a central reason to count him out of the natural law tradition.

¹ *Arthur Melzer*, *The natural goodness of man: On the system of Rousseau's thought*, Chicago: Chicago University Press 1990, p. 129 gives a survey of the debate. *C. E. Vaughan* asserts in his introduction to *The political writings of Jean Jacques [sic] Rousseau* that Rousseau "sweeps away the idea of natural law, root and branch", Vol. 1, p. 16; *Robert Derathé*, *Rousseau et la science politique de son temps*, Paris: Presses universitaires de France, 1950, p. 151–171, tries to show that Rousseau belongs to the tradition of natural law philosophy. *Robert Wokler*, "Rousseau's Pufendorf: Natural law and the foundations of commercial society", in: *History of Political Thought* 15 (1994), p. 373–402, tries to refute Vaughan and Derathé; *Roger Masters*, *The political philosophy of Rousseau*, Princeton: Princeton University Press, p. 275, claims that Rousseau "from the perspective of political philosophy [...] rejects any notion of natural law as the basis of society"; *Victor Goldschmidt*, *Anthropologie et politique. Les principes du système de Rousseau*, Paris: Vrin, 1973, assumes that Rousseau has the ambition to rival with the natural law thinkers (p. 169–176).

² For Rousseau's reception of early modern natural law, see *Gabriella Silvestrini*, "Rousseau, Pufendorf and the eighteenth-century natural law tradition", in: *History of European Ideas* 36 (2010), p. 280–301.

The purpose of this paper is to suggest a positive answer to the question raised above. My thesis that Rousseau actually is a philosopher of natural law is based on the following premisses: a) There are different possibilities to establish natural values and norms. The notion that natural law is necessarily grounded upon rationality offers too narrow a reading of the natural law tradition. It leaves aside the fact that the focus on rationality presents only one, though powerful, of many strains within the theory of natural law. That Rousseau's starting-point is not human rationality does not imply he is saying goodbye to natural law thinking. He simply puts the focus on other presumably natural human qualities than rationality. b) Natural law does not have to be presented in the form of laws by necessity. It comes in a variety of shapes, and therefore many natural law thinkers feel the need to explain what they mean if they talk about "law" – natural drives and advices, for example, are all treated under this headline.³

Indeed, Rousseau does not propose any concept of natural law that takes "law" to be the authoritative word of a legislator, issued in the grammatical form of a command and enforced with a threat of punishment. To conclude from this fact that Rousseau has no natural law theory at all would be wrong – it only means he does not belong to the voluntarist school of natural law. c) Once it is accepted that neither the concentration on rationality as the basis of natural law nor the focus on voluntarist lawgiving can be identified with *the* natural law tradition as a whole, it shows that Rousseau actually has a concept of pre-political moral principles which serves very well as standard for norms within his theory of the state.

II. Is there a Human Nature at all?

One reason for the many claims that Rousseau does not belong to the natural law tradition may be that he is not sparing with criticism of it. Given his thesis that the knowledge of man is the most useful of all human sciences, he thinks the ignorance about human nature is scandalous, and he rebukes natural law philosophers for their neglect of finding a common definition of natural law.⁴ In Rousseau's view, they are

³ Rousseau himself discusses the various uses of the term "natural law" in the preface to the Second Discourse (in: *Jean-Jacques Rousseau, Discourse on the origins of inequality [Second discourse], Polemics, and Political Economy, The collected writings of Rousseau, Vol. 3*, ed. Roger D. Masters and Christopher Kelly, Hanover and London: University Press of New England, 1992), p. 13–14 (in French: *Œuvres complètes*, ed. Bernard Gagnebin and Marcel Raymond, Vol. III, Paris: Gallimard, 1964 [Bibliothèque de la Pléiade] = OC III, p. 124–125). In this article the English references to Rousseau's writings will be followed by references to the standard edition of the *Œuvres complètes*, ed. Bernard Gagnebin and Marcel Raymond, Paris: Gallimard (Bibliothèque de la Pléiade), 1959 f., using the abbreviation OC. If an English translation of a work is not available, the references will be given according to the *Œuvres complètes* only.

⁴ On the prominent role of the science of man see *Rousseau, Second Discourse* (footnote no. 3), preface, p. 12 (OC III, p. 122); on the disagreements among natural law philosophers see *ibid.*, p. 124–125 (OC III, p. 13–14).

all bound to fail because their search for human nature takes civilized man as an object. They investigate into the qualities of man long after he has left the state of nature, then ask what rules would be beneficial for him in this situation and finally call this arbitrarily gathered body of rules “law of nature”.⁵ It is textbook wisdom that Rousseau wanted to show in the *Discourse on Inequality* that inequality was not authorized by the law of nature. But he not only tried to demonstrate that inequality was the product of civilization, legitimated by positive laws, his ambitions went much further: He repudiates the history of natural law from the very beginning until his days and claims to have the clue to find the true definition of human nature and of the law that corresponds to it. “*Non in depravatis, sed in his quae bene secundum naturam se habent, considerandum est quid sit naturale*”⁶, that is the motto for the *Discourse on Inequality* – a citation from Aristotle, but for Rousseau without doubt even Aristotle was not fit for the task he had set for himself. Rousseau however likes to play the part of showing he is ready, willing, and able to finish with two millenniums of errors concerning natural law and this time do it right.

