THE END OF HUMAN RIGHTS

CRITICAL LEGAL THOUGHT AT THE TURN OF THE CENTURY

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A Brief History of Natural Law: II. From Natural Law to Natural Rights

I. THE STOICS AND NATURAL RIGHT

The Romans adopted the Greek approach to justice and Roman law developed into the most advanced ancient legal system. The Latin words for justice and law derive from the same root, their semantic field is the same in Greek and Latin (*dikaion* and *jus* for right/law; *dikaiosyne* and *justitia* for justice). The Roman *jus*, like the Greek *dikaion*, was both the lawful and the just,[1] the aim of the jurist in each dispute was to serve justice by aiming at the just solution (*jus, id quod justum est* and *jus objectum justitiae*).[2] The first lines of the Digest state that *justitia est constans and perpetua voluntas jus suum cuique tribuendi* and that law derives from justice: *est autem a justitia appelatum jus.*[3] And when the Digest says that *jus est ars boni et aequi* or that the object of justice is *honeste vivere, alterum non laedere, suum cuique tribuere*,[4] it follows the Aristotelian conception of particular justice.

For the Roman jurist, as for the Greek, the *jus* was not a collection of rules but the just and rightful outcome of a dispute. The Digest says that "our proper civil law is not written but consists solely of the interpretations of the jurists".[5] The opinions of the jurisconsults started being written and eventually acquired a persuasive force for

[1] Some legal historians derive the etymology of *jus* from the Latin *jussum* and *jubeo*, to order. This possible association has been used to link *jus* with legal positivism. But *jubere* does not mean commandment in Latin. The semantic field of the Greek *dikaion* with its link between just and lawful influenced the Latin and led to a similar link. See Michel Villey, *Le droit et les droits de l'homme* (Paris, P.U.F., 1983) 39, 48.

[2] Thomas Aquinas, *Summa Theologiae*, 2.2ae.57.1.

[3] *Digest* 1.1.10 Ulpian; *Institutes* I.I.

[4] The full passage is: "*Justitia est constans et perpetua voluntas jus suum cuique tribuendi: 1) Juris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere; 2) juris-pudentia est divinarum atque humanorum rerum notitia, justi atque injusti scientia*". *Digest* I,1, 10, Ulpian.

[5] "*Aut est proprium jus civile, quod sine scripto in sola prudentium intepretatione consistit*". *Digest*, I, 2. 2, Pomponius.

later cases but the method remained dialectical and casuistical. "Starting from the study of just and unjust determinations, jurisprudence rises to general knowledge and comes to formulate 'definitions', 'rules', 'verdicts' – opinions of the jurisconsults".[6] The *jus civile* is a collection of just decisions and jurisprudential rules, of the procedural decrees of the magistrates and, later, of the decrees of jurists of the imperial court and has little affinity with contemporary systems of law, except with the common law before the assault of the European codifying spirit. The Digest states clearly that "the rule describes a reality briefly. The *jus* does not derive from the rule but the *jus* that exists creates the rule".[7] The *jus* designates the just share of each citizen in his relationship with others. The *jura* are not individual rights but real entities in the world, "objective" relations amongst citizens. They are often things and especially incorporeals but they include also institutions, such as the marriage, paternity or trade. Gaius lists amongst the *jura* "the *jus* of building houses higher and obstructing the light of neighbouring houses, or not doing so, because it obstructs their light; the *jus* of streams and gutters, that is of a neighbour taking a stream or gutter overflow through his yard or house".[8] Cutting through the contemporary distinction between rights and duties, the *jura* refer also to citizens' civic duties and burdens. The duty to serve in the army, for example, is a *jus* and, the brutal execution of a parricide is also called the murderer's *jus*. But predominantly, *jus* is the just outcome of distribution, the calculation of the just proportion amongst external things shared by the citizens. It is also the end of the just act or judgment, the aim of the art of law (*id ad quod terminatus actus justititae*). For the classical lawyers, "*jura* are plainly not rights in the modern sense".[9] As Michel Villey has argued, in Ulpian's definition of justice as *suum jus cuique tribuere*, the *jus* refers not to an individual right but to the just share or due determined within an established structure of relationships and varying with each person's status and role.[10] Like the Greek *dikaion*, therefore, the *jus*

[6] Villey, op.cit., supra n. 1, 66.

