Maimonides, Nature and Natural Law

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I. Did Maimonides Accept or Reject the Concept of Natural Law?

Although we can confidently assert that Maimonides (1138-1204) was familiar with some version of Natural Law doctrine, one cannot find explicit reference to it, either positive or negative, in his jurisprudential reflections. This fact alone makes it questionable whether Natural Law doctrine played any significant role in his legal theory. It also explains why there has been such a wealth of speculation about his views on Natural Law. While initial inquiries asked whether Maimonides accepted or rejected the doctrine as such,1 later studies focused on whether Maimonidean legal theory could be seen as compatible with Natural Law doctrine or not.2

My intention is to go a step further. I will argue that while Maimonides had a lively interest in the relationship between nature and law, he declined to be drawn into Natural Law discourse. In other words, although he did not overlook the nature-law question in his jurisprudential scheme, he did not consider it integral to his thinking about law. I will not try to determine whether Maimonides accepted or rejected the idea of Natural Law in itself, but rather present some of his personal reflections on his discourse over nature and law. His reflections gave rise to a new semantic of law and nature, which I will demonstrate in an analysis of three Maimonidean texts. I will also present a brief analysis of R. Yosef Albo's (c. 1380-1444) views which integrate Natural Law doctrine into a general jurisprudential theory of Jewish Law. Comparing Maimonides and Albo highlights the differences of their attitudes on the question of Natural Law doctrine vis-à-vis the jurisprudential theory of Jewish Law. More precisely, a comparison of their theories demonstrates how one of them embraces Natural Law semantics, while the other rejects it.

1 See for example two fundamental studies for the rejection of the doctrine: Marvin Fox, Maimonides and Aquinas on Natural Law, in 3 DINEI ISRAEL 5-36 (1972), and JOSE FAUR, STUDIES IN THE MISHNEH TORAH: BOOK OF KNOWLEDGE 61-65, 161-76 (1978).

II. Natural Law versus Divine Law in Maimonides

The validity and relevance of Natural Law is usually understood as a question about the primary source of the law: should the law be taken as the legislator’s will and thus distinct from and external to the minds of the law’s subjects, or is the law to be understood as deeply rooted in reality as accessible to and known by every human being through their intuition? In the context of a religion grounded in revelation, the question has a further dimension: to what extent does Natural Law doctrine stand in conflict with Divine Law? Can the presumption that the law is received by revelation (hereinafter: the revelational presumption) coexist with the idea that legal norms are to be achieved through contemplation or introspection?

The theory of Jewish Law discovers in the Biblical narrative yet a third dimension to the problem. The law revealed to Moses at Mount Sinai is by definition not universal legal knowledge, but rather a particular set of laws exclusively addressed to the Israelites. Thus Jewish Law is not only grasped as transcendent, but also as nationalistic in character, i.e. its values and meaning are limited to a specific ethnic group. This national aspect of Jewish Law intensifies the tension between the revelational presumption and the claim of Natural Law doctrine that universality is an essential condition of law, since nature is a universal phenomenon. The main question regarding Natural Law for Judaism is whether there is any way of settling the tension between revelational presumption and Natural Law theory. Interpretations of this question can be divided into two main camps: those which hold to the incommensurability thesis which emphasizes those elements in Maimonides’ theory that cannot go along with Natural Law doctrine, and those which espouse the compatibility thesis by asserting that it is plausible to accept both the revelational presupposition and Natural Law theory.

Marvin Fox’s interpretation is an example of the incommensurability thesis. In his view, Maimonides does not recognize the rationality of Divine Law, as Maimonides understands Divine Law to be evidence for rejecting Natural Law doctrine. According to Fox, the incommensurability of Natural Law doctrine with Jewish Law is the most accepted view in Jewish thought, with just two exceptions: Sa’adiah Gaon (882-942) and R. Yosef Albo. In his estimation, Natural Law doctrine is a concept that distinguishes Jewish legal theory from all legal theories originating in Christian contexts.³

³ Fox, supra note 1, at 5-36. Faur’s analysis, on the other hand, connects the entrance of the Natural Law concept to the Jewish jurisprudence with the influence of the Mu'tazilah (the Islamic rationalist theology originated in the Eighth Century in Basra). Maimonides’ jurisprudence, according to Faur, refers to Natural Law as a “technical term” only, as an explanatory mean, without any substantial meaning. Jose Faur, Studies in the Mishneh Torah: Book of Knowledge 165 (1978).
Supporters of the compatibility thesis do not believe that Maimonides rejects Natural Law doctrine. They emphasize the naturalistic components in his legal theory which they see as an initial step towards an implied acceptance of Natural Law doctrine.

The question of Natural Law in Maimonidian legal theory has attracted considerable attention recently because of current scholarly interest in later Jewish emancipationists, rationalist thinkers (such as Moses Mendelssohn and Hermann Cohen among others). These thinkers, like traditional commentators, saw the question of Natural Law as constituting the essence of Maimonidean Halakhic rationalism. They were drawn to Maimonides's enthusiasm for rationalism in keeping with the spirit of the medieval appropriation of Aristotle to which he was witness and in which to some degree he participated. Maimonides was perhaps the most systematic rationalist theorist in the history of Jewish Law.