Seen in this light, the preface of the *Discourse on Inequality* constitutes the self-confident manifesto for a fresh start in natural law theory. The basis for this project consists in the promise to master what Rousseau’s predecessors in his view had not managed to do: the enterprise of distinguishing the original aspects in human nature from the artificial ones.⁷ Rousseau gets on with “stripping” man “of all the supernatural gifts he could have received and of all the artificial faculties he could only have acquired by long progress” and discovers an “animal”⁸ who differs from other creatures less in rationality than in his quality of “being a free agent” (“sa qualité d’agent libre”)⁹. This being is presented as “neither good nor evil, [having] neither vices nor virtues”¹⁰, and Rousseau offers an interesting explanation for this absence of moral faculties: “[...] Savages are not evil precisely because they do not know what it is to be good [...]”.¹¹ There is no law to hinder savage man from doing bad, no enlightened insight, and being ignorant of vice, the idea of doing something civilized generations in the future might call vicious does not even enter his mind.¹² Rousseau distances himself from Christian theologies which claim that fallen man is in need of rules from the very beginning. Given his “ignorance of vice”¹³, no law is necessary to guide natural man.

⁵ *Ibid.*, preface, p. 14 (OC III, p. 125).

⁶ *Aristotle*, *Politics*, L. 2., cited at the front-page of *Rousseau*, Second Discourse (footnote no. 3), p. 1 (OC III, p. 109).

⁷ *Rousseau*, Second Discourse (footnote no. 3), preface, p. 13 (OC III, p. 123).

⁸ *Ibid.*, part I, p. 20 (OC III, p. 134).

⁹ *Ibid.*, part I, p. 25 (OC III, p. 141).

¹⁰ *Ibid.*, part I, p. 34 (OC III, p. 152).

¹¹ *Ibid.*, part I, p. 35 (OC III, p. 154).

¹² *Ibid.*

Rousseau is looking for the “first and simplest operations of the human soul”, to find out the basic principles in the behaviour of natural man: “self-love” (“amour de soi”) and “pity” (“pitié”) which he believes to be the origins of “all the rules of natural right”.¹⁴ Self-love consists in the care for self-preservation, and is a natural drive common to animals and men that makes them do what is necessary to survive.¹⁵ This drive however is bridled by an “innate repugnance to see his fellow suffer”.¹⁶ Unless he is legitimately forced to secure his survival, natural man will never hurt any “sensitive being”.¹⁷ His natural drive of pity is so powerful that he would have to resist it actively in order to be able to do any harm at all. Men (as well as animals) in the original state of nature possess the ability to identify with suffering beings, a process happening sub-consciously and without reflection, quasi automatically, as it were.¹⁸ Rousseau claims it is “evident that this identification must have been infinitely closer in the state of Nature than in the state of reasoning”.¹⁹ The reason why it is much more difficult to sympathize with man or animal in the civilized state is that civilized man is rational, and “[r]eason engenders amour propre and reflection fortifies it”.²⁰ “Philosophy isolates” man, he is ingenious in finding good reasons why he does not need to identify with another man in trouble and to bother to help.²¹ This adjusting of arguments will hinder civilized man from intervening when he is needed, a “talent”, Rousseau sarcastically says, that is completely absent in natural man, who will always follow his “first feeling of humanity”.²²

Rousseau’s message to the “modern” representatives of natural law theory²³ is clear: they all presuppose man as a being that has no reliable intrinsic motivation

¹³ Ibid.

¹⁴ Ibid., preface, p. 14–15 (OC III, p. 126).

¹⁵ Ibid., preface, p. 15 (OC III, p. 126).

¹⁶ Ibid., preface, p. 36 (OC III, p. 154). Despite of directing his reflections concerning pity to man in the first place, Rousseau says animals sometimes show symptoms of pity, too (ibid.).

¹⁷ Ibid., preface, p. 15 (OC III, p. 126).

¹⁸ Ibid., part I, p. 37 (OC III, p. 155).

¹⁹ Ibid., part I, p. 37 (OC III, p. 155–156).

²⁰ Ibid., part I, p. 37 (OC III, p. 156).

²¹ Ibid.

²² Ibid.

²³ In the Second Discourse (footnote no. 3), preface, p. 13–14 (OC III, p. 124–125), Rousseau discusses the errors of the ancient and the “modern” philosophers of natural law. In his criticism, he concentrates on the “moderns” like Hobbes, Grotius, Pufendorf, Burlamaqui and Barbeyrac. In this text, the theories of these early modern natural law philosophers are simplified and streamlined concerning their variety in order to be able to contrast Rousseau’s position more clearly. Their theories undeniably vary a lot, but for the sake of the argument, the emphasis is put on the ideas they have in common: They are of one mind that pre-political norms are not efficient enough to secure a peaceful life (even if they are taken to be obligating because of a divine legislator); in order to be efficient they have to be enforced by the state, the power of which however has to be restricted by the natural law. And they agree that these

not to harm others, and has to be guided by laws in order to prevent the worst. But it is not natural man they are talking about, they refer to man in the civilized state. As far as the truly natural man is concerned, the talk about law is pointless – a being who is naturally driven to do right does not need any orders. Prescribing a certain behaviour becomes an issue only after the natural inclinations are weakened by the process of civilization. In “the state of nature, [pity] takes the place of Laws, morals, and virtue, with the advantage that no one is tempted to disobey its gentle voice”²⁴, temptation being a consequence of the establishment of artificial guidelines that entice into trespassing them. As soon as such rules enter the stage, the age of moral innocence is over – Rousseau agrees that duties, customs and laws may help man to act well, but they have the side-effect of making him realize the tempting possibilities to do the contrary.²⁵