[7] "*Regula est quae rem quae est breviter enarrant. Jus non a regula sumatur sed a jure, quod est, regula fiat*". *Digest*, 50, 17, I Paul.

[8] *The Institutes of Gaius* (F. De Zalueta ed., Oxford, 1946), I.

[9] Richard Tuck, *Natural Rights Theories* (Cambridge, Cambridge University Press, 1979) 9.

[10] Michel Villey, "Les Origines de la notion du droit subjective" in *Leçons d'histoire de la philosophie du droit* (Paris, Dalloz 1962) 221–57; *La Formation de la Pensée Juridique Moderne* (Paris, Montchrétien, 1968). It has been argued that the concept of the Romans and early glossators closest to individual right is not *jus* but *dominium* with its implications of property, possession and control and to that extent Villey is wrong. For a review of this debate, see

differs both from a moral code and from a system of positive laws regulating conduct.

Aristotelian concepts of legal justice survived and thrived in Rome, where the Stoic ideas of natural law, simplified and transformed by Cicero, were also applied for the first time. As the Greek city-states started dissolving, first in the Macedonian and later in the Roman Empires, the idea of a law common to all imperial subjects, of a *jus gentium*, started to take hold. The Stoics had stayed away from direct political involvement, but the morality of universal humanity, which they espoused and based on norms deriving from rational human nature, could be used equally well to restrain the irrational passions of individuals and ethnic and local nationalisms, in favour of a new cosmopolitanism. The Stoic Chryssipus, for example, described universal humanity as a nation, while for Posidonius, the world was "the commonwealth of gods and men".[11] But it was Cicero, an eclectic Stoic and a pragmatic lawyer and politician, who turned the rational universality of Stoicism into the legal ideology of Rome.

Cicero rationalised Roman law and claimed that many of its central tenets could be traced back to universal rational norms. In the process, the Stoic "common notions", through which men partook of universal reason and became aware of its dictates, were psychologised. The *orthos logos* or right reason of the Greeks, which united natural necessity with the laws of reason, was turned into the *recta ratio* of good sense, "though of course as a common sense that has become the supreme source of law".[12] When the Roman jurists spoke of *jus naturale* or used nature to explain or qualify legal concepts, their terms had less of an Aristotelian tint and more of a practical import: "For 'natural' was to them not only what followed from physical qualities of men and things, but also what, within the framework of that

Tuck ibid., 5–39. Michel Villey's response was that while *dominium* meant mastery over words or things, it was not a legal construct but a pre-legal reality restricted by law. For Villey, the whole structure of language in Rome was built around concepts different from ours in which the concepts of the subject and subjective rights had no place. See *Le droit et les droits de l'homme* op.cit., supra n. 1, 74–104. Tuck agreed that the "classical Romans did not have a theory about legal relationships in which the modern notion of a subjective right played any part", ibid. at 12. He differs from Villey, however, who believed that subjective rights were introduced after the nominalist revolution in the 14th century, and argues that the first glossators collapsed the concepts of *jus* and *dominium* in the 12th century and created the origins of a theory of rights. For an exhaustive review of the debate, see Brian Tierney, *The Idea of Natural Rights* (Atlanta, Scholars Press, 1997) Chapter I.

[11] Quoted in Ernst Bloch, *Natural Law and Human Dignity* (D. J. Schmidt trans.) (Cambridge, Mass, MIT Press, 1988) 14.

[12] ibid., 20.

system, seemed to square with the normal and reasonable order of human interests and, for this reason, not in need of further evidence".[13] Still, the Roman *jus* continued to signify a set of objective relations in the world and, like Greek law, did not have a concept of individual rights. And while Aristotle and universal legality may have pragmatically coincided for a brief period, through the needs of the Roman Empire, they soon diverged again. Aristotelian justice made its last grand appearance in the writings of Thomas Aquinas and then gradually descended into positivism. The natural right tradition, on the other hand, influenced by Stoicism and Christianity, moved towards a command-theory of law and a subject-based interpretation of right and prepared the modern conception of human rights. Let us examine closer some of the main elements of Stoic thought which, misdigested and eclectically revised by Cicero, exerted such immense influence on later political and legal thought.[14]

