

## The Law-Based Utopia

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The main aim of this paper is to describe *how* and *why* law is more important in one of the ideal society models, Utopia, than in the other four models of ideal society – which I call Abundantia, Moralia, Millennium and Naturalia.<sup>1</sup> The best way to set out the argument intimated in the title is through a typology of ideal societies. The starting point is the affirmation that not every ideal society is Utopia. Not every detailed description of an ideal society has the same structure. The Spanish historian, José Antonio Maravall, tells us that utopian thought reflects a comparison between ‘the experience of the real city where in fact men live’ and ‘the yearning for the ideal society that directs us toward stronger or less strong aspirations for reform’. This aspiration ‘appears in different forms from the earliest years of Western history’ (Maravall, 1976, pp.13–14). The existence of a typology is basic to understanding how law, as a particular normative system, operates in just one of the ideal society models: the Utopian model of the eponymous book written by Thomas More.<sup>2</sup>

By considering some elements of the utopian model and its history, I will try to describe this relationship between law (and the state) and Utopia. If we start from the original title, we will find that what we call *Utopia* is really *Concerning the Best State of a Commonwealth and the New Island of Utopia*. In *The Oxford English Dictionary*, Utopia, as the first exemplar, is described as ‘an imaginary island, depicted by Thomas More as enjoying a perfect social, legal and political system’. The utopian model has a close relationship with law, but this close relationship is not repeated in the other models. I want to analyse the reasons that justify the elimination of law and other normative systems from the other ideal society models. My proposal, therefore, is that only

in one of the ideal society models, Utopia, is law maintained as a valid instrument to produce the intended social transformation; law will be the instrument used to lead us from the present to utopia.

For this purpose, I am going to use some of the classic utopian texts to explain the relationship between law and ideal societies. I believe that this relationship has not changed. In 1516, More created a unique model of the ideal society and nowadays this uniqueness remains because law can be seen as a useful and indispensable instrument for producing a radical transformation of society. I agree with Skinner that More's text does not introduce 'a completely new topic into Renaissance political thought ... the question of what constitutes the best state of a commonwealth was a standard subject of debate throughout the era of the Renaissance' (Skinner, 1987, p.125). But, as Colin Davis asserts, 'what was original in his *Utopia* was the mode by which he chose to resolve these problems. He enquired as to the capacity of institutional, legal, educational and bureaucratic arrangements' (Davis, 1981, p.61). Of course, *Utopia* became a model for many later utopias. Utopian thought teaches us that human beings are able to transform society by changing the law and by creating new forms of politics which will improve human life.

The first picture one has of the ideal society is the vision of paradise, where humanity is liberated from its chains. In paradise, the natural environment would not be hostile to men because it would produce enough material goods to satisfy all the desires and necessities a person can have. There would be no conflict between human beings, because they behave well, or because they do not have to struggle for material goods. If this is our general idea of ideal societies, why am I trying to describe the relationship between law and ideal societies? Is law necessary in paradise?

Miriam Eliav-Feldon, in her book *Realistic Utopias. The Ideal Imaginary Societies of the Renaissance, 1516–1630*, starts with a basic question: 'Why should there be laws and law-enforcement in the perfect society?' This question is very important because '*prima facie* one would have thought that in a vision of an ideal land there would be no need for limitations on human activities nor penalties for breaching such limitations' (Eliav-Feldon, 1982, p.107). This idea of the relationship between the ideal society and the normative system makes law and social imperfection complementary; society is imperfect if rules are needed to govern human behaviour or to distribute material goods. Perhaps, therefore, the only ideal societies are those where there are no rules, due

to a particular configuration of human nature or the natural environment. Colin Davis asserts, 'a society bound together and ordered by its formalities, may, obviously, still be perceived as a far from ideal society' (Davis, 1993, p.21).

*Anomia* (the absence of law) is the hallmark of some ideal societies (Eliav-Feldon, 1982, p.108). Society is ideal if there are no laws that restrain liberty. Social perfection is achieved by the abolition of legal rules and of moral or customary rules. But, although anomic societies are one of the most important utopian dreams in western thought, *anomia* is a device particular to only four ideal society models; *anomia* and utopian thought are not inevitably connected.<sup>3</sup>

The relationship between normative systems and ideal societies is not an easy and peaceful one. In the utopian model, 'on the one hand, law is seen as an important means of providing stability. On the other hand, law and particularly lawyers are seen as agents of instability because of their quibbling over insignificant points.' (Sargent, 1982, p.583.) Moreover, law is evaluated as a useful instrument, or else as a tyrannical one (Goodwin, 1978, pp.93–100, 137). Ideal society models and normative systems seem antithetical because, as I have pointed out, it is not clear why law should be necessary in a society where perfection has been reached. Various arguments purport to justify the elimination of law, but we can also find arguments for its retention. Law is an important aspect of utopian thought, whether the utopian argues for or against it (Sargent, 1995, p.76).