Compared with the natural inclination of pity, rules are only second-best, and in the historical perspective they also come second. They become necessary only after society has developed and men suddenly need “qualities different from those they derived from their primitive constitution” in order to cope with the change.²⁶ Fortunately, human nature for Rousseau is well equipped to adapt itself to transformations in its environment: “It was by a very wise Providence that his potential faculties were to develop only with the opportunities to exercise them, so that they were neither superfluous and burdensome to him beforehand, nor tardy and useless when needed”.²⁷ The “meta-faculty” that enables man to adjust to change is what Rousseau calls “perfectibility” (“perfectibilité”).²⁸

Perfectibility, along with free agency²⁹, is what distinguishes men from animals. It does not refer to the simple ability, say, to avoid stinging nettles after a first ignorant and hurtful contact, i. e., it is not just learning from experience, common to men and animals alike. What is special about perfectibility is that it is “a faculty which, with the aid of circumstances, successively develops all the others”; it brings forward faculties man potentially has, but that according to Rousseau he does not need from the start – such as sociability or rationality.³⁰ That is a slap in the face of most natural law thinkers before Rousseau, who presupposed a natural sociability making human beings favorably disposed towards their fellow men. Rousseau elegantly dis-

pre-political norms are represented as laws, in the grammatical form of commands, issued by a lawgiver (God).

²⁴ *Ibid.*, part I, p. 37 (OC III, p. 156).

²⁵ *Ibid.*, part I, p. 38 (OC III, p. 157) and *Rousseau*, Émile, in: *Œuvres complètes*, ed. Bernard Gagnebin and Marcel Raymond, Vol. IV, Paris: Gallimard, 1969 [Bibliothèque de la Pléiade], book II, p. 334.

²⁶ *Rousseau*, Second Discourse, part II, p. 48 (OC III, p. 170).

²⁷ *Ibid.*, part I, p. 34 (OC III, p. 152).

²⁸ *Ibid.*, part I, p. 26 (OC III, p. 142).

²⁹ *Ibid.*, part I, p. 26 (OC III, p. 141).

³⁰ *Ibid.*, part I, p. 26 (OC III, p. 142) and *ibid.*, p. 33–34 (OC III, p. 151).

misses this pillar of natural law theory, claiming that “from the little care taken by Nature to bring Men together through mutual needs and to facilitate their use of speech, one at least sees how little it prepared their Sociability, and how little it contributed to everything men have done to establish Social bonds”.³¹ Sociability does not come naturally, it only developed after the population grew and the circumstances drove men to have closer contact with others. The same holds for rationality. Again, Rousseau goes on the offensive against an idea which in natural law thinking was taken for granted for ages – the idea that man is endowed with reason by nature. Rousseau puts forward the objection that man in his original state has no grounds to use his brains, as only “desire and fear” could make him search for knowledge, states of mind he is completely free of.³² Therefore, rationality is a faculty man possesses from the beginning potentially, but not actually, as it will develop only “with the opportunities to exercise” it, and such opportunities are absent in the original state.³³

Now perfectibility “resides among us as much in the species as in the individual”, making man able to become more perfect whereas there is no substantial change in animals.³⁴ Perfectibility and free agency³⁵ are the only *differentiae specificae* of man, and the ironic point of these classifications is that they make it impossible to fix a constant human nature – the two only constants in man being faculties that keep him flexible. Talking about human nature, what can be legitimately said according to Rousseau is that man always has the (by definition) wobbly faculties of free choice and of perfectibility, but statements like “man is sociable” are inappropriate unless specifications concerning the circumstances in question are added. It follows a) that there is no such thing as a constant human nature, b) that exactly because human nature is subject to change, it is impossible to draw constant norms from it.³⁶ That makes it difficult to talk correctly about natural law, on the one hand because of the meaning of “law”: “Law” has no place in the original state of nature, when man does not need any guidance or pressure because pity will prevent him from doing harm. It is only possible to talk about natural “law” in a metaphorical sense, and this is what Rousseau does when he for example calls the natural inclina-

³¹ Ibid., part I, p. 33–34 (OC III, p. 151).

³² Ibid., part I, p. 27 (OC III, p. 143).

³³ Ibid., part I, p. 34 (OC III, p. 152) + p. 42 (OC III, p. 162).

³⁴ Ibid., part I, p. 26 (OC III, p. 142).

³⁵ Ibid., part I, p. 25 (OC III, p. 141).

³⁶ „Les règles de justice ne se trouvent pas dans une nature humaine ou un modèle unique des relations pré-civiles. [...] elles sont des solutions plus ou moins heureuses, et relativement provisoires à des problèmes engendrés par tel ou tel état des relations humaines: elles sont liées aux circonstances de leur énonciation. C’est pourquoi il y a non pas une, mais plusieurs normativités pré-politiques, et c’est pourquoi aussi l’état civil ne dépend pas des lois naturelles. Le droit n’est pas une parole universellement valide, mais la norme qui se dégage d’un fait ou d’une situation, soit spontanément et nécessairement (mœurs, propriété), soit artificiellement [...]” (*Gabriella Radica, L’histoire de la raison. Anthropologie, morale et politique chez Rousseau*, Paris: Honoré Champion, 2008, p. 148).

tion of self-preservation a natural “law”.³⁷ On the other hand, assuming a natural law is problematic because of the sense of “natural”, as the so-called “natural” laws usually refer to faculties and rules that are products of civilization.