### III. Conditional Recognition

Discussions of Natural Law doctrine frequently refer to the notion of Natural Law as defined by Cicero. This definition includes five essential components of any Natural Law doctrine: (1) intelligibility; (2) correspondence with nature; (3) universality; (4) exchangeability; and (5) attainable by introspection. While Jewish Law was usually perceived as revealed knowledge and a feature of national identity, many inquiries into the character of Maimonides' idea of law have focused on two of the above aspects, its concern with the rationality and

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* See Oliver Leaman, Maimonides and Natural Law, 6 JEWISH L. ANN. 78-93 (1987).

* See, e.g., David Novak, Natural Law in Judaism 92-121 (1998); Joel L. Kraemer, Naturalism and Universalism in Maimonides' Political and Religious Thought, in ME'AR SHE'ARIM: STUDIES IN MEDIEVAL JEWISH SPIRITUAL LIFE IN MEMORY OF ISADORE TWERSKY 47-81 (G. Bildstein et al. eds., 2001). On the Islamic approaches to Natural Law, see Griffel, Frank, The Harmony of Natural Law and Sharia in Islamist Theology, in SHARI'A: ISLAMIC LAW IN THE CONTEMPORARY CONTEXT 1-19 (Abbas Amanat & Frank Griffel eds., 2007).

* Mendelssohn criticized Maimonides for denying in his interpretation of Genesis 2:9 that ethical norms are intelligibilia. Warren Zev Harvey, Mendelssohn and Maimon on the Tree of Knowledge, in SEPHARAD IN ASHKENAZ: MEDIEVAL KNOWLEDGE AND EIGHTEENTH-CENTURY ENLIGHTENED JEWISH DISCOURSE 186 (Resianne Fontaine, Andrea Schatz and Irene Zwiep eds., 2007).

* See generally Hermann Cohen, Religion of Reason out of the Sources of Judaism 331 (Simon Kaplan trans., 1995).

* This tendency also explains a propensity in these thinkers to emphasize the rational aspect of the natural law doctrine, as against other aspects.


* "True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrong-doing 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 .... one eternal unchangeable law will be valid for all nations and all times." Marcus Tullius Cicero, De Re Publica, in CICERO, DE RE PUBLICA (ON THE REPUBLIC) AND DE LEGIBUS (ON THE LAWS) 211 (Clinton W. Keyes trans., 1928). See generally Brian Bix, Natural Law Theory, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 224 (Dennis Patterson ed., 1996) (footnotes omitted).
universality of law: to what extent, then, did Maimonides approve extra-revelational and extra-national aspects of Jewish Law?

A relevant case study is Maimonides’s inquiry into the value of non-Jews observing the commandments. His opinion on this question suggests recognition of both rationality and universality:

[10] Moses, our teacher, bequeathed the Law and commandments to Israel, as it is said an inheritance of the congregation of Jacob, and to those of other nations who are willing to be converted, as it is said: One law and one ordinance shall be both for you, and for the resident alien. But no coercion to accept the Law and commandments is practiced on those who are unwilling to do so. Moreover, Moses, our teacher, was commanded by God to compel all human beings to accept the commandments enjoined upon the descendants of Noah. Anyone who does not accept them is put to death. He who does accept them is invariably styled a resident alien. He must declare his acceptance in the presence of three associates. Anyone who has declared his intention to be circumcised and fails to do so within twelve months is treated like a heathen infidel.

[11] A heathen who accepts the seven commandments and observes them scrupulously is a “righteous heathen,” and will have a portion in the world to come, provided that he accepts them and performs them because the Holy One, blessed be He, commended them in the Law and made known though Moses, our teacher, that the observance thereof had been enjoined upon the descendants of Noah even before the Law was given. But if his observance thereof is based upon a reasoned conclusion he is not deemed a resident alien, or one of the pious of the gentiles, but one of their wise men.

The above quotation is taken from the Maimonidean Code where Maimonides deals with the national aspect of the Torah, conversion to Judaism, the marginal standing of resident aliens and the question of their reward on the ‘World to Come’. Alongside his emphasis on the national aspect of Jewish Law and on revelational presumption, Maimonides ascribes religious value to the observance of the Law by non-Jews. He locates this value in the religious meaning of non-Jews’ commitment to pre-revelational laws and consequently integrates it into two Talmudic categories: (1) that of pre-revelational legal norms, Noahide

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11 Deuteronomy 33:4.
12 Numbers 15:16.
14 In fact, Maimonides here determines three statuses regarding the law: (1) a Jew and a convert, (2) a resident alien, and (3) a gentile. The second one is a border category which indicates those who are committed to certain part of the Jewish Law on the one hand, but are not considered full Jews on the other. See generally id.
Laws;\(^{15}\) and (2) that of extra-national pietism, the "Righteous among the Nations."\(^{16}\)

By combining these categories Maimonides seeks to find some meaning and legitimization to legal norms preceding revelation and therefore going beyond Jewish national boundaries. One could imagine someone pushing this step to the point of imputing religious value to legal norms quite apart from the Divine Law, that was exclusively revealed to the People of Israel. The purpose of eliding the categories then would be to undermine the fundamental perception that the Torah and Laws are meant solely for one nation.