In the different relationships between ideal societies and normative systems, especially law, four characteristic dimensions can be found: ambiguity or ambivalence; critique; necessity; and paradox. Ambiguity or ambivalence implies that each ideal society offers a different argument for the presence or absence of a normative system. Each ideal society has its own solution, and it is even possible to distinguish between two models of ideal society based on formalism (Davis, 1998, p.63). The second dimension (critique) justifies the special treatment of law in this paper: in all the ideal society models it is argued that law and legal institutions are the origin of the social imperfections and, therefore, law is shrewdly criticised. All the ideal society authors disapproved of the formulation of law in real societies and this negative evaluation results in the disappearance of law, except in the utopian model where confidence in law persists, even though law is also the main object of criticism. In this model, a radical, but positive, reform of law is proposed and legal institutions are a necessary part of the model. Lastly, the utopian model

also has a paradoxical dimension: first, because law is criticised, yet it is the main instrument used to create and maintain social perfection (Tasso, 1999, p.303); second, because of the radically different way that legal roles (for example, lawyer, judge, and lawmaker) are conceived; and, third, because of the contradiction between the proposed reduction in the number of rules and the setting up of a utopian legal system that rules all possible actions.

### Anomic Ideal Societies

Eliav-Feldon says there are three types of ideal society 'in which the central theme is the absence of laws'. The first is Abundantia, 'which is not a description of a community but of a paradise for the individual who seeks total freedom from restraint, obligation, and hardship' (Eliav-Feldon, 1982, p.107). Here, people have the vastest possible sphere of freedom because 'in Cockayne there were satisfactions enough to satiate the grossest appetite' (Davis, 1981, p.21). Abundantia permits *anomia* because of the union of two elements. The first is an absolute abundance of material goods, which produces the second element: people are liberated from the yoke of basic needs and all social problems disappear. In this ideal society, human behaviour has been changed by the elimination of the tyranny of necessities (Morton, 1952, pp.11–34, 217–22).

The second anomic model of ideal society is Naturalia, the model which 'depict[s] ideal primitive societies where life is reduced to the barest necessities, rendering all the institutions redundant ... there are no rulers to exact obedience, no religion to impose moral codes, no institutions to create regulations. Each person satisfies his own simple needs without friction with his neighbours, without aspirations for higher things.' (Eliav-Feldon, 1982, p.107.) Life is made easier by reducing demand. Naturalia implies a reevaluation of primitivism, especially legal primitivism. It is thought that less developed societies have a superior standard of living and that *anomia* is the acme of this way of life (Lovejoy and Boas, 1935, pp.14–15). In primitive society, people are completely free because, besides eliminating such artificial elements as law, people have reduced their basic needs, due to the transformation of human nature (Montaigne, 1997, pp.161–75; Cervantes, 1996, pp.168–74).

In these models of ideal society, according to Eliav-Feldon, 'behaviour is regulated by basic necessities, not by artificial laws. The

complete absence of social institutions, including family and property, eliminates all emotions and motives for crime.' (1982, p.107.) Satisfaction of needs is people's goal in life and is the regulative element. Law and political society are only required where desires and basic needs cannot be satisfied. Davis contends that the Arcadia and Cockaigne models 'assume away the basic premise on which all social constraint is based: nature's inability to meet all our needs or satisfy all the wants we are capable of conceiving. Unlimited substance overwhelms form.' (1993, p.21.) Real societies, therefore, require legal rules because satisfaction is not guaranteed. The inevitable correlation between basic needs, satisfaction and social problems means that, once needs have been satisfied, social problems will disappear and social perfection will be achieved. Abundantia and Naturalia are the only models of ideal society which can be labelled *body utopias*, since both models set out to satisfy human needs in order to set up and maintain an ideal social system, without the presence of law or other normative systems (Sargent, 1994, p.4).

Perceived social problems will have been erased by satisfying human desires and necessities. In the first model, abundance of material goods removes problems and conflicts from society, 'not by changing the character of man nor by elaborate social rearrangement, but by the fullest private satisfaction of men's appetites' (Davis, 1981, p.21). In Naturalia, law is unnecessary because there is relative abundance and simplicity of needs. In this model, 'nature is generously benevolent rather than hostile, but at the same time men's desires, in particular sociological ones, are assumed to be moderated. There is thus harmony between man and nature in Arcadia which parallels a social harmony between men of moderation. Arcadians tend to assume that, if the problems of material scarcity are resolved in a world of men of moderation, problems of sociological scarcity will also cease to exist.' (Davis, 1981, pp.31-2.)

The third of the models which Eliav-Feldon presents as anomic is that formed by 'a community of people so learned or so pious by nature that they require no external rules of conduct - instinctively all their actions would be moral ... Such a vision is based on the assumption that certain people in this world are intrinsically good, so that by careful selection and with the aid of learning, a community could be formed of individuals who would always act according to reason (or ethical values) without any guidelines artificially laid down by social institutions.' (1982, p.108.) Davis affirms that in this model 'the message remained

simple: as ungodliness caused corruption so godliness was the essential path to social perfection' (1991, p.330). My argument is that this third model of anomic society represents *Moralia* as much as *Millennium* (a perfect religious society of the future) because these two models of ideal society agree on this material point about human nature (Davis, 1981, p.46). Both models show how human nature changes until a society of angels is achieved, a community of rational people who always know what is right and behave accordingly. An example is the true Christians described by Luther (Lutero, 1990, pp.21–65). Human perfection and its expression in conduct contributes to social harmony (Goodwin, 1978, p.67).