Rousseau leaves no doubt that the establishment of norms results from an adjustment to the times that are a-changing. They become necessary only when it turns out that the natural goodness of man, so appropriate for the original state, is not suited to the altered circumstances. And as this adjustment of human nature as a result of perfectibility cannot be brought to a standstill, neither can the corresponding norms. They need to be revised constantly to make sure they will not become superfluous or detrimental to the situation in question.³⁸

III. Pre-political Moral Faculties: Rationality Revised

The change in human nature prompts the question whether there is any faculty enabling man to judge which ways of adjustment are good. After all, the fact that natural pity is weakened in the course of civilization may be answered quite differently. You might welcome the vanishing of pity as it will help you to shrug your shoulders at the misery of others without any annoying natural inclination interfering with your egotism. You might as well regret the weakening of pity and look for a way to replace it, fearing you might become a plague for your fellow men otherwise. And Rousseau leaves no doubt that not any change and not any way to adapt to it is good. But what is the standard of judgement, and how does such a judgement take place?

The answer that might be expected of a 18th century philosopher would most probably be the claim that reason helps you to distinguish a positive change from a negative one and to assess how you should adjust to it. But Rousseau – not surprisingly – does not belong to the usual suspects which are customarily detained whenever an example for an optimistic take on rationality in Enlightenment philosophy is needed. Already in the preface of the *Discourse on Inequality* he makes it clear why he will not join the group of rationalists in moral philosophy. He is criticizing the “modern” natural law theorists who understand “law” to be “only a rule prescribed to moral being, that is to say, intelligent, free [...]”, limiting “the competence of natural Law to the sole animal endowed with reason, namely man”.³⁹ Rousseau obviously rejects this concept of natural law as too narrow (“only a rule”, “limiting”) as it presupposes the existence of man as a rational agent and focuses on his faculty of reason alone. Again, the problem according to Rousseau is that no such rational creature exists in the original state; therefore, the said natural law theorists wrongly assume natural man “must have used [...] enlightenment which only devel-

³⁷ Rousseau, *Émile* (footnote no. 25), book III, OC IV, p. 467.

³⁸ Rousseau, *Second Discourse* (footnote no. 3), part I, p. 34 (OC III, p. 152).

³⁹ *Ibid.*, preface, p. 14 (OC III, p. 125).

ops with great difficulty and in very few People in the midst of society itself".⁴⁰ The very fact that the rationalist natural law advocated by this "modern" natural law theory places such high demands on man for Rousseau speaks against the plausibility of its arguments. Very "few people [are] capable of comprehending these principles" even among his own civilized contemporaries, he claims, let alone in the original state of nature, and they are "far from being able to find them by themselves".⁴¹ This last point is a knockout in Rousseau's view: to be able to call something a "law", "not only must the will of him who is bound by it be able to submit to it with knowledge; but also, for it to be natural, it must speak directly by Nature's voice".⁴²

Therefore, the law that modern philosophers take for "natural" is a product of civilization, as it cannot be known without a certain degree of learning unavailable for natural man. And what is more, this law's not speaking "directly by Nature's voice" means its content cannot be grasped by every man equally. Whoever is advocating this "modern" concept of natural law should be aware of the consequences, as for Rousseau it implies the admission "that it is impossible to understand the Law of Nature and consequently to obey it without being a great reasoner and a profound Metaphysician".⁴³ The author of the *Discourse on Inequality*, apt to show that inequality is opposed to natural law, has set himself the goal here to demonstrate that "modern" natural law thinkers had nothing better to do than drafting a so-called natural law biased in favour of learned men, viz., themselves. This is why Rousseau stresses he is leaving aside "all scientific books which teach us only to see men as they [the authors of those books, we might specify] have made themselves".⁴⁴ The outcome of their efforts is a natural law theory that unfairly favours rationality, a faculty not yet developed in natural man and distributed extremely unequally in civilized man.

Rousseau harshly rebukes those early modern philosophers of natural law who suppose all the principles of morals are rational and can be recognized by every rational being, that is every man. One of his aims in the *Discourse on Inequality* was to show they were wrong in assuming rationality is a faculty all men possess by nature, in a degree sufficient to understand the demands of a natural law conceived as rational. When Rousseau claims to have discovered the two "first and simplest operations of the human soul", "self-love" and "pity"⁴⁵, he praises the advantage of his own concept: it does not need to "make man a Philosopher"⁴⁶, a dig at rationalist natural law theory. To sum up his criticism, rationality is too elitist a

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid. p. 14 (OC III, p. 126).

⁴⁵ Ibid., p. 14–15 (OC III, p. 126).

⁴⁶ Ibid., p. 15 (OC III, p. 126).

faculty to serve as a foundation for moral judgements. In *Émile* Rousseau proposes another way to find out which principles for his behaviour man should follow. He makes the Savoyard vicar say he is “not deducing these rules from the principles of high philosophy, but he is finding them at the bottom of his heart, where nature has engraved them uneffaceably. [...] The best advocate is conscience.”⁴⁷ Again, Rousseau voices here a polemic against a philosophy that tries to lure men into believing it is by reflection they will learn to act well. The background of this thought very probably is Rousseau’s suspicion that philosophers want to make disciples, they don’t want to help people to make up their own mind.⁴⁸

This is why Rousseau insists the real natural law must be understood “directly” (“immediately”)⁴⁹, without any mediation, be it by clergymen or by philosophers, for only then it can be said to be “natural”, guiding all men equally. Conscience according to Rousseau is an “innate principle of justice and virtue”⁵⁰, proper to every man, easily recognized by everybody independent of any intellectual talent. It seems that conscience is a promising candidate in our search for a natural faculty helping to discern which change and which adjustment to it is appropriate. And Rousseau says indeed that “one cannot establish a natural law with reason alone, independent of conscience”.⁵¹