However, Maimonides does not develop such a position, but rather recognizes the religious value of legal observance by non-Jews in such a manner as to reintroduce the tension between rationality and revelation via a back door. He stipulates, namely, that it is not enough to observe the Noahide Laws to be counted as a Righteous among the Nations and to acquire a share in the world-to-come; that rather only those who observe the Noahide Laws \textit{because they are divinely revealed} are to acquire such a reward. In other words, Maimonides has a restricted tolerance for according religious standing to those who observe legal norms without reference to Divine Law.\(^{17}\)

Ambiguity due to manuscript variations makes uncertain how categorically Maimonides means to reject the ascription of religious meaning to the observance of a rational morality. In one textual variant, the concluding part of the text depends upon the Hebrew conjunctive \textit{waw [velo] nor}, suggesting that observing the Noahic Laws for rational reasons has no normative value at all, since such an individual is neither a Resident Alien, nor a Righteous among the Nations "nor one of their sages." A second textual variant, however, substitutes

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\(^{15}\) \textit{Genesis} 9:4-6. The Noahide Laws are a list of seven moral imperatives which, according to the Talmud, were given by God to Noah as a binding set of laws for all mankind.

\(^{16}\) The origins of this term in the Talmudic Literature denote non-Jews who were considered pious, such as Job. See \textit{The Babylonian Talmud}, 1 \textit{Seder Nezikin}, Baba-Bathra 15a, 15b, 16a 16b, 75-82 (I. Epstein ed., Maurice Simon trans., Soncino ed. 1935), or the wise or helpful among Roman officials such as Antoninus, see \textit{The Babylonian Talmud}, 2 \textit{Seder Nezikin}, Sanhedrin 91a, 91b, 610-612 (I. Epstein ed., H. Freedman trans., Soncino ed. 1935).

for this conjunctive, with the conditional particle *ela* [but], with the result that a
person who observes the Noachide Laws for rational reasons is not a Resident
Alien or a Righteous among the Nations "but one of their sages."^{18}

Whether Maimonides' devaluation of the observance of Noachide Laws is
categorical or is merely relative, his position is clear. He does not consider the
observance of the content of the rational laws, external to revelation, to be the
source of the non-Jewish moral agent's justification, but rather he considers that
justification to arise, from the dramatically different angle, i.e. from the
motivation with which such observance is undertaken on the emotive level,
namely with religious consciousness recognizing God as the prime commander
of the law and of Moses' prophecy.

How should we understand this aspect of Maimonides' position?

By according the standing of the Righteous Among the Nations to non-Jews
who observe the law, Maimonides shows that he approves some universal aspect
of pre-revelational laws. On the other hand, the religious meaning he sees in
non-Jewish legal observance, even as far as it goes, expresses deep conceptual
ambivalence about the validity of any legal norms which are external to Divine
Law, revealed to Israel at Sinai. He remains always loyal to the perception of
Divine Law as the concrete law, revealed at a defined moment, to the chosen
people, through the ultimate prophet.

Thus, observance of the content of Noachide Laws is only one necessary
condition for gaining the status of Righteous among the Nations to a non-Jew.
The second necessary condition is the acceptance of the *theological* principles of
the revelational source of the law and Moses' prophecy.

According to this reading, Maimonides offers a way of solving the conceptual
tension, more generally, between rationality and revelation in his stipulation that
the value of observing a rational morality external to Divine Law rests on the
same dogmatic foundations of the Divine Law itself. Accepting these foundations
dissolves the tension between Natural and Divine Law for Jewish law by
neutralizing the threatening component of Natural Law doctrine, namely, the
possible suggestion that heteronomy over and against God can be abandoned.
The potentially unacceptable portion of Natural Law doctrine for Jewish Law
should be treated not as a matter of substance, but rather of attitude. That
portion concerns the underlying theological presuppositions and beliefs that a
person brings to the understanding of moral obligation. The legitimacy or
illegitimacy of a morality allegedly based in reason has nothing to do with the

^{18} The survey of these two versions and their history can be found at: Jacob I. Dienstag, *Natural Law in
Maimonidean Thought and Scholarship*, 6 THE JEWISH L. ANN. 64-77, 66 (1987) [emphasis added]; from a philological
perspective it should be noted that early manuscripts and testimonials read "ela." The other readings are found
only in late editions. The corrupt readings are of historical importance, since the editions used by Spinoza,
Mendelssohn, and Emden had the corrupt text. Michael Z. Nehorai, *Righteous Gentiles Have a Share in the World to
intelligibility or universality of the norms cited, but rather everything to do with the motivational beliefs of the actors.

