Episode 339 – How to Demonstrate the Existence of Rights
Guest: Frank van Dun
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WOODS: You've done very, very important work in the area of natural law, natural rights from a libertarian standpoint. These are issues that create confusion even in the minds of some libertarians, and I thought some clarification of them might be in order. To do that, I am referring to a couple of your articles. One of them is an article—I will link to both of these on the show notes page for this episode, by the way, which will be tomwoods.com/339, but the first one where I guess I probably spend most of the time has to do with contrasting the Universal Declaration on Human Rights with classical natural rights theory. Let's begin, therefore, with what is the idea of natural rights, or explain the idea of natural rights as a libertarian would believe it so that we can use that to critique the Universal Declaration.

VAN DUN: Well, the main difference, of course, is that natural rights as I understand them are rooted in the notion of natural law. So you have to start with natural law and then go to natural rights. And then if you want to speak about human rights as they are understood since the second half of the 20th century, you have to move away from natural law, because there is really no connection between human rights and natural law. So if I may, I will start with the natural law concept rather than strictly with natural rights, which comes second.

WOODS: Well, certainly, in fact, of course, the very idea—the very words natural law are extremely controversial in our day and age, as you well know.

VAN DUN: Yes, of course, it's a word with a long history and history is never very kind to words, so when most people hear about natural law, they have in mind who knows what kind of theory of it. But you have to go behind the words to a sustainable concept, so to speak, a concept that makes sense, and it's rather fortunate that in English we speak of natural law. Whereas in Latin, for example, you would speak of the *lex naturale* or something like that—a law and *lex* are two different concepts. The English word "law" originally meant order. So the natural law is basically the natural order, not the natural order of nature or the natural order of the Universe or something like that, but the natural order of the world, and the world is the human experience, all human affairs, all things that are either human persons or dependent for their existence on the activities on human persons. So the question for natural theorists is, what is the natural order of the world? And the first question you ask about an order is what kind of distinctions do you have to make in order to get the order? For example, if you are

ordering your library, you have a variety of distinctions that you may make. Books are different because of their orders, their titles, their sizes, their colors, whatever.

So you can order according to different distinctions. Now if you look at the world that is the age of man—the human experience. The three most basic distinctions, which you cannot bypass in any case, are first, the distinction between a person and a non-person—an animal or an object—second, the distinction between one person and another, and third, the distinction between what belongs or is what is part of one person's life and part of belongs to another person. But you respect those distinctions in your actions. Your actions are in order with the world. If you start treating people as you would treat an animal or an object, you are no longer acting according to the natural order of the world, the natural law of the world. Similarly, if you mistake one person for another, you are confusing the world of persons, and confusion is the opposite of order. And again, when you are taking or being taken by other person or what belongs to another person, then of course, you have all these sources of conflict in the world—confusion, conflict—all these things undermine the order of the world. So the basic idea of natural law—and this goes beyond any things that may add to it—but it is the basic conception of natural law that these distinctions ought to be respected, and that means ought to be respected by human beings because as far as we know, here on Earth these are the only beings or things that are able to respect or disrespect order.

So that's the basic idea. The idea of libertarian rights is, of course, derived from that in the sense that persons have rights as against non-persons, who have no rights. Every person is who he is and not somebody else, so that these rights are personal also in that sense, and they extend to what people do and accomplish in the world—what they say their works, their products as well. So that is in a very short overview the link between natural law as the natural order of the world and the libertarian conceptions, or rather concept, of personal rights. Does that make sense?

WOODS: It does although you can imagine, and I am sure you've encountered critics who will say that there are as many versions of natural law as there are philosophers, and so really, natural law is just a way for philosophers to conceal their own, already-existing ideological prejudices. Now, I don't have to agree with that, but I know that that's often stated. I am sure you've responded to that at one time or another.

VAN DUN: Yes, of course, but if you look at the literature on natural law, this is not usually stated in distinctions that, in fact, every person who is not completely insane can make distinctions; distinctions between persons and non-persons and so on. But it is usually stated as if it as not an order we are talking about, but as a system of rules, right? And then if you go back in history, you find that the, for example, Thomas Aquinas when he speaks of natural law, he brings the concept, as it were, logically under the concept of rule, right? It's a measure rather than a distinction to found an order, and if you look at the further development of theories of natural law, they become ever more normative rather than stating the conditions of order in the world and you can also say peace in the world; the conditions of peace, orderly co-

existence, orderly conviviality—the way people deal on a friendly basis with each other. It is quite true that people have used the concept of this is natural for their own preferences, but the concept I have outlined at the beginning is not dependent on my preferences, but on the fact: can you or can you not make a distinction between persons and non-persons, between one person and another, and between what one person says and does and what another person says or does, right? So this is not quite the same concept. In fact, it is a very different concept from that, which looks like natural law as a system of rules that serves and has used very often to justify particular policies for regimes or whatever, and that is, of course, an objectionable conception of natural law.