IV. Obligation: Political, not Natural

So according to the *Discourse on Inequality* pity prevents man from causing damage, and following *Émile* the innate faculty of conscience helps man to check any egoist tendencies. But no matter what pre-political moral principle is consulted, the trouble is that all of them are not as effective as one might wish. Pity is weakened in the course of civilizational progress⁵², conscience is “timid” and tends to move back if its bearer dwells in a loud environment and prejudice tries to gain the upper hand inside him⁵³. In theory it is possible to preserve a pitying heart and to listen faithfully to the voice of conscience even if the state of nature is long gone and one historically and geographically lives in a hotspot of civilization. But be it in the advanced state of nature or in the civilized state, the difficulty is that one cannot count on every individual’s striving for moral goodness: “the sublime concepts of a God of the wise, the gentle laws of brotherhood He imposes upon us, the social virtues of pure souls [...] will always escape the multitude”⁵⁴. In the original state

⁴⁷ Rousseau, *Émile* (footnote no. 25), book IV, OC IV, p. 594 (transl. M. R.).

⁴⁸ Ibid., p. 568.

⁴⁹ Rousseau, *Second Discourse* (footnote no. 3), preface, p. 14 (OC III, p. 125).

⁵⁰ Rousseau, *Émile* (footnote no. 25), book IV, OC IV, p. 598 (transl. M. R.).

⁵¹ Ibid., p. 523 (transl. M. R.).

⁵² Rousseau, *Second Discourse* (footnote no. 3), part I, p. 37 (OC III, p. 156).

⁵³ Rousseau, *Émile* (footnote no. 25), book IV, OC IV, p. 601.

of nature, there was no need to compel anybody not to harm his fellow men, as pity was gently leading him to do what was necessary.⁵⁵ With the progress of civilization, one cannot count on the work of natural drives for goodness any more, and is therefore well-advised to make use of the institution of law⁵⁶: Man now has to be guided by more powerful means, with the help of obliging norms, the violation of which is punished. And law becomes even more necessary, the more the faculty of reason is developed. Reason enables man to clearly perceive what will serve his own needs, and there are some who will eagerly make use of their rationality for their egotist purposes.

In the *Geneva Manuscript* of the *Social Contract*, Rousseau presents a prime example for such a person: the “independent man”. If somebody tries to lecture him about his moral duties in the state of nature, his answer will be the following: “I am aware that I bring horror and confusion to the human species [...], but either I must be unhappy or I must cause others to be so, and no one is dearer to me than myself.”⁵⁷ Rousseau is quoting literally Denis Diderot’s *Encyclopedia* article on “Natural Right” here.⁵⁸ Diderot introduces the person he calls the “violent reasoner” as somebody who claims to be “equitable” as he is no free rider who has to count on most people’s altruism in order to be able to profit from them. The “violent reasoner” accepts that others will try to live at his expense as well, he is “not so unjust [to] require of another a sacrifice that [he does] not want to make for him”.⁵⁹ His maxim of legitimate mutual exploitation obviously is the consequence of his reasoning, and as Diderot presupposes that “it is necessary to reason about everything” and that reason is the “means to discover the truth”, the “violent reasoner” seems to be a challenge to this rationalist philosophy of natural law.⁶⁰ Diderot tries to save

⁵⁴ Rousseau, *Geneva Manuscript* (in: Rousseau, *On the social contract*, with *Geneva Manuscript and Political Economy*, ed. Roger D. Masters, New York: St. Martin’s Press, 1978), book I, chapter 2, p. 160 (OC III, p. 285).

⁵⁵ Compare Bruno Bernardi, *Le principe d’obligation. Sur une aporie de la modernité politique*, Paris: Vrin 2007, p. 288: “La pitié et l’amour de soi sont bien la racine naturelle de sentiments moraux mais ceux-ci doivent être pensés sous la modalité d’amour, non sous celle de l’obligation.”

⁵⁶ Rousseau, *Second Discourse* (footnote no. 3), part I, p. 37 (OC III, p. 156).

⁵⁷ Rousseau, *Geneva Manuscript* (footnote no. 54), book I, chapter 2, p. 170 (OC III, p. 284–285).

⁵⁸ Denis Diderot, “Natural Right” (*Encyclopedia* Vol. V), in: Rousseau, *Jean-Jacques, Discourse on the origins of inequality (Second discourse), Polemics, and Political Economy*, The collected writings of Rousseau, Vol. 3, ed. Roger D. Masters and Christopher Kelly, Hanover and London: University Press of New England, 1992, p. 135–139, here p. 136. However, there are pieces of evidence that this article is copied from Samuel Clarke’s *Discourse concerning the being and attributes of God* (see Anthony Burns, “The source of the *Encyclopédie* article ‘Loi naturelle [morale]’”, in: *British Journal for Eighteenth-Century Studies* 7 [1984], p. 39–48, here p. 39–40).

⁵⁹ Denis Diderot, “Natural Right” (footnote no. 58), p. 136.