The human disposition in these two models of ideal society means that it will be possible to do without legal rules because there will be 'a code of categorical prescriptions, enforceable by conscience, not by coercion, which usually directs human behaviour towards actions which are at least harmless to other individuals, and at best beneficial to them' (Goodwin, 1978, p.55). People, with their new human nature, will feel bound by the rules which guide them along the right path, and the possibility of behaviour contrary to those prescriptions is not admitted (Eliav-Feldon, 1982, p.107). To distinguish between the good person and the good subject or citizen in these models of ideal society is pointless because they are identical. In such societies, there are good men who always and inevitably obey the rules because for them the moral obligation is more important than legal or political obligations. This produces a radical improvement in the internal and external behaviour of individuals (see, for instance, Owen, 1991, p.110). 'Society is to be made harmonic by the moral reformation of every individual in society, and hence of every class and group.' (Davis, 1981, p.27.) In both models, to recover prelapsarian human nature or to create a new human nature will produce personal and social perfection. It will also bring about the elimination of all intersubjective conflicts and, therefore, it will be possible for this world to do without law. In these models, there is no imposition of rules, but inevitably people, after the reform process, are going to behave correctly. In my opinion, behaviour which is inevitable and necessary needs no rules (see Claeys, 1991, pp.xxiv–xxv).

It can be contended that in the first group of ideal societies the elimination of law, and other normative systems, depends on the benignity of the natural environment, which produces abundant goods for the satisfaction of desires and basic needs. This satisfaction is the cornerstone for creating social perfection and escaping from reality. In

this connection, Goodwin asserts, 'misery in an imperfect society is usually the result of unsatisfied need and frustrated wants, and although the mere satisfaction of needs may not be sufficient to constitute happiness, it is at least a necessary condition' (1978, p.70). Scarcity is the main cause of social crisis; it promotes social conflict. Moreover, law makes scarcity and conflict perpetual by imposing a non-egalitarian distributive system. In a society where people, aided by the natural environment, can satisfy their basic needs and conflicts of desire are removed, it is possible to live without law (Hill, 1997).

Human imperfection is another basic factor which causes conflicts in society, so in those societies inhabited by angels (good men who are perfect moral agents) law will disappear because of the radical reform of human nature. People will never act against the self-imposed rules because it is impossible. There will be no lawbreaking or rule-breaking. This is scarcely conceivable and, in my opinion, this negates moral freedom because human beings cannot choose between right and wrong. Their good actions are not morally free, for there is no freedom if their behaviour is beyond human control. Such beings do not decide their own behaviour because it is determined by nature. Hans Kelsen thinks that in societies where good behaviour is guaranteed, laws are unnecessary: law is meaningful in a society where deviant behaviour is possible and where the *absence* of law would therefore bring about a quite different society (1993, pp.24, 73). But laws are not required to govern determined or necessary behaviour. Abundantia, Naturalia, Millennium and Moralia would therefore be anomic societies because good behaviour is inevitable due to the reform of human nature.

There are two different paths (abundance or human perfection) to attaining anomic society. The material elements of human nature and the natural environment play an important role in the elimination of law and in the maintenance of the society. Their transformation causes law to *vanish into thin air*: it has no meaning or purpose. David Hume illustrated this situation when he analysed the necessity and functions of government. In *An Enquiry Concerning the Principles of Morals*, he argued the uselessness of the 'idea of justice' in societies where there is an abundance of material goods or where there is unlimited altruism. The idea of justice is pointless in societies where there is moderate scarcity or where society consists wholly of angels or of devils (Hume, 1983, pp.21-2).

In similar vein, the legal philosopher Herbert Hart argues that there are two evident truths that justify the existence of rules in society: limited

altruism and scarcity. Limited altruism means that:

men are not devils dominated by a wish to exterminate each other, and the demonstration that ... the basic rules of law and morals are necessities must not be identified with the false view that men are predominantly selfish and have no disinterested interest in the survival and welfare of their fellows. But if men are not devils, neither are they angels; and the fact that they are between these two extremes is something which makes a system of mutual forbearances both necessary and possible. With angels, never tempted to harm others, rules requiring forbearances would not be necessary. With devils prepared to destroy, reckless of the cost to themselves, they would be impossible. (Hart, 1988.)

On the other hand, there is scarcity:

it is a merely contingent fact that human beings need food, clothes and shelter; that these do not exist at hand in limitless abundance, but are scarce, have to be grown or won from nature, or have to be constructed by human toil. These facts alone make indispensable some minimal form of the institutions of property (though not necessarily individual property), and the distinctive kind of rule which requires respect for it. (Hart, 1988, pp.191–2.)

Such arguments are illustrated in Henry Neville's *The Isle of Pines*, which describes the progress from an anomic ideal society (Naturalia) to a nomic ideal society (Utopia). The isle inhabited by George Pine and his relatives was initially an Arcadian society, but became a utopian society due to the need for legal rules. This change was brought about by the radical transformation of the original situation, from a peaceful society (generated by abundance and altruism) to a society characterised by scarcity and conflict. The original 'orders' had to be altered because human behaviour and the distribution of goods had changed.<sup>4</sup> In the beginning, the island was Arcadian because:

The country [was] so very pleasant, being always clothed with green, and full of pleasant fruit and variety of birds, ever warm, and never colder than *England* in *September* ... for we wanted no food, and living idly, and seeing us at Liberty to do our wills, without hope of ever returning home made us thus bold (Neville, 1920, pp.65–6).