WOODS: Now that you've described the natural order of the world, how can we concisely describe what people's individual rights consist of?

VAN DUN: Well, if you used the language of rights, it's of course, also a very ambiguous language, as you know, but in terms of rights to being treated is, first, the right to be treated as a person, the right to be treated as the person you are, and second, the right to be treated as the author of the things you do, being respected as the author of the things you do and say rather than being treated as some distant cause of what another can appropriate.

WOODS: I wasn't planning to ask this, but how do the so-called rights of animals fit into this? Some people have argued that animals have some kind of rights, certainly, maybe not what human beings have, but certainly more than a stone might have. How does your outlook come down on this and explain this?

VAN DUN: Well, if you are looking for animal rights, you won't find them. You find rights only in speech, in argumentation, in the, let's say, intellectual intercourse of people. It's not something that you can find. We may attribute rights to animals. We human beings can do that. We can attribute rights to anything whatsoever, but that does not make having rights or not having rights an element in the life of animals or say the life of a beautiful building. It's not something that belongs to that thing in itself. We can ascribe rights to anything. So people who say animals have rights: they say that to other people, but it does not make sense if you say, well, what is having a right to an animal. And if you start losing the distinction between persons and non-persons, then you get to enter into all these weird sorts of arguments and say, well, if animals don't have rights, people don't have rights because they are animals, too, or if people have rights, then animals have rights because they are just as much animals as we are, but then you overlook the basic distinction between persons and non-persons between being able to act as a person to take responsibility, to be willing to answer for questions, to be answerable when you do something that hurts another or harms another or seems wrong to another. The whole dimension of right in the sense of which it is opposed to wrong is lacking, as far as we know, in the rest of the universe. It is only in the intercourse of intelligent, rational animals—human beings—rational animals, as they were called, that is the distinction between right and not right is made, and of course, if you say the right where people have right, logically speaking, this can be only a right to do right. There can be no right to do wrong. So logically or from a

philosophical point of view, it does not make sense to speak of animal rights unless you can say, or are prepared to say, that animals can do wrong or that buildings can do wrong or that the oceans can do wrong.

WOODS: Again, I wonder if a critic might say that perhaps animals, though, being sentient and being able to feel pain might occupy some kind of middle ground somewhere, and we can draw that conclusion from the moral intuition we have that while there is no moral problem with mistreating an automobile or a microphone or a Frisbee, there does seem to be something wrong with being gratuitously cruel to an animal. Where is that moral intuition coming from if not from some kind of special status that an animal has that other non-human entities do not?

VAN DUN: Well, I should say that it does not come from a special status of animals, but from the fact that we have certain sympathies and a closeness to certain animals and not to others. Cruelty to animals is, of course, something most people do not like, but that does not mean that any right of an animal is harmed or violated or whatever. It is something we do not like, and we can strengthen that claim by saying animals have rights, but that doesn't change anything for the animal itself, and when a lion attacks and eats an antelope, are you going to say that the lion is violating a right of the antelope? So it does not really enter into the object of animals apart from human, rational animals—the concept of rights.

WOODS: All right, let's shift gears because I do want to talk about the Universal Declaration of Human Rights from 1948. What is this document? And can you list for us some of the rights that you'll find in there that are not compatible with the classical, natural rights theory?

VAN DUN: Well, first of all, it is a historical document that was put together by the victors of the Second World War and these people were not, as it were, acting philosophically. They were trying to promise to the world that their victory would bring well-being and welfare and wealth to everybody, and indeed, everything that was according to the aspirations of mankind as they called them. So it was more a political program than a document about the law of the world, the order of the world. As far as I remember from my student days, it was not considered very important by lawyers. It was a sort of declaration of intention, not a declaration of rights in the classical sense where it was you have these rights. The Universal Declaration of Paris of Human Rights stated that we states commit ourselves to fashion our policies according to the following propositions. And the language they used was indeed the language in which the rights figured prominently, but only in the context of every man has a right to something, independently of whether that man has done anything to achieve it or even express—it's one thing to have it or his willingness to invest to acquire it. This was just, we assume that everybody aspires to be well educated, to be a basic income, or a secured income, to have a decent standard of living, to be well treated, and so on. This was an assumption of what people want, not of the rights people have. That's the basic distinction. So this idea that your wants determine what you want determines your rights other than what you are.

