Preface

The explicit idea that human society is the product of a contract between formerly separate individuals is easily enough rejected but the *image* is thoroughly extirpated only with considerable difficulty and often remains as an unacknowledged but operative presupposition. In contrast, evolutionary theory encourages us to imagine the social or political animals that we are as emergent in a web of interrelationships such that the question as to how humans invented society – a question that led Kant to replace the idea of an actual historical contract by an '*idea* of reason' – no longer arises. Humans in no sense invented society or the social order within which they emerged but, from within the social forms in which at any time they already found themselves, they discovered new forms, sometimes discarding older forms, sometimes developing new ones as circumstances evoked new questions to which new answers were given.

There is present in every type and at every stage of every human society a differentiation of function to ensure the consistent availability of those things without which no society can survive; the production of food and shelter and the procreation and education of children are obvious examples. Somewhat less immediately obvious are the mutual rights or entitlements that must be honoured to prevent social collapse. Many writers – including for example the jurists who compiled the *Corpus Iuris Civilis*, as well as St Thomas Aquinas, Thomas Hobbes, and Adam Smith – have understood these mutual rights or entitlements as 'justice'. In this book we adopt that understanding of such rights and entitlements and emphasize throughout that they are *essential* to the maintenance and survival of civil society.

The function of customs and laws is to sustain the social or communal order. As peoples are faced with new problems, as new ways of living are discovered, some rights proper to an earlier order are discarded and replaced by others that sustain the new emergent order; thus the set of entitlements that sustain a society of hunters and gatherers will not be the same as the set that sustains a modern industrial society. The sets of entitlements, although not identical, will nonetheless intersect and within the lens of the intersecting circles will be entitlements common to every society. Of these Gaius in his *Institutes* wrote that what natural reason established among all mankind is kept equally among all peoples. It is called in English the 'law of nations' or the 'right of nations' because all peoples in their practices acknowledge and respect it. Throughout this work we suggest that there exist such sets of entitlements in as much as all peoples must live together in similar fundamental ways if the society in which they live is to survive. So, to introduce what is a recurrent example, all peoples must distinguish between

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physical possession of a thing and the right or entitlement to that thing. The thing that is physically possessed is corporeal and, as Gaius wrote, can be touched; the entitlement or right is incorporeal and cannot be.

We must make clear from the outset that when we claim that a right – such as the ownership of a thing – exists, we mean that it is recognized in the society. In an imaginary society in which possession but not in any sense ownership existed the right would not exist. Some members of that society might well discover the usefulness of introducing the right – that is, of introducing the practice, for the practice cannot exist without the right nor the right without the practice – and argue in favour of its introduction but until it is introduced the right does not yet exist. Similarly, a right to fair and unbiased adjudication that takes equal account of each litigant is a right that actually exists only when it is recognized and established. Where it is not established, its establishment might be advocated or claimed, and we argue in favour of the claim on the grounds that fair and unbiased adjudication is intrinsic or natural to adjudication. We argue, indeed, that biased adjudication is wrongly called adjudication because it lacks the impartiality intrinsic to that activity; in the same way a 'promise' that carries with it no demand that it be honoured is wrongly called a promise because it lacks a characteristic intrinsic to promising. If in an imaginary society people make 'promises' and no one understands that promising carries with it a demand that it be honoured, then no right accrues to the person to whom the 'promise' is made.

A 'promise' that imposes no obligation is bogus; so, too, is a 'right' that is not acknowledged, and so confers no actual entitlement. There is much debate as to whether or not human rights exist and much confusion. Again, we distinguish between what exists and what ought to exist but does not. Let X be a 'human right'. If X exists, there is a jurisdiction in which X is an acknowledged right; if there is no jurisdiction in which X is an acknowledged right, then X does not exist as a right, however much it exists as an idea or a claim. In as much as a right is acknowledged and called a 'human right' in, for example, an international agreement such as the Universal Declaration of Human Rights, that right exists in as much as it has purchase in the signatory jurisdictions. But there remain jurisdictions in which some of the rights agreed in the Declaration are not rights.

Human societies are networks of entitlements or rights. Societies do not first come into being and only then suggest, agree, and establish the set of rights within which the members of the society are to live. Humans from the beginning live in a network of entitlements; from an evolutionary perspective we may think of this network as the human version of the ordered pattern of the life of the animals from which humans evolved. Human society differs from animal society in that humans are not in the same way locked into the patterns but can and do reflect upon them and, in the light of discoveries and the questions thrown up by those discoveries, change and develop the patterns of their lives and discover new mutual entitlements – rights and duties – that allow them to live peaceably

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together in the new conditions. Throughout the many and profound changes that have come about in human societies since their original emergence, some very fundamental patterns survive. Humans, for example, communicate with one another – if they did not they would not survive as a species – and there are features spontaneously, intrinsically, naturally present in human communication upon which communication depends. Such features are the 'natural laws' of communication. One such feature is that most speakers most of the time tell what they hold to be true; if no one at any time could rely on their interlocutors to tell what they held to be true, communication would collapse. That is a 'natural law' or 'natural characteristic' of communication. Hence the injunction that for the most part and most of the time one ought to tell the truth. Hence also the idea that for the most part and most of the time one can expect to be told what the speaker holds to be the truth, and thence the idea that one has the right to be told it. But because both withholding information and lying are possible, it is likewise possible that in a particular society or part of society, the right to be told what the speaker holds to be true may not in all circumstances exist. There are situations in which a person or set of persons has the right to be told what the speaker holds to be true; for example, students normally have that right, which is intrinsic to teaching and learning, relative to their teacher, and a class in which that right does not exist is fraudulent; but fraud is possible and may on occasion be institutionally established so that teachers, for whatever reason, teach as true what they hold to be false; and when such institutionalization of fraud exists, the right ought to, but does not, exist.

Humans can be stupid, vain, covetous, malicious, envious, prone to anger, greedy, selfish, dishonest, and unjust as well as intelligent, fallible, generous, loving, caring, kind, temperate, empathetic, honourable, and just, and so it is a fundamental error to think of human judgments and human decisions as inevitably true and good. To seek certain or absolute truth and goodness in law or legal judgments or decisions is misguided. It may be that the search for this chimera was encouraged by the idea that natural science was both certain and true, a distorted image of science that itself came from the Greek ideal of science as the certain knowledge of the necessary. Now that natural science is correctly recognized to be the best available opinion, and truth the asymptote, the nostalgic quest for infallibility may be abandoned and positivism and relativism more easily let go. For at the heart of both positivism and relativism is the quest for infallibility; if we cannot be sure of reaching the true and the good, we can define the true and the good, right and wrong, as simply what has been decided. But no one, we argue, consistently holds, or can hold, this position.

This work is a study in jurisprudence that considers the proper function of law to be the promotion of a context in which, without impeding one another, we can lead our lives together in peace and justice. How does law carry out its function? Our book may be read as a sustained commentary on that assertion and that question.

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Finally, a note on sources: This book draws on sources from different historical periods and in different languages. The majority of these sources have been interpreted and translated in many different ways by various authors. Here we are eclectic. In some cases we use 'standard' translations; in other cases we translate passages ourselves; in yet others we draw on various interpretations and translations in order to convey what we consider to be the primary meaning of the text in question. Obviously, there can be no substitute for the original, and the reader is well advised, if possible, to consult the original in cases where he is in doubt or where he senses ambiguity. Throughout this book, unless the context dictates otherwise, we use masculine pronouns as gender-neutral references.

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