**IV. Nature and Law—Maimonides’ Account of the Origin of Law**

A second key text in Maimonides articulates a different view of the nature-law question, looking at it from the prism of civil society and of political life in general. The importance of this text appears when one compares the view it expresses with later social contract theories set forth by Hobbes, Locke and Rousseau. Maimonides’ too understands the formation of society to be the transformation from a state-of-nature into civil-society. Like the aforementioned moral philosophers, he inquires into the essential differences between the state-of-nature and civil-society. He poses the questions: what is the meaning of this transformation? What is required for natural society to become a society under law? He elaborates:

It has been explained with utmost clarity that man is political by nature and that it is his nature to live in society. He is not like the other animals for which society is not necessity. Because of the manifold composition of this species – for, as you know, it is the last one to have been composed—there are many differences between the individuals belonging to it, so that you can hardly find two individuals who are in any accord with respect to one of the species of moral habits, except in a way similar to that in which their visible forms may be in accord with one another. The cause of this is the difference of the mixtures, owing to which the various kinds of matter differ, and also the accidents consequent to the form in question. For every natural form has certain accidents proper and consequent to matter. Nothing like this great difference between the various individuals is found among the other species of animals, in which the difference between individuals belonging to the same species is small, man being in this respect an exception. For you may find among us two individuals who seem, with regard to every moral habit, to belong to two different species. Thus you may find in an individual cruelty that reaches a point at which he kills the youngest of his sons in his great anger, whereas another individual is full of pity at the killing of a bug or any other insect, his soul being too tender for this. The same holds good for most accidents.

Now as the nature of the human species requires that there be those differences among the individuals belonging to it and as in addition society is a necessity for its nature, it is by no means possible that his society should be perfected except—and this is necessarily so—through a ruler who gauges the actions of the individuals, perfection that which is deficient and reducing that which is excessive, and who prescribes actions and moral habits that all of them must always practice in the same way, so that the natural diversity is hidden through the multiple points of conventional accord and so that the community becomes well ordered. Therefore, I say that the Law, although it is not natural, enters into what is natural. It is a part of the wisdom of the deity with regard to the permanence of this species of which He
has willed the existence, that He put it into its nature that individuals belonging to it should have the faculty of ruling.\textsuperscript{19}

In this passage, Maimonides refers to the nature-law question as it comes into focus at the heart of the formation process of political life. He formulates it as an outcome of two naturalist assumptions: (1) the Aristotelian point that the human is political by nature; and (2) the premise that human diversity, in terms of both character and behavior, is a natural necessity.

Maimonides does not talk about an organizing of politics but rather of the political necessity of eliminating the natural heterogeneity of human beings. He concludes that a society’s success depends on a rule over people that blurs their natural uniqueness and aspires to make them uniform. Thus in general terms, the law is a response countering the natural diversity of the human species; a natural reaction to natural heterogeneity.

Maimonides’ perception of the law as a response to the state-of-nature gives rise to a particular dialectical relation between nature and law. There are various ways to understand this dialectic. The traditional Jewish interpretation assessed it from the viewpoint of Divine law, and sought to describe the complex relationship between nature and Divine law. Maimonides attempts to bridge this traditional Jewish view, on the one hand, and philosophical thinking, on the other, with its emphasis on the concept of nature, by offering an interpretation of nature, but within a \textit{religious} framework. Accordingly, Maimonides, in the passage under consideration here, does not present nature in relation to Divine Law, but in relation to a religious worldview generally. Consequently, Maimonides equates Divine Law, while supernatural in essence, with the fundamental nature of human beings.

A different reading, offered of late by Joel Kraemer, interprets Maimonides’ words as not necessarily dealing with Divine Law, but rather with the law as a general phenomenon, in its universal sense. Kraemer thus sees Maimonides as linking nature and law in a more essential way, so that the dialectic Maimonides sees as joining law and nature means that “although the law itself is not natural, what is natural serves as an introduction to it.”\textsuperscript{20} Correspondingly, in the history of civilization law has arisen to mediate between the political nature of the human being and the natural capacity of the political leader to rule: “[t]here is the natural need or tendency for human beings to form associations; then there is the natural requirement for rulership to maintain law and order; and thereafter there is the natural faculty some humans have to govern.”\textsuperscript{21}

\textsuperscript{19} \textit{Moses Maimonides, The Guide of the Perplexed} 381-82 (Shlomo Pines trans., 1963) [hereinafter \textit{Guide of the Perplexed}].


\textsuperscript{21} Id. at 56.
Maimonides' legal theory is not purely naturalistic because it is based, in part, on an account of the essence of the state-of-nature and of the meaning of the transition to civil-society. Law emerges in connection with the development of political life and lies at the core of society's exit from the state-of-nature. Hence, the nature-and-law relationship in Maimonides at least should not be seen as reactionary but as evolutionary. The law, while arising with civil society, is, nonetheless, the predictable outcome of the nature of human beings.

While early-modern social contract theoreticians view this transition as an outcome of human, insight, whether deliberative or non-deliberative, Maimonides ascribes it to the wisdom of the Creator. When we turn below to Yosef Albo's theory, we shall see that it differs significantly from Maimonides' account precisely where it assigns the emergence of civil society to a cause other than the one which Maimonides makes critical, and that in doing so it places that emergence at a different moment in the history of society and politics than does Maimonides.