The Stoic teaching radically changed both the classical method of arguing about the naturally right and the content of nature, the source of law. Nature became the source of a definite set of rules and norms, of a legal code, and stopped being a way of arguing against institutional crystallisations and common opinions. The Stoics were the first pagans to believe that natural law was the expression of a divine reason which pervaded the world and made human law one of its aspects. Cicero's famous quotation from the Republic is worth quoting at length:

> The true law, is the law of reason, in accordance with nature known to all, unchangeable and imperishable, it should call men to their duties by its precepts and deter them from wrongdoing with its prohibitions . . . To curtail this law is unholy, to amend it illicit, to repeal it impossible; nor can we be dispensed from it by the order either of senate or of popular assembly; nor need we look for anyone to clarify or interpret it; nor will it be one law in Rome and a different one in Athens, nor otherwise tomorrow than it is today; but one and the same law, eternal and unchangeable will bind all people and all ages; and God, its designer, expounder and enacter, will be the sole and universal ruler and governor of all things.[15]

This God-given, eternal and absolute natural law had little to do with the natural right of the Sophists or of Plato and Aristotle.

[13] Ernst Levy, "Natural Law in Roman Thought", 1949 *Studia et Documenta Historiae et Juris* 15 at 7.
[14] Michel Villey, *Histoire de la Philosophie du Droit*, Paris (4th ed., 1975) 428–80.
[15] Cicero, *Republic* (N. Rudd trans.) (Oxford, Oxford University Press, 1998) III, 22.

Next, the concept of nature. The Aristotelian nature was a normative concept which combined the essence of a thing with its potential for growth and perfection, the efficient and final end of the cosmos and of all beings and things. Stoic nature was much more static. Its normative character was retained but became an omnipresent and determining spirit (*pneuma*), the *logos* or reason found as seedling in everything. This omnipotent *logos* unites man and world; in humans, it acts like the artist's fire:[16] it begets and sculpts the body and makes it cohere by assembling its components (*logos spermatikos*).[17] But it also commands the whole world, in the same way that the emperor commands his empire. Diogenes Laertius wrote that nature "is the force which constrains the world . . . a stable force which derives from itself, produces the seminal reasons and contains what comes from it".[18] Nature was therefore ontologised and spiritualised: it became the creative spirit or life principle which, in its pure state, is God while in man resides in the soul. The soul, Cicero's *vis innata*, is an internal force which unites human with divine *logos* and makes them discern the law of nature, which they are bound to observe.

Natura initium juris said Cicero.[19] The law, human institutions, rules and all worldly order proceed from a single source, all-powerful nature, the sole *fons legum et juris*[20] and *logos* discloses them to man. Nature commands, it is a moral precept which orders men to obey the sovereign *logos* which rules history. Natural right became a matter of introspection and revelation rather than of rational contemplation and dialectical confrontation and led to an abstract morality of precepts which anticipated Kant. As a result, two possibilities were opened. In the first, nature, with its principles of human dignity and social equality, was retained as a category of social and legal opposition and as the content of right. The second and dominant, however, equated natural with positive law and the real with the rational and anticipated Hegel. It privileged the passive and private morality of the happy soul and sanctioned existing institutions, social hierarchies and inequalities with the imprimatur of reason and nature. *Physis*, which had started its career in opposition to *nomos*, came finally to be identified with it.

[16] Cicero, *De natura deorum* (R. W. Walsh trans.) (Oxford, Clarendon, 1997) II, 22, 57.
[17] ibid., II, 11.29; II.22.58.
[18] Diogenes Laertius, VII, 148, quoted in Villey, supra n. 14, p.440.
[19] Cicero, *De inventione* (H. M. Hubbell trans.) (London, Heinemann, 1949) II, 22, 65.
[20] Cicero, *De Legibus* (N. Rudd trans.) (Oxford, Oxford University Press, 1998) I,5.

How could one find the content of this natural law? The right reason or *recta ratio* proceeds from the God of *logos* and its commands are placed in the conscience, through the "common notions" mentioned above. The logos has been inscribed on the soul and the paramount duty is to follow its commands. The sage does not need to observe nature or the city but only to listen to his inner voice. Stoicism became a religion with reason its god and law, and with natural right closer to the private morality of conscience than to the classical legal method. The Stoic concepts of nature and law had more in common with Christianity than with Aristotle and led directly to the modern idea of human nature. Let us summarise some Stoic innovations which paved the way to the legal humanism of the moderns.