⁶⁰ *Ibid.*

his theory by saying that the error of the “violent reasoner” is to “constitute himself judge and party”; therefore the question what is just and unjust should be brought not before individuals, but “before the human race”.⁶¹ Diderot assumes the existence of a “general will” proper to humanity, a will that teaches every man the right “rule of conduct” if only he renounces listening to his “private will” and “reasons in the silence of the passions” instead.⁶²

Rousseau proceeds to examine Diderot’s considerations and challenges his focus on rationalism by continuing the speech of the “violent reasoner”. He makes him say, “I admit that I see in this the rule that I can consult, but I do not yet see [...] the reason for subjecting myself to this rule. It is not a matter of teaching me what justice is, but of showing me what interest I have in being just.”⁶³ Therefore, even if Diderot was right in supposing the existence of a rational and rationally accessible “general will” – what Rousseau denies –, his concept was useless: A person might recognize the “rule of conduct”, but such an insight will not reliably move him or her to act accordingly.

Surely it is Rousseau’s skepticism concerning the powers of reason that comes to light here: reason is a neutral faculty helping men to choose the right means for their ends, but it does not necessarily enlighten them about which ends and means are good. Furthermore, he thinks the concentration on rationality is unfair as reason is not distributed equally; and that makes him favour faculties like conscience or pity that he originally takes to be egalitarian. But this awareness of the limits of rationality is not decisive here; what counts is that reason alone is not obliging. That is what the “violent reasoner” points at when he says that you “try vainly to tell me that in renouncing the duties that natural law imposes on me, I deprive myself at the same time of its rights and that my violence will justify every violence that others would like to use against me. I am all the more willing to agree because I fail to see how my moderation could protect me”.⁶⁴

The bitter truth is that you have to be able to afford being moderate, and in the state of nature this is not the case – it would be much too risky to comply with the rational “rule of conduct”. Even if every individual would recognize what behavior was desirable, this general knowledge would not lead to a peaceful social life: Rational insight per se does not obligate. Rousseau assumes there is nothing at all in the state of nature that could make such insights obligatory – a farewell to the Christian tradition in natural law that presupposes god is the obligating power. Therefore, the claim of the “violent reasoner” is perfectly justified: “Either give me guarantees against all unjust undertakings or do not expect me to refrain from them in turn.”⁶⁵ Searching for such guarantees, you cannot count on rationality, and you

⁶¹ *Ibid.*, p. 137.

⁶² *Ibid.*, p. 138.

⁶³ *Rousseau*, Geneva Manuscript (footnote no. 54), book I, chapter 2, p. 161 (OC III, p. 286).

⁶⁴ *Ibid.*, book I, chapter 2, p. 160 (OC III, p. 285).

cannot rely upon sociability either: the “general society” of humanity that Diderot supposed to be the moral framework for each individual only exists “in the systems of philosophers” according to Rousseau: “[...] the term *human race* suggests only a purely collective idea which assumes no real union among the individuals who constitute it”.⁶⁶ In consequence, rationality and sociability have to be ruled out in the quest for candidates that provide guarantees that will make the “violent reasoner” change his mind.

What is needed is an institution powerful enough to deliver such sureties, thereby enabling each individual to be moderate without risk. “Let us use new associations”, Rousseau suggests, “to correct, if possible, the defect of the general association”.⁶⁷ The general association of all mankind incapable of obligating its members is replaced by particular, political associations with the capacity to obligate their citizens. This is a thought that sounds familiar – after all, many thinkers in early modern natural law (see footnote no. 23) supposed that the existence of pre-political moral standards was not enough to secure peace among men, and consequently they entrusted the institution of the state with this task. In the *Social contract*, these are exactly the philosophers (particularly Hobbes and Grotius) Rousseau attacks for their eagerness to guarantee security, an ambition that leads them to advocate absolute power, as absolutist governments seem to successfully obligate their subjects not to harm each other.⁶⁸ Rousseau affirms their efficiency in this regard but criticizes that they make freedom perish in favour of security. Consenting to such a government according to Rousseau is the political equivalent to selling oneself into slavery.⁶⁹ “To renounce one’s freedom is to renounce one’s status as a man, the rights of humanity and even its duties. [...] Such a renunciation is incompatible with the nature of man, and taking away all his freedom of will is taking away all morality from his actions.”⁷⁰

Therefore, the “nature of man“ for Rousseau indeed is the standard for judging the quality of a political system or a government. In this respect, he is in agreement with virtually every natural law philosopher before him. Absolutist systems, for example, in his view are illegitimate exactly because they impose demands on the individuals that make them act against their very nature as human beings.⁷¹ Rousseau just simply diverges from the prominent natural law theories in his defi-

⁶⁵ Ibid.

⁶⁶ Ibid., book I, chapter 2, p. 159 (OC III, p. 284).

⁶⁷ Ibid., book I, chapter 2, p. 162 (OC III, p. 288).

⁶⁸ Compare *Rousseau, Social Contract* (in: *Rousseau, On the social contract*, with Geneva Manuscript and Political Economy, ed. Roger D. Masters, New York: St. Martin’s Press), book I, chapter 4, p. 49 (OC III, p. 355–356).

⁶⁹ Ibid.

⁷⁰ Ibid., book I, chapter 4, p. 50 (OC III, p. 356).

⁷¹ Compare *ibid.*, book I, chapter 4, p. 50 (OC III, p. 357), where the system of King Louis IX of France is condemned as being “contrary to the principles of natural right”.

nition of man's nature. The definition he goes back to in the *Social contract* is well-known from the *Discourse on Inequality*: human nature is basically characterized by "freedom", more precisely "freedom of will" or "free agency".⁷² This freedom has an intrinsic connection with "perfectibility": if man's nature implies constant change, it is vital not to tie man down to a particular faculty he possesses at a given time.

