In the preface to *Law and Justice in Community* the authors say:

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.[1]

In this vision of the proper function of law the authors capture the core purpose of a legal system, as a tool to support a good and just society, for example by promoting the common good and defining social order. The law evolves in a moral context which instructs that "to act reasonably and responsibly is the demand intrinsic to our moral experience as humans."[2] Natural justice or intrinsic moral behavior, such as to consider the interests of others, is cultivated and expressed in "the living or communal law" of a society.

Humans, the authors insist, are social animals and live by necessity in communities[3] and the ways of doing things in the community, customs, practices, expectations, develop in time into jural relationships—the "living law"—normative principles generally approved of by the community. Thus, they deduct, law in fact existed in all human communities before it ever was expressed in a formal way. Law is thus a product of evolution and in no way that of any social contract.[4] Rights and duties are not based on a consensus, they are entitlements that must be mutually valued for a society to survive, discoverable objects of justice. The authors adopt a classical theory of rights, maintaining that rights "are a function of justice understood as the giving to each what is due."[5] However, they denounce a subjective understanding of rights, thus a right only exists if it can be defined as an entitlement that has been accepted or acknowledged in the society.[6] Until it has been recognized it is only an as yet unsubstantiated claim.

So far I have more or less been in agreement with the authors, here I have to pause however, because they explicitly note that this view of the nature of rights applies to all rights, not just positive legal rights, or rights to a tangible object. It also applies to "natural

rights" and "human rights" like those rights listed in the Universal Declaration of Human Rights: in so far as the respective society of a proposed right-holder has not recognized the Declaration or the entitlement as such, there is no right to speak of.[7] I have to doubt that an entitlement to a fundamental right depends on its acceptance; that claim seems to go against the very essence of the nature of fundamental rights.

But I am not going to dwell on criticisms; rather I want to propose a *vision* of the initial status and interaction in human community and its consequences. The concept of "living law" as presented by the authors is plausible, but it does *not*, it seems to me, *suffice* to promote "a context in which, without impeding one another, we can lead our lives together in peace and justice."[8] This is so because the darker elements of human nature or simply the differences in physical and mental strength are bound to have had an influence on the development and acceptance of the "living law". That is to say, if this development is left to chance and no conscious measures are taken to guard a natural balance, an error in society's harmony may result.

Humanity

Before proceeding I must reflect on a few theses about human nature.

Many scholars have tried to define what exactly *being human* implies and its moral implications. Some want, for example, to describe the concept from the perspective of an inner self or consciousness, others emphasise psychological qualities such as memory and mind. Thomas Nagel stresses the *transcendental* nature when he says: "People can come to feel, when they are part of something bigger, that it is part of them too."[9] Nagel sees the capacity of insight—to transcend oneself in thought—as the cause of our feeling that life is absurd, which, in turn, he holds is "the most human thing about us".[10] He acknowledges the circularity of referring to such arguments but adds: "We adhere to them because of the way we are put together; what seems to us important or serious or valuable would not seem so if we were differently constituted."[11] Nagel captures here, I think, the essence of the human nature, the mystery of the conscious mind as it is expressed through imagination and

desire.

Another distinctive capacity human beings share is *rationality*. The Stoics compared rationality with a creature which forms and controls the individual it resides in as if it has a will of its own, but is at the same time like a bird in a cage, bound within the human individual.[12] In other words it needs to be cultivated and nourished and tamed so it may control the impulses to less virtuous actions rooted in our natural drive of self-preservation.

The *degree* to which human beings have this capacity or use it is irrelevant in this context, as well as the fact that it may be partly or completely lost on some, because this does not change the overall picture of how human beings are constituted. It is a characteristic of human beings that they are capable of virtue and rationality; and in this sense all men are *equal*, or as Johnny Christensen puts it:

Parity of natural potentiality is implied by the very definition of man. Therefore there can be no natural differences between Greek and Barbarian, man and woman, noble and commoner, free man and slave.[13]

And finally I would like to refer to Bernard Williams, who argues in his essay "The Idea of Equality"[14] that it is neither trivial nor a platitude to say that men's common humanity constitutes their *equality*. Any difference in the way men are treated must be justified, he says, and this is seen by many to imply "an essential element of morality itself".[15]

Human needs

Now, a reflection on the *needs* of the human being. Aristotle said that man needs certain living conditions to flourish and to perfect his human nature—learning virtue and good manners.

Thus, the human being needs relations with other human beings; but moreover she needs to experience autonomy in respect to her options and status,[16] this must be so because of her sense of the individual self, sense of well-being and sorrow, sense of right and wrong, etc. It is this somewhat mysterious characteristic of the human being that calls for a society in which *equal consideration and respect* are essential elements. In such a society fundamental rights, as we call them, are intended to protect those values of a human life that we see as essential to the sense of existence and the autonomy of everyone: and for these we constantly struggle.