WOODS: You have in the article a vivid example of how we might think about one of these so-called rights being enforced, and I think this is a very useful thought experiment that I have used myself. You imagine two people on a desert island trying to enforce their, I don't know, their right to an education on each other, or their right to a paid vacation. What would be the outcome in that case?

VAN DUN: Well, the outcome would be that the strongest wins. If I want you to provide me with a pension or an education—whatever, and you want me to provide you with it, then either we give up and withdraw each into his own part of the island, or we fight it out so that it's a war of all against all that ultimately decides unless we quit from each other as much as from the community on the island, we are no longer part of it. So we withdraw. But if we cannot withdraw or will not withdraw, we end up in a war, and then it's the victor who sets the rules, right? And he will say, you provide me with what I want.

WOODS: So strictly speaking, when we say that people have a right to life, liberty, and property, let's say. When we talk about a right to life, what we really mean if we want to be precise about it is a right not to be killed. It's not a right to life. You don't have a right to a kidney dialysis machine to be kept alive. You have a right not to be killed. You don't have a right to property. You have a right to enjoy your property unmolested and not have it taken from you. So this is, I think, the proper way to understand the negative rights of the classical view.

VAN DUN: Yes, where the right to things—the right to something or to many things is concerned. That's exactly correct, what you say. These things are scarce. They have to be produced. They have to be maintained. You cannot simply say because I wanted somebody else or everybody else should see to it that I have it. Whereas in the negative rights of which you speak are easily accomplished by saying, okay, you want an education—see that you can get it, and I am willing to help you, but not by being say made into your Greek slave to give you a Roman gentleman's education.

WOODS: I am going to, by the way, link on the show notes page to your website. It's not a page that's easily given out online. So I'll link to it at tomwoods.com/339 so that people can read more of your work. You have quite a few articles there and a number of other resources. I appreciate the discussion today. This is a conversation that libertarians love having, talking about rights. But on the other hand, there are libertarians, I might add, who really don't think rights talk is all that important; that we can justify the entire libertarian apparatus from a strictly utilitarian standpoint. Do you see any flaw in that?

VAN DUN: Yes, I do, because when you think in terms of utility, utility maximization and so on, you lose, as it were, the right to talk about rights. When you talk about rights, one question you have to answer is how do you know it is right—how do you justify your claim that it is right. Now the utilitarian has basically no answer for that question. What he says is we will go about and see what maximizes utility and since we do not know that beforehand we'll try it out, and that may lead to a war if one party does not give in, or it may lead to some sort of negotiation,

or it may lead to a parting of ways. But you cannot justify anything outside the context of argumentation. That's how the concept of natural law, natural rights, in my view, links up with the ethics of argumentation, which is, of course, also discussed and contested in many libertarian circles. But you have to make a distinction that's basic for me, a distinction between questions that can solved by argumentation and questions that can be solved by negotiation, and the thing that strikes me as irrefutable when you pose these two questions: What can be solved by argumentation? What can be solved by negotiation? It's this: What can be solved by the one is a question that can only be solved by argumentation, not by negotiation because negotiation can always be the strong against the weak can always be subjected to exploitation by the one who has the momentary advantage. So you have no compelling reason for any rule. Every rule may be renegotiated whenever the circumstances change, and that of course, gives no certainty or no basis for making judgments about what is right and what is not right. Every judgment has to be linked to a particular situation of particular individuals at a particular time, and two streets further on, a similar situation may be resolved in a completely different way merely because the parties doing the negotiation are different or have different relations to one another.

WOODS: Well, I think I am going to leave it there. I will link also to the general subject of argumentation ethics, which could obviously be an entire program in and of itself, and I find it quite interesting too, and as you say, it has been discussed in libertarian circles and been the source of additional controversy, but we'll leave things off here. I will link people to your site over at tomwoods.com/339, and thank you very much for helping to clarify a lot of these ideas for us.

VAN DUN: Thank you. It was my pleasure.