The law no longer derives from external but from human nature, man's reason. Man is celebrated as a rational being and is given a pre-eminent position above the rest of nature, against Aristotelian physics, in which the force of nature harmonised and hierarchised humans and animals.[21] As a result, while nature and reason were initially closely connected, reason eventually came to replace nature as the principal source of law. Following its commands is to follow our nature. But reason is also rationed and not everyone had equal access to it; the surest guide to its commands is the reason of sages (*ratio mensque sapientis*).[22] Thus, the idea that the legislator or judge is the mouthpiece of the spirit or reason of law entered the historical stage.[23] Finally, law and the just reside in the collection of legal and moral rules discovered by the human spirit. The *dikaion* of the Greeks and the *jus* of the Romans became identified with a set of laws *leges* and became a system of rational rules, discovered by the reason of the sages.

Jacques Derrida has called the dominant tradition of Western metaphysics, "logocentric".[24] In the Stoics, we find the first expression of a philosophical and ideological construction we have called "logonomocentrism".[25] It identifies the *logos* as reason with the law

[21] Cicero provides a further similarity: prefiguring Grotius, Puffendorf and the 17th century naturalists, he starts with human nature in order to explain the nature of society and law. In *De Legibus*, I. 5 and in *De Officiis* (M.T. Griffin and E. M. Atkins trans.) (Cambridge, Cambridge University Press, 1991) I. IV.11, Cicero gives a legally relevant list of human traits and inclinations which include, *ala* Hobbes, self-preservation, etc.

[22] *De Legibus*, II. 4.

[23] Cicero claims in *De Legibus* that the universal reason and the rules of the sages come from Jupiter (II. 4).

[24] Jacques Derrida, *Of Grammatology* (G. Spivak trans.) (Baltimore, The John Hopkins University Press, 1974).

[25] Costas Douzinas and Ronnie Warrington with Shaun McVeigh, *Postmodern Jurisprudence* (Routledge, 1991) 25–8.

and presents rational rule as the foundation and spirit of community. Being is equated with presence, with what is present in consciousness, and with the primacy of *logos* as *nomos*. Indeed, being is present in law and this immanence gives rational law an ontological pre-eminence. Rationalism, the cult of the legislator and of rules associated with legal positivism, the celebration of individual rights which derive from human nature, they all appear for the first time together in late Stoic thought and Cicero. But law's ontological dimension also promotes ideas of human dignity and social equality. The law as reason that begets the world pushes towards an, admittedly abstract, fraternity of all humankind. In this latter aspect, Stoic natural law remains one of the most honourable chapters in the history of ideas and is linked with the later theories of natural and human rights.

But the main force moving the law towards a theory of natural rights was its gradual christianisation. Jewish cosmology did not possess an inclusive and purposive concept of the cosmos. For the Jewish religion, the universe is the creation of God. It displays his omnipotence and presence precisely through his absence and, as such, it cannot acquire the autarchic normative weight of the Greek *physis*. Similarly, Christianity claimed that the world had been created *ex nihilo* through the free act of God. Nature, the invention of Greek philosophical imagination, was turned into the creation of an all-powerful being. The cosmos was reduced to the natural universe; the natural ends given to all things and beings were turned into their providential position in the plan of salvation, and teleology became eschatology. Nature retained a limited only normative character "expressing in time what from all eternity resides in God" and confirming and complementing divine law.[26]

The seeds of Christian natural law could be found perhaps in St. Paul's statement, inspired by Stoic teachings, that God has placed a natural law in our hearts (Rom 11.15). This was the beginning of the idea that conscience is the rule of God ingrained in the heart. After the victory of Christianity, the *jus* became intertwined with morality and took the form of a set of commandments or rules, the paradigmatically Jewish type of legality. Eventually, the Christian Fathers, commenting on the Bible, started using the term *jus* to mean divine command and, natural law to signify the Decalogue. Gratian's *Decretum*, published in the twelfth century, stated that the natural law is contained in the Gospels and is "antecedent both in point of time

[26] Louis Dupré, *Passage to Modernity* (New Haven, Yale University Press, 1993) 30.

and in point of rank to all things. For whatever has been adopted as custom, or prescribed in writing, if contrary to natural law is to held null and void . . . Thus both ecclesiastical and secular statutes, if they are shown to be contrary to natural law, are to be altogether rejected".[27] This usage was adopted by the medieval canonists and, finally, in the fourteenth century, *jus* came to mean individual power or subjective right.