This first stage is characterised by absolute satisfaction of basic needs, the

free realisation of desires, an absence of conflict and a lack of legal rules to infringe this natural freedom. It is a peaceful state of nature, a prelapsarian and pre-social situation. But everything changes when class distinctions develop (Neville, 1920, p.74), the population increases and natural goodness disappears. Then, conflict arises. The absence of government makes it easy for the strong to tyrannise the weak. Religious control is not enough and the only practicable solution is to set up a legal order:

Now as Seed being cast into stinking Dung produceth good and wholesome Corn for the sustentation of man's life, so bad manners produceth good and wholesome Laws for the preservation of Humane Society. Soon after my Father with the advice of some few others of his Counsel, ordained and set forth these Laws to be observed by them' (Neville, 1920, p.73).

Law, therefore, is not autonomous but depends on social conditions. It is unnecessary where there is a perfect natural environment and perfect human nature. Four out of the five models of ideal society assume it is possible to maintain an anomic society if (*and only if*) human nature or the natural environment, or both, are altered. However, the main question is whether absolute *anomia* would allow the establishment and maintenance of an ideal society.

The proper selection of methods of social control and conflict resolution influence the practicality of the reform project for the ideal society. Goodwin asserts, 'the survival of a social system in its particular forms depends on the successful resolution of the conflicts of interest which arise where there is a plurality of desires that limited resources cannot satisfy', and, therefore, 'the proposed solution is consequent upon the manner in which the problem is conceptualised' (1978, p.82). All the ideal society models (anomic or nomic) maintain a strict relationship between the solution proposed and the problem, because all of them want to solve the social and political problems.

I believe it is impossible to create an anomic society because human nature and the natural environment would have to be reformed to become perfect. It would be necessary to create a new human nature which would allow social life to continue without primary or secondary rules (Hart, 1988, pp.77–96; Raz, 1991, pp.179–88). Nor it is possible to reform society through the satisfaction of basic needs and desires, first, because this solution simplifies political problems, and, second, because, although it was possible to produce artificial abundance

(according to nineteenth-century utopians) a formal system for distributing goods would still be necessary due to human imperfection.

### The Role of Law in Utopia

There is one model of ideal society, Utopia, which is an ideal society because of the perfection of its legal, bureaucratic and formal structures (Davis, 1968, p.174). In this model, law and the state are necessary elements for realising social reform and setting up new ways of governing and administering goods and people. As Giampaolo Zucchini asserts, the Renaissance utopians aimed to achieve earthly happiness through a new model of society or an alternative state, or both (1986, p.409). In this new model of ideal society, according to Eliav-Feldon, 'Law is a subject that received a great deal of attention from the utopists and deserves close examination.' (1982, p.110.)

Utopia admits imperfections in human nature and the natural environment as irreducible, but this does not mean it is impossible to do anything about them. Utopians admit that 'a much better life could be developed without changing the basic nature of the people' (Sargent, 1975, p.91). Therefore, according to Davis, the utopian model 'focuses all attention on [the bureaucrat's] primary role, the implementation and efficient operation of a given system' (1981, p.381). The utopian model has created institutional perfection in order to moderate problems caused by limited altruism and scarcity. This perfection, based on law and the state, tempers the threats to society caused by the other imperfections (Davis, 1984, p.9). Sargent thinks that 'More's Utopians are infinitely better than any other people at the time, but they are not significantly better by nature; they are better because their social institutions are better.' (1975, p.89.)

Utopia is the only model where law is considered as a necessary instrument to create and maintain social reform. It does not guarantee good behaviour (men can become criminals or sinners) and the social problems caused by redistribution of goods have not disappeared. But, in this model, though human nature and the natural environment are imperfect, the reasons for unfair behaviour have been eliminated, a fair system for distributing goods ('artificial abundance') and extensive social control have been established. The imperfections have been controlled by formal mechanisms; although they cannot eradicate them (Davis, 1984, p.10), they reduce the adverse effects. In *Utopia*, More asserts that remedies can ease the maladies of society, but never eradicate them.

These remedies can be found in statutes, prescriptions, and legislation. In the utopian model, social and political problems do not vanish into thin air because human behaviour has been reformed. Human beings are not angels, but they live in a society with a reformed institutional framework and one where the roots of unfair behaviour have disappeared. In More's words:

Everyone knows that if money were abolished, fraud, theft, robbery, quarrels, brawls, seditions, murders, treasons, poisonings and a whole set of crimes which are avenged but not prevented by the hangman would at once die out. (1999, p.109.)

A few people might continue to infringe the rules, however, and authority is necessary because men are not always virtuous. Eliav-Feldon asserts, 'the serious utopists of the Renaissance did not believe that it was possible to transform human nature completely', so, 'even in the best of states some coercion and restriction would be necessary' (1982, p.109). A negative view of human nature 'is a basic theme running throughout a significant number of utopian novels' (Sargent, 1975, p.89). Laws are born, according to Ludovico Agostino, due to *peccato di Adamo* which is indissoluble (1957, pp.24–6). The utopian is not looking for the good man, but the good citizen or subject. Robert Burton, for example, in his utopia tried to find the good man, but knew it was impossible:

Priests should imitate *Christ*, charitable Lawyers should love their neighbours as themselves, temperate and modest Physicians, Politicians contemn, Noblemen live honestly, Tradesman leave lying and cosening, Magistrates corruption &c. but this is impossible, I must get such as I may.' (1991, p.87.)