V. Nature and Law—Maimonides' Theory of Divine Law

Maimonides' tendency to disregard the possibility of Natural Law doctrine is evident in yet another text in which he offers a jurisprudential perspective whose meaning and structure derived from a particular understanding of the concept of nature. The semantic, which this passage employs in naming the nature-law relationship, leaves scant possibility for the adoption of Natural Law categories. This semantic depicts the nature-law relationship through the idea of the generality of the law, namely that the law should be formulated and presented in the form of general rules. For Maimonides, the issue is not a merely formalistic one, but an essential aspect of the substance of Divine Law.

Maimonides stresses this point for various reasons. Above all, he wishes to persuade his readers of the validity of the perspective that the law is not intended to cover all cases and circumstances, but only the majority of them. The yardstick by which to measure the law's efficacy is not its ability to provide an answer to all cases and for all individuals, but only for most of them. The basic justification for this perspective is derived, according to Maimonides, from a comparison of Law to Nature. He explains:

Among the things that you likewise ought to know is the fact that the Law does not pay attention to the isolated. The Law was not given with a view to things that are rare. For in everything that it wishes to bring about, be it an opinion or a moral habit or a useful work, it is directed only toward the things that occur in the majority of cases and pays no attention to what happens rarely or to the damage occurring to the unique human being because of this way of determination and because of the legal character of the governance. For the Law is a divine thing; and it is your business to reflect on the natural things in which the general utility, which is included in them, nonetheless necessarily produces damages to individuals, as is
clear from our discourse and the discourse of others. In view of this consideration also, you will not wonder at the fact that the purpose of the Law is not perfectly achieved in every individual and that, on the contrary, it necessarily follows that there should exist individuals whom this governance of the Law does not make perfect. For not everything that derives necessarily from the natural specific forms is actualized in every individual. Indeed, all things proceed from one deity and one agent and have been "given from one shepherd" [citing Ecclesiastes 12:11]. The contrary of this is impossible, and we have already explained that "the impossible has a stable nature" that never changes [citation deleted]. In view of this consideration, it also will not be possible that the laws be dependent on changes in the circumstances of the individuals and of the times, as is the case with regard to medical treatment, which is particularized for every individual in conformity with his present temperament. On the contrary, governance of the Law ought to be absolute and universal, including everyone, even if it is suitable only for certain individuals and not suitable for others; for if it were made to fit individuals, the whole would be corrupted and you would make out of it something that varies. For this reason, matters that are primarily intended in the Law ought not to be dependent on time or place, but the decrees ought to be absolute and universal, according to what He, may He be exalted, says: As for the congregation, there shall be one statute [huqqah] for you [citing Numbers 15:15]. However, only the universal interests, those of the majority, are considered in them, as we have explained.22

These lines have received considerable attention of late for the light they are able to shed on the question of whether Maimonides, in defending the generality of the law, is deviating from an Aristotelian scheme, and whether his position renounces the principle of equity.23 Little attention, by contrast, has been paid to the appeal Maimonides makes in these lines to similarity between nature and law as the basis of a jurisprudential perspective. That perspective is one under which the normative standing of Divine Law does not imply any certainty in the attainment of its end, but merely probability.

Maimonides derives his conclusion that the Divine Law, of its nature, is expressed by rules that are general in character, from two essential features of Divine Law. The first feature is the direction it finds in natural specific forms, rather than in any resolution of particular cases or in individuals. Maimonides distinguishes Divine Law from other legal systems through the structured gap that separates natural forms from their actualization in individuals for not everything that derives necessarily from the natural specific forms is actualized in every individual. The term nature here merely is, thus, a prediction of the characteristics the individual will in all probability have. Beyond this, it reveals little. On the other hand, Maimonides may mean to say that Divine Law points

22 Guide of the Perplexed, supra note 19, at 534-35 (footnotes omitted).
only to ideal forms, because only these are natural, and does not reveal the nature of individual actualization.

The second feature of Divine Law that Maimonides cites as a basis for his ascribing to it generality as one of its essential elements is the divine character in fact of Divine Law.\textsuperscript{24} Maimonides' identifies the divine in Divine Law with the permanent, stable, and effective, on an analogy to the characteristics of nature in its physical or scientific sense. The enduring qualities of law, in this view, are accompanied by two others. The divinity in divine law is akin to the character of nature as general and limited in scope. Just as nature is not absolute in its effectiveness, so Divine Law too is limited in its efficacy and does not cover all eventualities. As Aristotle stated, the circumstances in which acts of nature are not effective, and even cause damage, are accidental deviations from the general behavior of the laws of nature.\textsuperscript{25} Similarly, Maimonides says we should accept the general nature of the law and reconcile ourselves to its 'incompleteness.'

Maimonides is interested in deconstructing our image of the law as an enforceable remedy, and replacing it with a notion from nature. In keeping with his concept of nature, our expectations from the divine in Divine Law should vary in that we ought not to hold expectations of the law to apply uniformly in all particular cases, but only to most of them.

Maimonides accepts an analogy between the generality of nature with its merely predictive value in the individual case and the character of Divine Law. He does not adopt any notion, by contrast, of natural law, understood as rooted in human nature. This distinction, I believe, adequately describes the differences between Natural Law semantics and the perspective, which Maimonides is seeking to develop regarding the nature-law relationship.