Natural law thinkers who suppose that rationality and sociability are the virtually eternal features of human nature to which all laws must correspond, thereby try to freeze man in a historically and anthropologically contingent condition. Rousseau insinuates that a political agenda is responsible for the attempts to design a human nature that can only be adequately met by a particular political system or government that unfortunately often happens to be despotic or even tyrannical. "Modern" natural law thinkers in Rousseau's mind are not interested in discovering what is truly natural in man. They prefer to construct a vision of man's nature suitable for their political ends: They seek "rules on which, for the common utility, it would be appropriate that men agree among themselves, and then one gives the name natural Law to the collection of these rules [...]".⁷³ The second half of the prize question proposed by the Academy of Dijon in 1754 – "What is the origin of inequality among men, and is it authorized by natural Law?"⁷⁴ – was answered by eight out of ten participants in the competition in the affirmative (and it goes without saying that one of them won the prize)⁷⁵. That is just one instance that shows Rousseau has a point when he judges that theories of natural law are often modelled "for the common utility", to fit the political *status quo*.

Rousseau wants to stop the artificial construction and political instrumentalization of so-called human nature. But if it is right to assume that Rousseau is a natural law thinker himself, taking human nature as the moral standard for the realm of politics, the question is how he tries to escape the reproach of exploiting it for political ends. Rousseau thinks himself to be on the safe side because he does not engage human nature to legitimize systems of rule subjecting men to heteronomy. Just like the mainstream philosophers within the early modern tradition of natural law (see footnote no. 23), he thinks obligation is essential as men will not reliably abstain from harming each other just because of, say, a rational insight. Men need to know there is a law that obliges them not to injure anybody, or else they have to reckon with punishment – so far Rousseau agrees with his colleagues. "But what is the foundation of this obligation?", Rousseau asks and proceeds to discuss the standard answers: "Some say, it's force; others, paternal

⁷² Rousseau, Second Discourse (footnote no. 3), part I, p. 25 (OC III, p. 141).

⁷³ Ibid., preface, p. 14 (OC III, p. 125).

⁷⁴ Ibid., p. 17 (OC III, p. 129).

⁷⁵ See Heinrich Meier's commentary to the prize question of the Academy of Dijon in Rousseau, *Diskurs über die Ungleichheit/Discours sur l'inégalité*, ed. Heinrich Meier, Paderborn et al.: Schöningh (UTB für Wissenschaft; 725), p. 64–65.

authority, others, the will of God. [...] I put the body politic on the basis of the agreement of his members.”⁷⁶

His theory is superior to all the others, he claims, because there is no safer foundation for obligation than “the free consent of the person who obliges himself”.⁷⁷ Self-obligation according to him is “the condition of liberty”, it is appropriate for human beings and does not contradict the natural laws, which is important because it is not permitted “to offend against the natural laws by means of the social contract”.⁷⁸

Therefore, any other foundation for obligation than free consent is rejected, and Rousseau presents free consent as obligation’s only legitimate basis, the only one that truly corresponds to human nature: man’s *differentia specifica* being free agency, he cannot be obliged but by his own agreement. However the notion of self-obligation can be used to justify the subjection to heteronomous principles as well, as Thomas Hobbes’ concept of authorization shows: The individuals agree to authorize the sovereign, thereby once and for all consenting to accept any decision of the sovereign as their own.⁷⁹ Rousseau wants to make sure that such irrevocable, unchangeable decisions cannot have a place within his system, even if they should be based on agreement. His notion of self-obligation implies that it is illegitimate to bind one’s will once and forever, as that would be contrary to free agency. Whoever sells himself into slavery, proudly stating that it was his free decision to do so, is in Rousseau’s eyes a madman.⁸⁰

For free agency to make any sense, the individual must have the liberty to revoke his decisions, to change his mind, to make improvements. The political system drafted by Rousseau in the *Social contract* is meant to do justice to man’s freedom of will: “It is apparent [...] that there is not, nor can there be, any kind of fundamental law that is obligatory for the body of the people, not even the social contract.”⁸¹ A constitution would inadmissibly bind the will of the citizens, as would be the case with natural laws in the prominent modern variant as well – pre-political norms in the grammatical form of a command, setting the standard for political legislation. Such a concept of natural law limits the task of the political lawgiver to transferring the natural laws into positive laws. Rousseau dismisses

⁷⁶ *Rousseau*, *Lettres écrites de la montagne* (in: *Rousseau*, *Œuvres complètes*, ed. Bernard Gagnebin and Marcel Raymond, Vol. III, Paris: Gallimard, 1964 [Bibliothèque de la Pléiade]), 6th letter, p. 806–807 (transl. M. R.).

⁷⁷ *Ibid.* (transl. M. R.).

⁷⁸ *Ibid.*, p. 807 (transl. M. R.).

⁷⁹ See *Thomas Hobbes*, *Leviathan*, ed. Richard Tuck, Cambridge: Cambridge University Press, chapter XVI, p. 112: “[...] when the Actor maketh a Covenant by Authority, he bindeth thereby the Author, no lesse than if he had made it himself; and no lesse subjecteth him to all the consequences of the same.”

⁸⁰ Compare *Rousseau*, *Social contract* (footnote no. 68), book I, chapter 4, p. 49 (OC III, p. 356) and *Rousseau*, *Lettres écrites de la montagne* (footnote no. 76), 8th letter, p. 842: “the true liberty is never self-destructive” (transl. M. R.).