Searching for the good man or the good citizen or subject are completely different because they are different goals and the instruments that are utilised are also different. The good citizen or subject is the goal of any legal system, while the good man is the goal of all morality. Modernity has produced a separation of spheres, so that the good citizen need not necessarily be a good person, although the utopians seek the union of both spheres (Habermas, 1990, pp.50–54). Moreover, each model of the ideal society is looking for a different kind of person. So, while anomic models try to create societies inhabited by good men, utopian models try to create good citizens or subjects, although they would also like to create good men. For example, the Moralia model trusts in human self-restraint, but Utopia, according to Johann Valentin

Andreae, does not trust in this self-restraint (Andreae, 1999, p.187), because when the stringency of control by rules is reduced, according to Campanella, sedition appears (Campanella, 1993, p.162). I would assert that it is possible to differentiate between the good man and the good citizen or subject, so I do not agree with Davis when he states that 'in Utopia, or Hagnopolis, as that holy community was also called, the distinctions between law and morality, between good citizen and good man, have disappeared' (1981, p.50). I think the basic differentiation between the good person and the good citizen remains in this model of ideal society because, if it did not, Utopia would be transformed into Moralia.

I would argue that the utopian model can exist with a minority of good men and a majority of good citizens (Andreae, 1999, p.180). Societies inhabited entirely by good people are impossible, so Andreae, Gott, Burton, More and Campanella set up imperfect Moralias, which are in fact utopias. In the utopian model, there are differences between 'those of their citizens who have internalized the ideal society's values, those who are capable of outward reformation only, and those who are potentially or actively deviant. Vivian Carol Fox has persuasively demonstrated that it is in this sense that deviance is integral to the utopian construct.' (Davis, 1993, pp.24-5.) In the utopian model, there are people who do things by conviction (Campanella, 1993, p.217), and also there are people who have adapted their external behaviour to the rules, but have not internalised the rules. This is possible because, according to Burton, men do not have a window to see the heart's secrets (1991, p.83). The other possibility is the person who tempts others or infringes the rules (legal or moral), because *ubi lex, ibi praevaricatio*. In this case, the utopian model only has one answer, law enforcement and penalties:

He that commits sacrilege shall lose his hands; he that bears false witness, or is of perjury convict, shall have his tongue cut out, except he redeem it with his head. Murder, adultery, shall be punished by death, but not theft, except it be some grievous offence, or notorious offenders: otherwise they shall be condemned to the gallies, mines, be his slaves whom they offended, during their lives. (Burton, 1991, p.89.)

The utopian model does not trust in the resolution of social and political problems through natural abundance, so work has an important value (Skinner, 1993, p.122; Kumar, 1987, p.28). In More's *Utopia*, for

example, agricultural work is obligatory. Descriptions of the natural environment are secondary in this type of ideal society model, because work transforms the environment. For instance, Patrizi's first description of the natural environment concerns the sterility of the land and the art required to produce fertility (1941, p.125) and More, when he acknowledges that Utopia's soil is not very fertile and its climate is not of the best, says that the Utopians protect themselves against the weather by temperate living and improve their soil by industry (1999, p.77).

In the utopian model, there are powerful instruments to combat the social deficiencies caused by the natural environment and human nature. The recourse to law and the state is historically determined: in the Renaissance, law and the state were considered as methods by which to control men and order society (Maravall, 1976, p.76). It is possible to stipulate 1516 as the starting point of this model of ideal society. The true utopia is born in the Renaissance (Manuel and Manuel, 1984, p.33). Eliav-Feldon considers 'the sixteenth and seventeenth centuries were a period when traditional organizations were losing ground and the national states were consolidating and extending their powers. Only the State, with its rapidly growing machinery of administration, could be regarded as capable of coping with the formidable volume of social and economic problems and with the fear of chaos.' (1982, p.128.) There is also an inevitable relationship between law and state, for example, in Bodin's theory of sovereignty. Maravall asserts that law is the expression of the political action of the state. State is law: 'the old equation of law = king, is now formalized as State = law' (Maravall, 1976, p.417).

The state is an agent which can create new rules and new legal institutions, and enforce them. So, one of the persisting elements in the utopian model is a positive valuation of the existence and functions of the state (Bobbio, 1994, p.179). Eliav-Feldon asserts, 'the utopias depict centralized states that do not tolerate independent entities within them. There is one Law and one hierarchy of courts in these imaginary lands.' (1982, p.119.) The state's legal independence and the uniformity of law and custom are affirmed, while the judicial and legal authority of the church is severely curtailed (Bell, 1967, p.127). It is noteworthy that Weber's idea of the state is anticipated in this particular form of political thought (1993, p.83).

The critique of law and the affirmation of its necessary presence in society are both fundamental to the utopian model of ideal society: their simultaneous presence gives the model a paradoxical character because of the ambivalence about law. Criticism of law is found in many books

of the time, and perhaps one of the most important is the one noted in Burton's *Anatomy of Melancholy*:

To see so many lawyers, advocates, so many tribunals, so little justice; so many magistrates, so little care of the common good; so many laws, yet never more disorders.... To see often a most unjust man preside over justice, an impious man over religion, a most ignorant man decide questions of learning, a most lazy man questions of labor, a monster questions of humanity! To see a lamb executed, a wolf pronounce sentence, a robber arraigned, and a thief sit on the bench, the Judge severely punish others, and do worse himself! ...Laws are made and not kept; or if put in execution, they be some silly ones that are punished. (1991, p.51.)