As we have seen in all three of the key texts considered here, Maimonides, while citing nature or even particular elements sometimes associated with natural law can fairly be characterized as developing a jurisprudential perspective that does not embody Natural Law doctrine.

\section*{VI. R. Yosef Albo—Lex Naturalis and Violence}

Yosef Albo in his jurisprudential theory seeks to integrate Natural Law doctrine and the concept of Divine Law. Like Maimonides, Albo adopts an evolutionary perspective, but unlike him he tries to offer a concept of evolution that makes room for Natural Law doctrine. His basic approach is eclectic, merging different systems of thought, philosophical and theological alike. He draws on both Islamic literature and Christian scholastics. Influenced by the thinking of St.

\textsuperscript{24} Fridlander translates: "Divine Institution." The term divine matter, as Harvey notes, is denoting to its meaning by previous Andalusian Jewish thinkers such as: Judah ha-Levi (d. 1141/5), Abraham Ibn Ezra (d. 1164) and Abraham Ibn Daud (1125 – 1198). See Zeew Harvey, \textit{Maimonides on the Generality of the Law and the Judge's Role, in ON LAW AND EQUITY IN MAIMONIDEAN JURISPRUDENCE} (Hanina Ben-Menahem & Berachyahu Lifshitz eds., 2004).

\textsuperscript{25} See \textit{ARISTOTLE, PHYSICS 36-37} (Richard Hope trans., 1961).
Thomas Aquinas (1224-1274), Albo’s jurisprudential thinking is based on the theory of “triple legal systems.”

According to this typology, there are three kinds of law: Natural Law [lex naturalis] Human Law [lex humanitas posita] and Divine Law [lex divina]. These three kinds of law stand in a clear hierarchical relationship based on their source of validity, extension and functionality. Natural Law is essentially universalistic, independent of any temporal or geographical context, and has a relatively modest aim: to supply basic norms for the minimal survival of society. Human Law is a product of human intelligence and its scope therefore corresponds to spatial and temporal conditions. An additional purpose of Human Law, according to Albo, is its pedagogical aspect. In contrast to these two systems, Divine Law is the outcome of revelation and its aim is to drive human beings towards religious and spiritual achievement. Contrary to Christian legal views, these three kinds of law are not based on an eschatological scheme and do not supersede each other. In other words, one system of law

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28 1 Joseph Albo, Sefer Ha-Ikkarim [Book of Principles] 78-79 (Isaac Husik trans., 1929) [hereinafter Albo] (“There are three kinds of law, natural, positive or conventional, and divine. Natural law is the same among all peoples, at all times, and in all places. Positive or conventional is a law ordered by a wise man or men to suit the place and the time and the nature of the persons who are to be controlled by it, like the laws and statutes enacted in certain countries among the ancient idolaters, or those who worship God as human reason dictates without any divine revelation. Divine law is one that is ordered by God through a prophet, like Adam or Noah, or like the custom or law which Abraham taught men, instructing them to worship God and circumcising them by the command of God, or one that is ordered by God through a messenger whom He sends and through whom He gives a law, like the Law of Moses.”).

29 “The purpose of natural law is to repress wrong, to promote right, in order that men may keep away from theft, robbery and murder, that society may be able to exist among men and every one be safe from wrongdoer and oppressor.” Id. at 79.

30 “The purpose of conventional or positive law is to suppress what is unbecoming and to promote what is becoming, that men may keep away from indecent according to human opinion. Herein lies its advantage over natural law, for conventional law also controls human conduct and arranges their affairs with a view to the improvement of human society, even as natural law.” Id.

31 “The purpose of divine law is to guide men to obtain true happiness, which is spiritual happiness and immortality. It shows them the way they must follow to obtain it, teaches them the true good that they may take pains to secure it, shows them also real evil that may guard against it, and trains them to abandon imaginary happiness so that they may not desire it and not feel its loss. And in addition it also lays down the rules of right that the political community may be ordered in a proper manner, so that the bad order of their social life may not prevent them from attaining true happiness, which is the ultimate end of the human race to which they are destined by God. Divine law is therefore superior to conventional or positive.” Id. at 79-80.

32 While it is precisely through its introduction of an element of eschatology into its schema that the notion of law found in Thomas Aquinas can be deemed specifically Christian, it is interesting to note that Aquinas’s attachment to the rational character of law puts him at pains to assert that even as human law adds to natural law, it does not contradict it, rather it adds to it “by determination.” See Summa Theologica, supra note 31, at 1.II., Q. 94, Art. 2. Similarly, where Aquinas distinguishes divine law from human law and natural law by explaining that, “since man is ordained to an end of eternal happiness which is inproportionate to man’s natural faculty ... therefore it was necessary that, besides the natural and the human law, man should be directed to his end by a law given by God,” Id. at 1.I.II., Q. 91, Art. 4. He, nonetheless, goes to lengths to assert that Divine Law, even so, does not supersede or
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does not qualify or limit the validity of another. In fact, Albo claims the systems correspond to the structure of the history of the religion. This legal theory is interesting because Albo seeks to offer it as the theoretical basis for a general theory of Jewish Law and for a brief phenomenology of violence.