A crucial link in the christianisation of law must be sought in Augustine's theory of justice which combined some of the characteristic difficulties of Plato's metaphysics and Aristotle's rationalism. Aristotle believed that a secularised version of *dike*, the order of the world, still existed and just laws and constitutions were part of it. His identification of law with justice was therefore a way of strengthening the authority of law, while retaining the dynamic character of justice according to nature. Augustine, on the other hand, equated the two in order to undermine the authority of law of the still pagan Roman Empire. He defined justice, like Aristotle, as *tribuere suum cuique*. But while for Aristotle, a man's due was determined by the *ethos* of his *polis* and the judgments of the practically prudent, for the Christian bishop, man's due was to serve God. The virtue of justice was defined as *ordo amoris*, the love of order: by attributing to each his proper degree of dignity, justice leads men to an ideal state in which the soul is subjected to God and the body to the soul. When this order is absent, man, law and state are unjust. Justice is therefore the love of the highest good or God.

> Where, then is the justice of the man, when he deserts the true God and yields himself to impure demons (as the romans do)? . . . Is he who keeps back a piece of ground from the purchaser, and gives it to a man who has no right to it, unjust, while he who keeps back himself from the God who made him, and serves wicked spirits, is just? . . . Hence, when a man does not serve God, what justice can we ascribe to him . . . And if there is no justice in such an individual, certainly there can be none in a community composed of such persons.[28]

Unjust law is no law and an unjust state is no state. Without justice, states become great robberies. "Where there is no true justice there can be no law. For what is done by law is justly done, and what is unjustly done cannot be done by law. For the unjust inventions of

[27] *Decretum*, D. 8, 2, 9.
[28] *De Civitate Dei* (M.Dods, J.J. Smith and G. Wilson trans.) (Edinburgh, 1872) Bk IV. Ch. 4.

men are neither to be considered nor spoken of as rights."[29] Augustine's denunciation of the injustice of the pagan state and its law was a consequence of his deep pessimism about the human condition. The original sin and the fall made it impossible for secular law and justice to redeem people from evil. We can never know fully God's wishes, and justice will always remain a promise that cannot be fulfilled in this life. Justice is a divine attribute which does not belong to this world. Indeed, our fallen nature is so ignorant that we cannot fully understand even fellow humans. Christian princes and judges, despite good intentions, cannot expect therefore to understand people well enough to pass correct judgments. Secular justice is a misnomer and a poor approximation for the justice of God and, while necessary, its success will always be limited. As Judith Shklar puts it:

> justice fails on two grounds, cognitive and practical, and the realm of injustice is revealed to be so extensive that it is quite beyond the cures of even effective political law and order . . . In the Augustinian vision injustice embraces more than those social ills that justice might alleviate. It is the sum of our moral failures as sinful people, which from the outset dooms us to being unjust.[30]

But while injustices are denounced, the earthly city is called the *civitas diaboli*. Its laws come into existence and are called just out of necessity. The function of states and laws is to coerce men, restrain their *cupiditas* or infinite desire and keep the peace in these cities of the devil. The state has no intrinsic legitimacy therefore and even the most successful nations are certain to decline and fall. Its limited utility is to meet internal and external violence with violence. Against the classical tradition, Augustine argued, that not only does "the removal of justice not lead to the breaking up of a state, but in fact there never has been a state that was maintained by justice".[31] The few predestined to be saved will stay in *the civitas terrena* as *peregrini*, itinerant foreigners, until they join the realm of true justice in the city of God after this life.