But the critique does not eliminate law from utopia because the model has a necessary relationship with law. Eliav-Feldon says, 'Society, according to our writers, can be reformed only through good laws and good institutions that will protect men from evil within them. The serious utopia is, in fact, a complex legal network of such close mesh as to leave individuals with very little freedom of action.' (1982, p.109.) The perfect social system is achieved through law which has an effect on human nature and distribution. Social perfectibilism is thus distinguishable from human perfectibilism (Goodwin, 1978, pp.4-5): social control is perfected and human and natural imperfections are allowed to remain.

Utopia is an example of government by laws and not by arms or men. Government is not a personal matter, but an institutional one (Ferguson, 1965, p.16) and the rulers are not above the law. Tyranny is outlawed because most utopians equate it with government by men (Winstanley, 1965, pp.527, 534). The quality of government is not the only relevant element for attaining the *optima respublica*; the quality of the institutional framework is also vital. A radical reform of society was to be attained by the abolition of unfair and imperfect rules and by adopting new ones. Burton and Andreae considered real society (which could be labelled as dystopic) as the world turned upside down due to legal imperfections, while their own ideal societies were the *normal* societies (Burton, 1991, pp.61, 79; Andreae, 1999, p.177). Flawed rules, laws and formal institutions are at the root of social problems and bad habits. Those social maladies can be meliorated through the implementation of the legal systems described in their ideal societies.

All utopian thinkers are critical of law, but only one ideal society

model utilises law in spite of this criticism. 'All our utopists, irrespective of their country, denomination, or particular background, acknowledged the widespread discontent with the existing legal system and, except for those who rejected the entire subject and took refuge in fantasy, devoted much thought and space in their descriptions of imaginary societies to offering an alternative in the form of an ideal legal system.' (Eliav-Feldon, 1982, pp.110–11.)

### **Ideal Legal Systems**

The critique of law deserves further consideration, since it determined the kind of law which utopians advocated. The imperfections of real legal systems can be divided into the formal and the material. Formal imperfections derive from problems connected with law enforcement, elaboration of codes and so on, while material imperfections are caused by the disassociation of justice and legality. Law, as a formal framework, is imperfect because it is formed by a set of rules which are hard to understand, lengthy legal texts and unfamiliar or unknown laws. These formal imperfections make law unfair (Fuller, 1969, pp.38–9). A widespread idea among the authors of the utopian model was that 'codes of laws that are too long, extremely complex, open to different interpretations, and written in a language that most people do not understand, defeat their purpose' (Eliav-Feldon, 1982, p.111). These problems hamper purposive action, for which everybody must know their duties and obligations so as to adapt their conduct to them (More, 1999, p.85; Winstanley, 1965, p.590). The utopian solution is to simplify the complexity of the legal system, 'so that it will be possible to have a system in which every individual knows exactly what is right and wrong and what will happen if the taboos of the society are violated' (Sargent, 1975, p.92). More's Utopians 'think it completely unjust to bind men by a set of laws that are too many to be read or too obscure for anyone to understand' (1999, p.85). According to Zucchini, utopians have as a main objective the creation of legal certainty by a schematic system of laws, ordained and created by a lawmaker (1986, p.417). Therefore, the initial solution is to create a legal system with few laws: the Utopians 'have very few laws, and their training is such that they need no more ... for the laws are very few, as I said, and they consider the most obvious interpretation of any law to be the fairest' (More, 1999, pp.84–5). As Harrington states, 'the best rule as to your laws in general is that they be few' (1977a, p.187). In the utopian model, the

legal system is simplified, and that solution is part of the utopians' originality (Zucchini, 1986, pp.411–12). Legal rules in the ideal society are also interpreted in the simplest way and literally. Interpretation by judges, magistrates or lawyers, who may have bad intentions, is forbidden (Burton, 1991, p.51). Winstanley thought 'the bare letter of the Law' would be enough (1965, p.512). One of the discoveries of utopian thought is that the method of determining the sense and meaning of rules must be simple because even people without technical knowledge must be able to understand them, so that everybody is a legal expert. In these utopias, lawyers will disappear and the magistrate's work will be transformed because, although the magistrate is honest, intelligent and learned, he will be under the state's control. Nobody can interpret law because it is self-interpreting when its words are pronounced. There is a clear legal code which determines the sentence, and the function of the magistrate or judge is solely to determine guilt or innocence (Sargent, 1975, p.92). For instance, in *Sinapia* the laws do not give reasons, but just decree commands and prohibitions (*Sinapia*, 1976, p.116).

There is a third innovation: utopian laws are written in the vernacular and Latin or French are abandoned as the language of codification. The laws in Burton's utopia are going to be 'plainly put down, and in the mother tongue, that every man may understand' (1991, p.86). The fourth solution to formal imperfections is the publicity of laws. Winstanley considers the esoteric nature of law and ignorance of the law a serious problem in the real world: 'if there were good Laws, and the People be ignorant of them, it would be as bad for the Commonwealth as if there were no Laws at all' (1965, p.562). Therefore, laws must be public. Campanella proposed that laws should be written on bronze tablets and displayed on the columns of the temple (1993, p.185). (At Gortyn in Crete the laws of the city are inscribed on the outer walls.) Harrington also advocated a written system:

It shall not be lawful for the senate to require obedience from the people, nor for the people to give due obedience unto the senate, in or by any law that hath not been promulgated or printed and published for the space of six weeks. (1977a, p.281.)