Albo's legal typology, as I read it, finds a correspondence in his interpretation of the socio-political sphere, where he distinguishes three political and moral viewpoints (in his words: "three opinions" or "three sects") that base their respective notions of social order on three distinct principles: violence, power and authoritative rule, and worship. Unlike the static typology of law mentioned above, the socio-political typology reflects three phases in an evolution occurring within religion and politics, which is an era of natural violence (identified according to the biblical narrative with the generation of the Flood), the era of political domination and rule (from the Flood until the revelation of the Torah) and the religious era (subsequent to the giving of the Torah). By anchoring his theory of "triple legal systems" in the evolutionary unfolding of religion and politics of the Old Testament narrative, Albo gives his legal theory a grounding in realism.

For the sake of the argument of the present essay, it is above all important to address the way in which Albo characterizes natural society and the place of violence in it. According to these three opinions arising in the biblical narrative, those of Cain, Abel and Seth respectively, all mankind are divided into three classes. One class follows the opinion of Cain, and thinks that the most important human occupation is agriculture. Its members feel hostility towards political rulers and desire to kill them, as Cain killed Abel.

A second class follow the opinion of Abel, thinking that politics is the most important pursuit, and its members risk their lives for political activity like Abel, because they think that it leads to human perfection, as we are told concerning their Roman rulers. So kings risk their lives for the sake of power, which is natural to them as it was to Abel, who was the first shepherd and ruler and lost his life on that account.

The third class follows the opinion of Seth, thinking that the important thing is to worship God, and despite power and the other pleasures. But the opinion of Cain was widely prevalent among his descendants, and hence the earth was filled with violence on their account, their belief being that man has no superiority cancel natural law, properly understood, even in the event of a direct Divine Command that appears to contradict natural law as when God command to Abraham to sacrifice Isaac, since the definition of murder under natural law contains an exception for capital punishment. Id. at I.II. Q. 100, Art. 8, Reply Obj. 3. Likewise, while Aquinas asserts that the "New Law" of the Christian Covenant supplants the "Old Law" of the Hebrew Covenant, he assiduously works to show that it does not contradict it or annul it, but rather sets out the same principles but only more perfectly seeks to realize them. Id. at I.II. Q. 107, Art. 1, Reply Obj. 2.

33 ALBO, supra note 33, at 134-35.
over animals, and the one who is more violent prevails *(kol dea'lim gavar)*. Therefore they were corrupt and lived like animals. For this reason it was decreed that their name should be wiped out from the earth in the Flood.

Three political worldviews are therefore symbolically represented through the three sons of Adam, and in accordance with them the universal population is divided into three types of society. The first society is agrarian and deeply hostile to government and dominance by an elite, a society whose political order is characterized by natural violence. The naturalistic view widespread in this society does not conceive normative behavior as separate from nature and natural constraints, but as rooted in nature and deriving from it. Viewed through the lens of this society, normativity is not autonomous but dictated by natural forces and at the same time reflective of them.

The second society is an authoritarian society whose political structure is based on the principles of dominance [*potestas*] and authority [*auctoritas*]. The high regard for political authority and government in this society is not only an expression of power, but rather a moral aspiration for human perfection marked by self-dominance and self-control. Moral ideals engaged with self-government are well known to us from the Sophistic moral worldview and from the political logic of ancient Rome, and indeed Albo denotes Roman culture as ratifying this identification.

Placing government as a moral ideal, according to him, inculcates a passion for domination and the willingness to fight and endanger oneself for the sake of a moral value.

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34 The translation above is literal. For an analysis of this Talmudic norm as articulating the problem of law and violence relations, see Joseph E. David, *The One Who is More Violent Prevails—Law and Violence from a Talmudic Legal Perspective*, 19 CAN. J. L. & JURISPRUDENCE 385, 385-406 (2006).

35 It is not really clear whether he sees an essential linkage between violence as a norm and the agrarian society. Nevertheless, it is plausible that such linkage does reflect in his view the feudal structure which he is willing to locate in the tri-functional typology he develops. On the other hand, perhaps this linkage is a consequence of his hermeneutical move that connects this structure to Adams’ three sons and mainly to the tension between Cain and Abel.

36 The identification of the fundamental justification of this Talmudic norm in reference to Natural Law was made by Samuel Atlas. See Samuel Atlas, *Pathways in Hebrew Law* 76-82 (1978). Atlas’s analysis of Talmudic discussions and post-Talmudic commentaries leads him to associate the Halakhic category *hefker* [ownerless property and renunciation of ownership] with the idea of Natural Law. Regarding that it should be noted that in classic Roman Law exists a conceptual connection between legal categories of ownerless [*derelictio, res nullius*] with Natural Law. For an example of such connection see, 4 The Digest of Justinian 41.1.3, 487 (Theodor Mommsen & Paul Krueger eds., Alan Watson trans., 1985) (1870) [hereinafter JUSTINIAN] ("Quod enim nullius est, id ratione naturali occupandi conceditur.") ("What presently belongs to on one becomes by natural reason the property of the first taker."). Mendelssohn criticized Maimonides for denying in his interpretation of Genesis 2:9 that ethical norms are *intelligibilia*. Warren Zev Harvey, Mendelssohn and Maimon on the Tree of Knowledge, in *Sephardi in Ashkenaz: Medieval Knowledge and Eighteenth-Century Enlightened Jewish Discourse* 186 (Resianne Fontaine, Andrea Schatz and Irene Zwiep eds., 2007).