In ancient Greece, where the law was based, in part at least, on *convention* or the "living law", philosophers saw the role of motherhood as a reason to doubt the full humanity of females[17] and ever since this has significantly contributed to their subjugation. Women have been, as Kymlicka says, "associated with the merely animal functions of domestic labour, whereas men achieve truly human lives by choosing activities according to cultural goals, not natural instincts".[18] When a certain group of people has been displaced in society for any reason, such as has for example been the case with black people and women, it is clear that their fundamental equal status has been violated, and their human status has not been respected. Today we call this *discrimination*; something must have gone wrong in the development of law and that implies the "living law" has not sufficed to secure a good and just society in the absence of guiding principles.

What we know about the inner life of human beings is sufficient to provide us with a compelling reason for acting at least in one certain fashion, and that is to treat all human beings with *equal consideration and respect*. To act otherwise amounts to abusing the common needs of all human beings. Barden and Murphy might want to qualify that assertion by saying that we must not discriminate *unjustly*.[19] They also criticize Ronald Dworkin's thesis about a *right* to equality of concern and respect[20] by reference to their down to earth relativistic view of the law.[21] Their relativism nevertheless misses an important point about the nature of fundamental rights. In line with Dworkin I would now like to further suggest that *equality* is *the* fundamental principle of human interaction, and that any thesis that does not embody it is therefore fundamentally flawed.

Hypothesis: a platform of equality—a principle of human interaction

In this final section of my paper, I want to propose an argument. In substance it holds that *equality* must have an even stronger and, in particular, a more *fundamental* role in a just and flourishing community in which "we can lead our lives together in peace and justice".[22] I will venture a strong approach to a principle of equal consideration and respect as a rationale for any fundamental rights human beings may have.[23] On this understanding, the *conception of equality* is *prior* and *primary* to, as well as being in a causal relationship with, the existence of the values we call fundamental rights of human beings; *not* the other way around. This is so, because when we have defined the characteristic elements of human nature, as above, and reflected on them, we can agree, I think, that there can be no justification at hand for discrimination in respect to *those elements*.

Follow me now in a little thought experiment. Imagine a platform, like a huge derrick or an outdoor stage, or the starting square in a game. On this platform we have all the human beings there are. Maybe this is at the very beginning of human existence, it does not make a difference. They are landed there in their capacity as human beings; before the game starts; before they begin to fend for themselves in the state of nature or in society. I like to call this position *the Platform of Equality*.

We may be looking from high above, so we cannot see the details. We only see human beings and as such they are all the same. In fact one may talk louder than another, one may be physically stronger than another, one may be equipped with a better tool to reason. Because of such differences we sometimes say that men are approximately equal,[24] but the important question is: do these differences entitle them to a head start in the game, or in life in fact? I think we can agree that they do not, so let's imagine that the human beings on the Platform have not yet themselves realized these differences. They are *qua human beings* all in equal need of the basic necessities that bring a flourishing human life. There at the Platform there is no ruler, and as yet no rules. It is here that the "living law" begins to develop, and the important question is by what norms it will be guided. Will it be by the understanding and respect for mutual human needs, or will this understanding—an essential

condition for a peaceful society in which everyone may flourish—be lost on many when they have started to fend for themselves and individual strengths prevail, thus unduly influencing the development of the "living law"?

The point being stressed here is simply that human nature requires that everyone is *equally* ensured the opportunity to be in control of those matters in her or his life that are the most important for human living. On this understanding, it is not just *having* the same fundamental rights that constitutes the parity of human beings, but that human beings more importantly have these rights *because* they are *equal* in a fundamental and natural sense; it is the sameness that inspired the Stoic's teachings of brotherhood or solidarity.

We can imagine that we draw a circle around each and every individual on which those items most important for human living are located. They may then be seen like electrons circling an atom, bound to its core by an invisible force. And they cannot be removed without consequences: the disruption of the individual as an autonomous entity. If we make a list of these needs and values we will obviously find security of life, liberty, food and shelter—and most likely other elements and values which today are acknowledged in human rights clauses and conventions. But in spite of the fact that all humans are fundamentally the same in regard to these basic elements, they are still different in their individuality and strength, and *that* fact makes it essential to recognize and find a way to protect their equality in respect to these fundamental elements, as humans diverge from the Platform of Equality.

From the Platform of Equality we continue to build a society, applying a theory of the development of laws or some contract theory of fairness; but a *primary premise* must always be that the citizens already have those properties—we can call them rights—equally allocated, and that those cannot be obliterated or curtailed by our actions, customs or the rules we set. On those terms a society evolves from the grounds of that which is essential for the development and wellbeing of everyone who lives in it. That is the idea of the Platform of Equality; building society on the conception of fundamental equality. From there other interactions may develop.