Augustine gave religious expression to the strengths and difficulties of classical theories of justice. He agreed with Plato that we can neither fully know nor achieve justice in this world. But while all attempts are bound to fail, we must continue the doomed quest

[29] ibid., Bk XIX, Ch. 21.
[30] Judith Shklar, *The Faces of Injustice* (New Haven, Yale University Press, 1990) 26.
[31] Dino Bigongiari, "The Political Ideas of St. Augustine", in St. Augustine, *The Political Writings* (Henry Paolucci ed.) (Washington D.C., Gateway, 1962) 346.

through laws and institutions which will never achieve what they promise. With Aristotle, Augustine accepted that justice is *suum cuique*. But the love of God replaced the *poli*tically situated love of justice and judgments lost their flexibility. They became both more certain, in an attempt to imitate God's absolute justice, and impossible since the gap between God and humanity is unbridgeable. Justice, identified with God's love, does not belong to this world; injustice becomes the condition of humanity. And yet, Augustine's inward turn to the self in his *Confessions*, his emphasis on the justice of a sovereign legislator and on the coercive role of state power prefigure the jurisprudence of modernity. At the same time, his city of God redefined the idea of utopia for a Christian audience, as a place of unblemished well-being. The Stoics had placed their utopia in a mythical past, while the city of God belongs to an unknown but predetermined and certain future. Augustine has been called a "prophetic utopian", the "chief source of that ideal of a world order which is haunting the minds of so many today" but also a "Macchiavelian".[32] If we bracket his Christian metaphysics, he is the first political philosopher who both accepted and legitimised the might of the state and proposed a higher justice which state law flagrantly violates. Augustine's Christian peregrines were asked not to contrast the two but "to tolerate even the worst, and if need be, the most atrocious form of polity".[33] But the juxtaposition between heaven and earth and their sharp separation had created the conditions for their eventual comparison and combination. As the two-world metaphysics was gradually weakened, the time came when the principles of heaven were made to justify first and to condemn later the infamies of earth.

II. THE RELATIVE NATURAL LAW OF THOMAS AQUINAS

The classical theory of *dikaion/jus* survived in part in the work of Thomas Aquinas. Ulpian had defined jurisprudence as the search for just solutions carried out through the knowledge of things[34] and Aquinas' theory of right faithfully followed this definition.[35] Michel

[32] Etienne Gilson quoted in "Introduction" to *The Political Writings*, op. cit., supra n. 31, vii.

[33] *De Civitate Dei*, op.cit., supra n. 28, XVIII, 2.

[34] *Digest*, I.1.10.

[35] The First Article in *Summa's* chapter on Justice states categorically that the object of *jus* is the just or right and offers the Philosopher (Aristotle) as main evidence for the

Villey has forcefully argued that, despite the Christian influence, Aquinas remained an Aristotelian in many respects. Villey finds Aquinas' specific contribution to jurisprudence not in the often cited chapter on Law of the *Summa Theologiae* but in the less frequently examined chapter on Justice. The similarities between Aristotle's general justice and Aquinas' *justum* are striking.

> [T]hat which is correct in the works of justice, in addition to the direct reference to the agent [which pertains to all the other virtues], is constituted by a reference to the other person. It is the case, therefore, that in our works, what responds to the other, according to the demands of a certain equality *aequalitatem* is what is called right *justum*.[36]

The strong link remains when we move from general to particular justice. The various Aristotelian meanings of *dikaion/jus* are retained: *jus* is the lawful and the just, justice, as a juridical activity, is the art through which the just becomes known and which tends towards establishing a just state of affairs. As the object of justice, *jus* is again a legal quality inherent in a external entity, an objective state of affairs rather than a subjective right, for which Aquinas has no word or concept. The *jus* as just outcome is an arrangement of things amongst people that respects, promotes or establishes the proportion or equality inherent in them, and these proper relations are observable in the external world. *Res justa, id quod justum est*, writes Aquinas and, *ipsam rem justam*, the just thing itself.[37]

In all these respects, Aquinas followed the teachings of the "Philosopher", whom he endlessly quoted. But his most important and novel contribution to jurisprudence was the fourfold distinction between eternal, natural, divine and human law with its religious overtones, found in the *Summa*'s chapter on *Lex*. Here the law has none of the uncertainties and hesitations associated with Aristotle and the classics. Natural law is definite, certain and simple. No doubt is expressed about its harmony with civil society and the "immutable character of its fundamental propositions", formulated by God the lawgiver in the "Second Table of the decalogue".[38] These principles of divine law suffer no exception in the abstract and, their universal

proposition. ST II-II, Q. 57; Saint Thomas Aquinas, *On Law, Morality and Politics* (W. Baumgarth and R. Regan eds) (Indianapolis, Hackett, 1988) 137. See generally, Anthony Lisska, *Aquinas's Theory of Natural Law* (Oxford, Clarendon, 1996).