37 "Such a law, however, is not yet sufficient to order the needs of men and to control their social life, unless there is added to this a certain order or convention which embraces all the social and commercial relations and transactions of the people, like the laws of the Roman emperors . . . ." ALBO, supra note 28, at 72-77.

38 "Conventional law cannot exist unless there is a ruler, or a judge, or a king, placed at the head of the group or city, who compels the people to repress wrong and observe the law so as to secure the welfare of the group." Id. at 73.
The way in which Albo seeks to distinguish between these moral doctrines is by describing the moral theory of human law, associated with domination and authority, as a human effort to establish "second nature," a moral nature superior to the naturalistic nature that constitutes the inferior.

It is worthwhile to pause here to consider two interesting aspects of Albo's thought. First, his distinction between the two political-legal views embodied in natural law and human law coincides with a basic distinction between Sophistic and Stoic legal theories i.e. that of *jus naturale* and *jus civile*. What is most interesting in Albo's treatment of this classical distinction is his equating it to the distinction between law and violence. A social order based on Natural Law actually adopts violence as a basic norm, while a social order based on human law is woven around concepts such as domination for a rational purpose, authority and positive law.\textsuperscript{39}

Second, Albo addresses Natural Law as a complicated and dialectical issue. Natural Law, according to him, is a double-faced legal-political agenda. On the one hand, he includes within it moral intuitions about universal and eternal norms of a kind. On the other hand, he insists that a worldview that supports Natural Law in fact legitimizes violence as a habitual and accepted behavior.\textsuperscript{40} Hence, the relationship between law and violence is also evolution naturalistic-violent to a society based on positive law.

Albo also connects the notion of Natural Law and violence on the conceptual level, effectively encapsulating the difference between law and violence in the distinction between positive law and Natural Law. In other words, according to Albo, the justification of violence concealed in the Talmudic norm *kol dea'lim gavar* [the one who is more violent prevails] is equal in extent to the legitimization and normative value of violence in Natural Law.\textsuperscript{41}

\textsuperscript{39} "The whole group residing in a city, or a district, or a region, or all the human beings in the world should have some order which they follow in their conduct, maintaining justice in general and suppressing wrong . . . . This order the wise men call natural law, meaning natural that it is necessary for man by his nature . . . . Such law, however, is not yet sufficient . . . unless there is . . . conventional [positive] law . . . . [T]he establishment of a king or a ruler or a judge is almost imperative for the continuance of the human species, seeing that man is political by nature." \textit{Albo, supra} note 28, at 72-73. Albo's distinction between violence and political power definitely reminds the distinction made by Hannah Arendt in her concluding analysis of both notions: "Power and violence are opposites; where the one rules absolutely, the other is absent. Violence appears where power is in jeopardy, but left to its own course, it ends in power's disappearance." \textit{See Hannah Arendt, On Violence} 56 (1969).

\textsuperscript{40} "The purpose of natural law is to repress wrong, to promote right, in order that men may keep away from theft, robbery and murder, that society may be to exist among men and every one be safe from wrongdoer and oppressor . . . . [whereas] [t]he purpose of conventional or positive law is to suppress what is unbecoming and to promote what is becoming, that men may keep away from indecent according to human opinion." \textit{Albo, supra} note 28, at 79.

\textsuperscript{41} The identification of the fundamental justification of this Talmudic norm in reference to Natural Law was made by Samuel Atlas. \textit{See Samuel Atlas, Pathways in Hebrew Law} 76-82 (1978). Atlas's analysis of Talmudic discussions and post-Talmudic commentaries leads him to associate the Halakhic category *hefker* [ownerless property and renunciation of ownership] with the idea of Natural Law. Regarding that it should be noted that in classic Roman Law exists a conceptual connection between legal categories of ownerlessness [*derelictio, res nullius*] with Natural Law. For an example of such connection see, \textit{Justinian, supra} note 36, at 41.1.3, at 487 ("Quod enim nullius est, id ratione naturali occupandi conceditur.") ["What presently belongs to one becomes by natural reason the property of the first taker."]
VII. Conclusion

Comparing Maimonides' view to Albo's highlights the difference in approach separating the two thinkers and supports my basic argument that Maimonides views Natural Law doctrine as irrelevant to his jurisprudential thinking, where Albo describes it as an essential component in the general theory of the law. While both acknowledge the connectedness of nature and law and both accept an evolutionary explanation, they see the development of law differently. While Maimonides sees politics as emanating as a response to heterogenous human nature, Albo emphasizes the transition from a natural law society to higher societies which are based on positive law and Divine Law.