The fifth problem is the enforcement of the legal rules. It is one of the most important problems, because the authors were critical of the fact that laws were not strictly enforced. Laws are made, but not observed, said the Clerk of the Market at the City of Oxford (Burton,

1991, p.51). Therefore, in the utopian model, laws are strictly enforced. In this, the utopian model contrasts with historical reality.

Strict law enforcement makes for inexorable laws, one of the most important aspects of the new legal system, because the utopians believe in the formative power of discipline (Oestreich, 1982, p.269). For laws to succeed as behavioural guides, they must be few, understandable, known, public, and enforced. Moral codes and educational systems, though necessary, are not adequate to control human behaviour. However, Davis thinks that 'the moral philosophy of More's Utopians was central to his whole design, and social morality has remained the issue central to utopianism' (1981, p.334). In my opinion, the role is central because morality is basic to the stability of social systems; moral principles can serve to obtain political obedience. The state therefore assumes the responsibility of supervising the faith and morality of its inhabitants (Eliav-Feldon, 1982, p.120). Campanella set up a caesaropapist utopia in which the chief ruler, Hoh, had secular and religious (that is, moral) powers (Campanella, 1993, p.146; Manuel and Manuel, 1984, p.109). More thought that the doctrine that the soul dies with the body had political relevance:

Who can doubt that a man who has nothing to fear but the law, and no hope of life beyond the grave, will do anything he can to evade his country's laws by craft or to break them by violence, in order to gratify his own personal greed? (1999, p.98.)

The utopian models include moral exhortation as just one of the instruments of social transformation, because alone it is not sufficient to impose a social order (Davis, 1991, p.330). Furthermore, although the educational system is important for reforming society because it moulds human behaviour, it too is not enough. Goodwin argues that education delineates acceptable and non-acceptable behaviours and sets up self-restraint mechanisms (1978, p.85). Moralia is a good example because this model is based on reform of human nature through education. The utopian model also utilises the educational system to condition human behaviour (Eliav-Feldon, 1982, p.57), but it is not the only instrument of social control. This relationship between morals, religious principles and educational control is made plain in *Utopia*:

The priests do the teaching of children and young people. Instruction in good manners and pure morals is considered no less important than learning proper. From the first they make every

effort to instil in the pupils's minds, while they are still young and tender, principles useful to the community. What is planted in the minds of children lives on in the minds of adults and serves to strengthen the commonwealth; its decline can always be traced to vices which arise from wrong attitudes. (More, 1999, p.102.)

In the utopian model, therefore, law, religion and education coexist as compatible methods for controlling human behaviour, and 'although these methods can be distinguished in principle, in practice they merge and overlap considerably, as control is usually achieved through a mixture of physical, intellectual and psychological devices' (Goodwin, 1978, p.86). The utopian model does not trust exclusively in law enforcement, since that would weaken the stability of the system, but also relies on spontaneous adherence to laws, achieved through morality and education. In spite of that, in Utopia, law is the last line of defence (Zucchini, 1986, p.415).

The goal is to control *all* behaviour and this is achieved through strict enforcement of rules (Tasso, 1999, p.300). In the utopian model, we find a system of legal rules for controlling public and private behaviour. For example, in Campanella's social system, the state rules everything, even the most personal sphere (Tasso, 1999, p.310). Comprehensiveness is therefore another of the legal system's characteristics, which implies the capacity to rule all the actions a man can take (Raz, 1991, pp.175–6).<sup>5</sup> There is normative intervention from birth to death. Thus, according to Winstanley: 'there will be Rules made for every action a man can do' (1965, pp.512, 528). During that historical period some behaviour, nowadays considered private, was regulated, and other kinds of behaviour, nowadays considered public, first began to be regulated. Hyper-regulation or comprehensiveness was not thought strange because the modern state had to increase its presence in society with new institutions and new areas of control (Oestreich, 1982, pp.138, 157). Comprehensiveness does not involve incoherence among rules; all the laws operate under the same principles. It means that every possible action is regulated and, moreover, everybody should act in the same way. Utopian society operates on a general rule: 'if the law did not say expressly that you could do something, you could not do it' (Sargent, 1975, p.91).

Comprehensiveness in utopia is a product of the state's preoccupation with the idea that every person and event is its responsibility (Eliav-Feldon, 1982, p.47). Every action is considered as a

possible cause of social disorder and there is no differentiation between the public and private spheres. The amalgamation of the spheres goes further because in that historical period, according to Oestreich, 'State and society were not separate entities, as they were considered to be in the early Nineteenth century, but formed a unity.' (1982, p.160.)

Historically, the main material and practical problem of the legal system has been the separation between law and justice. According to Zucchini, the crisis of contemporary legal systems was explicitly underlined in the Renaissance utopias by demonstrating the dramatic separation between legality and justice, a separation that the utopians wished to abolish by creating social justice founded on citizens' virtue and the virtue of the new social and institutional systems (1986, p.423). We should note, however, that non-utopian political thinkers also offered this critique of law. One of the roots of this separation is the behaviour of judges and lawyers in courts, where the sense of the justice of laws is lost. It is human beings who create this separation; human conventions cause deviation from the principles of justice. Laws have adulterated the sense of moral rules, as More understood. Positive laws ought to respect the material content of the superior moral rules. The proposed solution to this problem was natural law theory. The perfect civil law is the one based on natural law precepts which represent the original divine laws of justice (Eliav-Feldon, 1982, p.112). Agostino distinguished between divine law and human law (1957, p.21), and More maintained the priority of divine law:

Perhaps it will be argued that God's laws against killing do not apply where human laws allow it ... If mutual consent to human laws entitles men by special decree to exempt their agents from divine law and allows them to kill where he has given us no example, what is this but preferring the law of man to the law of God? (1999, p.22.)