[36] ibid.

[37] ibid., 138.

[38] Leo Strauss, *Natural Law and History* (Chicago, University of Chicago Press, 1965) 144.

validity is emphasised by their inscription in human conscience. At the same time, the natural law revealed in the Decalogue presupposed a fallen humanity and a sinful nature and, as a divine remedy against sin, it became flexible and relative. *Natura hominis est mutabilis*, wrote Thomas, and this flexibility can lead to amendments not just in positive law but in the *jus naturale* itself. Natural law cannot be legislated in rules or canons of behaviour and does not accept a rigid or fixed formulation. It offers only general directions as to the character of people and the action of the law. These are supple and flexible, imprecise and provisional, context dependent and situation following. To be sure, this God-ordained and newly-found flexibility allowed state authorities a large degree of discretion.

Aquinas succeeded in integrating law and state into the divine order through the mediation of relative natural law: while the state was the result of the original sin, it was also justified because it served the hierarchical celestial order as its human part. State law and its coercion were necessary punishment and indispensable remedy for sins (*poena et remedii peccati*) and they were open to criticism only if they did not follow the edicts of the Church. At the same time, the state was responsible for the well-being and security of its citizens and, the Decalogue, the "compendium of relative natural law", furnished it with the necessary rules. Thus in equating the Decalogue with natural law, Thomas helped turn it into a "technical, rational canon of positive law",[39] a way of interpreting and justifying reality, an almost experimental method.[40]

And while Thomas separated natural and eternal law and assigned them respectively into the here and the here-after, he also linked them through a series of hierarchised divine mediations. "Now, all men know the truth to a certain extent, at least as to the common principles of natural law . . . and in this respect are more or less cognisant of the eternal law".[41] Justice is the canonical form of this mediation and a principle of gradual participation in the divine order. "Even an unjust law, insofar as it retains some appearance of law through being framed by one who is in power, is derived from the eternal law, since all power is from the Lord God, according to Romans".[42] Natural law and justice came again together and justice

[39] Bloch, op.cit., supra n. 11, 27.
[40] Michel Villey, "Abrégé du droit naturel classique" in 6 *Archives de Philosophie du Droit*, 27–72, (1961), 50. *La Formation*, op.cit., supra n. 10, 126–30.
[41] *Summa Theologiae*, ST I-II, Q. 93, 3d Art. (38).
[42] ibid.

"in giving to each his due – whether that be a requital in the form of punishment or reward, or distributive according to merit – it expressed a gradation, namely, that architectonic hierarchy which Thomism had erected as the mediation between earth and heaven, heaven and earth".[43] In this way, Thomism justified fully the medieval order, once its rulers and masters had accepted the dominance of the Church. The Stoic golden age as well as Augustine's City of God, the mythical past and the unknown but certain future, were partially present in the medieval city and the relativised natural law lost its ability to oppose positive law. Michel Villey distinguished between Aquinas' concepts of *jus* and *lex* and presented the former as the legal concept *par excellence* while restricting *lex* to moral law and its commands. But Aquinas, following standard practice, occasionally distinguished and at other times equated the two terms.[44] Villey's sharp distinction between the classical and Thomist *jus/dikaion* and the Judaeo-Christian *torah* or *lex* cannot be sustained, because the two were complementary. The just and objective share of external goods, was often determined through the application of *lex*, of law or precept.

But the greatest problem with Aquinas, from the perspective of the natural law tradition, lies in Aquinas' definition of justice. Justice turned into a category of natural law and expressed the advantage of church and feudal hierarchy; its demands were satisfied as long as the law was administered without prejudice and exception. This type of justice represented the inauthentic and relative natural law which repressed sins and atoned for guilt. Classical natural law, on the other hand, was not about the just application of existing laws. It was a rational and dialectical confrontation of institutional and political common sense. The Thomistic *suum cuique tribuere* allowed the scholastics to combine Aristotle and the Old Testament concept of justice as retribution, in a way that retained both Greek class hierarchies and the Judaic patriarchal principle, itself alien to social divisions. Maimonides brilliantly combined severity of form and relativity of content in his definition of justice: "Justice consists in granting his right to everyone who has a right, and in giving to each living being that which he should receive according to his rights".[45] But this justice which completes relative natural law, as its highest virtue and ideal, is very different from classical natural law. Freedom,