⁸¹ *Rousseau*, *Social contract* (footnote no. 68), book I, chapter 7, p. 54 (OC III, p. 362).

it by claiming that “in any event a people is always the master to change its laws – even the best laws [...]”.⁸²

Talking about autonomy would be futile if the citizens would be bound to the natural laws presented by the standard variant of modern natural law theory. The trouble with this variant is furthermore that it presupposes pre-political norms valid for every human being, no matter when or where it has lived. If the idea of perfectibility is taken seriously, the thought of laws universally applicable to men of all periods and in every corner of the world is absurd. This is why Rousseau dispatches the notion of a “general society of mankind” and opts for the creation of “new associations” instead, particular body politics which members are at liberty to choose the laws fit for them at a given time, laws that are binding only because they oblige themselves to obey them.⁸³ This constitutes a politicization of obligation that claims to put an end to the universalist standard of traditional natural law. Any obligation according to Rousseau is a political self-obligation. There are no other powers – like God – or faculties – such as reason – that are capable of obligating man.

Following the standard reading of early modern natural law theory, the power of the state is restricted by natural law. Natural law is an instrument to diagnose the shortcomings of the positive law, and it represents the remedy as well. Rousseau rejects the idea of pre-political norms in the form of laws which the laws of the state have to imitate. But the indisputable fact that Rousseau does not advocate the standard version of early modern law does not mean that he is no philosopher of natural law at all. He also makes use of the notion of “natural law”, however he does not define “law” in terms of “command”, but in terms of the “first and simplest operations of the human soul” and of man’s quality of being a free agent.⁸⁴

The point is that freedom, so essential for man, cannot exist without laws: even in the state of nature, Rousseau claims, man is free only thanks to the natural law.⁸⁵ Guarantees that every individual will respect his fellow man’s freedom being absent in the original state, it is the political association that has to provide such a surety. From this point of view, Rousseau’s republic is the facilitating condition of freedom. Rousseau is trying to design a political system with built-in measures to secure man’s freedom: For example, the citizens are asked in each assembly if it “please[s] the sovereign to preserve the present form of government”.⁸⁶ What he ventures here

⁸² Ibid., book II, chapter 12, p. 76 (OC III, p. 394).

⁸³ Rousseau, Geneva Manuscript (footnote no. 54), book I, chapter 2, p. 162 (OC III, p. 288). Therefore, the “general will” is called “general” only in relation to the state it corresponds to; in relation to other states it is a “particular will” (Rousseau, Political Economy, in: Rousseau, On the social contract, with Geneva Manuscript and Political Economy, ed. Roger D. Masters, New York: St. Martin’s Press, p. 140–170, here p. 144; OC III, p. 246).

⁸⁴ Rousseau, Second Discourse (footnote no. 3), preface, p. 14–15 (OC III, p. 126). Compare Rousseau, Émile (footnote no. 25), book III, OC IV, p. 467: “The first natural law is the care of self-preservation” (transl. M. R.).

⁸⁵ See Rousseau, Lettres écrites de la montagne (footnote no. 76), 8th letter, p. 842.

is the squaring of the circle in the field of politics: the establishment of a (by definition inflexible) institution, adaptable to the (by Rousseau's definition infinitely flexible) human nature. Rousseau's solution to the "fundamental problem" of reconciling a political "form of association" that provides security with a freedom as unrestricted as in the state of nature⁸⁷ consequently claims as well to show how natural law can be respected and represented by the state.

Therefore, Rousseau on the one hand bids farewell to the tradition of natural law theory. On the other hand, he claims to have found out what is truly natural in man, and what political system corresponds to it. And that is how he is making natural law history.

Zusammenfassung

Ist Rousseau ein Naturrechtsdenker oder nicht? In diesem Aufsatz soll eine positive Antwort auf diese kontrovers diskutierte Frage gegeben werden. Rousseau schreibt zum einen eine kritische Geschichte des traditionellen Naturrechts, das aus seiner Sicht auf falschen Prämissen beruht: nicht auf natürlichen, sondern auf erworbenen Fähigkeiten des Menschen, zu denen er auch Rationalität und Soziabilität zählt. Zum anderen stellt er die seiner Auffassung nach korrekte Version der Geschichte des Naturrechts vor, basierend auf der wahren menschlichen Natur. Der Aufsatz demonstriert, dass die einzigen natürlichen Eigenschaften des Menschen, die laut Rousseau konstant bleiben, diejenigen sind, die ihn flexibel halten, nämlich Perfektibilität und Willensfreiheit. Und es soll deutlich werden, dass genau diese Eigenschaften für Rousseau als naturrechtlicher Maßstab des politischen Systems und seiner Gesetze dienen: Nur derjenige Staat wird der Perfektibilität und Willensfreiheit gerecht, der auf der freiwilligen Zustimmung der Individuen beruht. Die dadurch erlangte Selbstverpflichtung aber muss revidierbar sein, weshalb die Republik des *Contrat social* keine Verfassung haben soll und es kein Gesetz geben darf, das die Bürger nicht ändern könnten. Die Rousseausche Republik, so wird gezeigt, ist damit die Ermöglichungsbedingung natürlicher Freiheit.

⁸⁶ Rousseau, Social contract (footnote no. 68), book III, chapter 18, p. 107 (OC III, p. 436).

⁸⁷ Ibid., book I, chapter 6, p. 53 (OC III, p. 360): "Find a form of association that defends and protects the person and goods of each associate with all the common force, and by means of which each one, uniting with all, nevertheless obeys only himself and remains as free as before'. This is the fundamental problem which is solved by the social contract."

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