If society is a *necessity* for humans, as the authors hold, that must only be true in so far as the individuals are not harmed by it. Who has a *need* (perhaps mere survival aside) for being in a group where he is ill-treated or subjected to the domination of another, or subjected to lifelong poverty, or not treated with equal concern and respect to other members of the group? To stay with an analogy from physics, interaction is meant to transfer energy, not destroy it.

If we take *equality* of humans in this sense seriously it leads us to an awareness of the necessity of protecting certain fundamental rights and to provide certain conditions based on respect for the values these protect. In the case where these are not *acknowledged* as valid entitlements action is needed to correct the situation. Government power, official institutions and private enterprises must follow suit, and experience shows we cannot leave this entirely to development. These principles should always have been clear, but they have not been, or not opted on. We have realized that things are not right, and tried to define how they should be by using the hypothetical methods of natural or positive law, social contract theories or the concept of the living law; but, I believe our documented failure lies, among other things, in never defining properly what went wrong, the situation at the very beginning, at the *Platform of Equality* and the development of society from there on. We have failed to recognize how the principle of equal consideration and respect is derived from our very nature. And the necessity of protecting certain fundamental rights and living conditions come from *that* fact, not the other way around.

It is of course complicated to turn around in the real world where we have obviously started down a terribly wrong path, a long, long time ago, but to think it over and realize the mistake may be taking the first step to rectification. Hopefully we have not created a web of rules so entangled that we cannot disentangle it for the cause of a just society. That seems necessary if the law is ever to fulfil its proper function of promoting "a context in which, without impeding one another, we can lead our lives together in peace and justice."[25]

[1] Garret Barden and Tim Murphy, *Law and Justice in Community*, Oxford University Press Inc, New York, 2010, p. vx.

[2] Ibid. p. 9

[3] Ibid, p. 20.

[4] Ibid. pp. 20-22.

[5] Ibid. p. 16, cf. pp. 206, 210.

[6] Ibid. p. xiv, pp.205-212.

[7] Ibid. p. xiv.

[8] Ibid. p. vx

[9] Nagel, T., *Mortal Questions*, Cambridge University Press 1979, p. 16.

[10] Ibid. p. 23.

[11] Ibid. pp. 17-18.

[12] Christensen, J., *Equality of Man and Stoic Social Thought*, Comm. Hum. Litt. 75 (1984), pp. 45-54, at pp. 45-6.

[13] Ibid. p. 46.

[14] Williams, B.A.O., *The Idea of Equality* in Justice and Equality, Bedau, H.A., (ed.), Prentice Hall, New Jersey 1971, pp. 116-137, at pp. 116-117.

[15] Ibid. p. 117.

[16] It is this sense of life we mean when we talk about human beings flourishing as the beings they are. A good society provides such conditions. Good society is governed by good laws, said Aristotle, but will be destroyed by bad. The laws are to proscribe and guard those elements that entice welfare and happiness. And in so far as the law is good, one who infringes it does injustice. Aristotle discusses these matters in his *Ethica Nicomachea* and *Politica*, e.g. NE I 4 1095a.

[17] Aristotle, *De Generatione Animalium*, Book IV, 767b, cf. 775a.

[18] Kymlicka, W., *Contemporary Political Philosophy: An Introduction,* Oxford University Press, Oxford 1990, p. 255.

[19] Barden and Murphy, p. 210. The principle to treat everyone with equal concern and respect they argue "demands […] that one not discriminate *unjustly* between people."

[20] Barden and Murphy quote Dworkin: "We may therefore say that justice as fairness rests on the assumption of a natural right of all men and women to equality of concern and respect, a right they possess not by virtue of birth or characteristic or merit or excellence but simply as human beings with the capacity to make plans and give justice." Dworkin R., *Taking Rights Seriously*, Cambridge, Mass: Harvard University Press, 1977, p. 182.

[21] Barden and Murphy, pp. 209-210.

[22] Barden and Murphy, p. vx.

[23] In my approach I have in particular been influenced by two conceptions. One is Ronald Dworkin's thesis that governments ought to treat people 'as equals' and not merely 'equally'. His theory of equality is complex but importantly he seems to see equality as a fundamental value and liberty and equality as inseparable. See e.g., Dworkin, R., "Liberalism", in *Public and Private Morality*, Stuart Hampshire (ed.), Cambridge University Press, Cambridge 1978, p. 113ff, at p. 125; and *Taking Rights Seriously*, Harvard University Press, Cambridge, Massachusetts 1977, p. 227.The other is the 'respect principle' Tom Regan spells out in his *The Case for Animal Rights*, University of California Press, Berkeley 1984, pp. 326-327.

[24] Hart, H.L.A., *The Concept of Law*, Clarendon Press, Oxford, second edition, paperback, 1998, p. 195.

[25] Barden and Murphy, p. vx.