He criticised the injustice of law in English society and asserted that there are two kinds of justice:

One for the common herd, a lowly justice that creeps along the ground, hedged in everywhere and encumbered with chains, and the other, which is the justice of princes, much more free and majestic, which can do anything it wants and nothing it doesn't want. (More, 1999, p.87.)

By contrast, in the utopian model, law is the means for justice (Zucchini,

1986, p.423), and the unfair social situation has disappeared:

At this point, I'd like to see anyone venture to compare this equity of the Utopians with the so-called justice that prevails among other nations – among whom let me perish if I can discover the slightest scrap of justice or fairness. (More, 1999, p.107.)

In short, law is an instrument for building the ideal society because it has been improved and these two deficiencies, formal and material, have been overcome. The new law is an instrument of justice because there is now no separation between the two.

### Conclusions

To conclude, the utopian ideal society model is based on legal rules. That is why Utopia can cope with scarcity, which is resolved by the setting up of a rational system for the distribution of goods. The imperfections of human nature can lead to deviant behaviour, which is eliminated by the rigorous enforcement of law and its sanctions. The legal system is perfect because it is immune to these imperfections. Law is free from external (human) influences because it has become an idealised instrument for maintaining social perfection. For this reason, 'the devices to be used – legal, educational, bureaucratic, and institutional – must not follow nature, since nature itself is deficient. Rather they must discipline man and nature to conform to them. Men must be made to conform to the law and not *vice versa* ... Laws were not to be moulded to men but men to be moulded by and to the laws.' (Davis, 1991, pp.371, 342.) The goal, in short, is to build a perfect legal and political system that resolves social problems and maintains social perfection for ever.

The early modern authors of the utopian model considered law as an instrument with positive social functions. They did not see law as an instrument for oppressing people, but later utopians started to see law as an instrument to create freedom and security (Davis, 1992, p.513; 1993, pp.28–9; Maravall, 1997, p.131). So, the negative sense of freedom is the one exemplified in early utopian models through the absence of the arbitrary and the contingent. The positive sense of freedom, or participatory freedom, refers to when men participate in self-government as citizens. This last sense, according to Furet, developed in eighteenth-century democratic theories, which offer the promise of freedom seen as autonomy (1998, p.65), although, in my opinion, it is possible to find this positive sense in Harrington's and Winstanley's

utopian societies, and even before (Carlyle, 1982).

The early utopian model of society is not a hellish 'closed society', because there was already a concept of negative freedom at this time and also because 'in comparison with the methods of law enforcement in contemporary Europe, the proposals of utopists were relatively lenient' and 'the Renaissance social reformers were blissfully ignorant of the experience of twentieth-century civilization with totalitarian regimes' (Eliav-Feldon, 1982, pp.125, 127). These utopian societies are authoritative, but not totalitarian, though 'the [most important] tendency in [the twentieth] century has been to equate utopia with force, violence, and totalitarianism' (Sargent, 1982, p.568). Goodwin argues that 'although a minority of utopians have seen coercion and even violence as a lamentable but necessary means to change, a survey of utopian literature does not establish anything approaching a *necessary* and *universal* association of utopianism with coercive means' (1980, p.395). It is true that utopian writers described societies in which the use of force would be necessary to achieve and maintain the new society, but, first, it is legal coercion, and, second, 'the utopian need be no more coercive than were the liberal founders of the welfare state' (Goodwin, 1980, p.396).

Evidently, using the law and the state as instruments to reform society is an ideological choice. State intervention in society through the law also implies a defined limit to the degree of intervention. Utopian political thought shows us the positive role these instruments can have; dystopian political thought, the negative. *Anomia* creates rules and sanctions less developed than legal ones and may permit an irrational use of power. *Anomia* creates a situation of fear and invites the tyranny of personal government. Law and the state are human instruments either for oppressing or for liberating people, and they are in our hands. Through law we can create *Dystopia City* or *Eutopia Island*. We choose.

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## NOTES

1. The origin of this typology is the one proposed by Colin Davis in his book *Utopia and the Ideal Society* (1981). I have altered the titles of each ideal society, though Professor Davis has kindly commented on his disagreement with some of them.
2. This typology seeks to set up distinctions between the different models of the ideal society, and it is founded on material, functional and historical elements. This typology can embrace some other typological schemas (Lewis Mumford, Lyman T. Sargent, Elizabeth Hansot or Judith Shklar), but it goes further because it resolves some of the problems that they create.
3. For an opposing position, see Dahrendorf (1994, pp.13–58).
4. 'Orders' means the basic rules of a society, which cannot be transformed by the ordinary rule-maker. Machiavelli talked about *ordini*, and Neville, according to the republican tradition deriving from Harrington, uses this term with the same meaning.
5. Joseph Raz affirms that comprehensiveness means that legal systems seek authority to rule all behaviour.

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