[43] Bloch, op.cit., supra n. 11, 28.
[44] Tierney, op.cit., supra n. 10, 22–27.
[45] *Guide for the Perplexed*, III, Chapter 53.

communal property and abundance ruled the Stoic edenic age, but for the Christian Father natural law became, after the fall, the law of retribution, accompanied necessarily by courts, punishments and the authority of the sword. Thus, the Church abandoned the Stoic positions on rational freedom and human dignity and "in this way the worst *embarrassment* of natural law, namely, oppression was founded upon natural law itself as something that had been relativised".[46] It was handed down from above, it was based on inequality and domination and underpinned and promoted social differentiation. "Distributive justice gives to each that which corresponds to his degree of importance (*principalitas*) within the community".[47] This hierarchical justice becomes the foundation of an unjust rule. It was represented throughout medieval Europe in the form of *Justitia*, a severe woman whose scales weigh each person's dues, whose sword decapitates the enemies of order and Church and whose blindfolded eyes, added in the late Middle Ages, symbolise the impartiality of justice.[48] As Bloch pithily observed, this is not "a category that thought, justifiably dissatisfied, could consider its own".[49]

Thomas was the last thinker in the Aristotelian legal tradition of *jus naturale* and the most prominent of the new religious naturalism (*lex naturale*). Historians will argue about the relative prominence of *jus* or *lex* and of the legal or religious-moral aspects of his work. But as a direct result of his teachings, the new legislative powers of Church and state were legitimised and, natural law teaching was absorbed by theology. The religious re-definition of natural law profoundly undermined the political and prudential character of the classical doctrines of justice and the critical emphasis of natural law. The ideal city of the future, which for the Greeks and Romans would be built through rational contemplation and political action, was replaced by the non-negotiable other-worldly city of God. God, the lawgiver, infuses his commands with absolute certainty; natural law is no longer concerned with the construction of the ideal moral and political order and the just legal solution, but with the interpretation and confirmation of God's law. After Aquinas, justice largely abandoned its critical potential for jurisprudence. With its pathos vacated and its role as primordial standard gone, it turned into a "cold virtue". The

[46] Bloch, op.cit., supra n. 11, 26.
[47] *Summa Theologiae*, II-2, Q. 61, 2nd Article (166–7).
[48] Martin Jay, "Must Justice be Blind", in Costas Douzinas and Lynda Nead, *Law and the Image* (Chicago, University of Chicago Press, 1999) Chapter 1.
[49] Bloch, op.cit., supra n. 11, 38.

word survives but "its supremacy in natural law disappears, and above all, the undeniable moment of condescension and acquiescence, inherent in the severity that the word confers upon itself, disappears".[50] Rousseau defined it as "the love of man derived from the love of oneself"[51] and in this formulation, as social justice, it migrated from law to economics and socialism. Freedom and equality, not justice, will be the rallying cries of modern natural law.

III. THE INVENTION OF THE INDIVIDUAL

There is one final and crucial aspect in the genealogy of human rights, without which we cannot understand the jurisprudence of modernity. This is the process through which the classical and medieval tradition of objective *jus* turned into that of subjective rights and the sovereign individual was born. John Finnis has argued that the transition from Aquinas' *jus* defined as "that which is *just in a given situation*" to that of Suarez as "something beneficial – a *power – which a person has*" was a "watershed".[52] It re-defined the concept of right as a "power" or "liberty" possessed by an individual, a quality that characterises his being. The detailed historical steps leading to this watershed have been examined by Richard Tuck and Michel Villey and more recently by Brian Tierney[53] and there is no need to repeat them here. The remainder of this Chapter will signpost only the main stations in this important transition.

The birth of modern man and of individual rights passes through the theology of Catholic scholasticism, which discovered the principles of natural law in the way God created human beings. The essential nature of man was created by God and all main elements of natural law can be deduced from the morality of the commandments. Moral and political obligations derive from revealed truth and, as a result, Christian love and the *caritas* of providence replaced the quest for the best polity. The first radical step in this direction was taken by the Franciscan nominalists Duns Scotus and William of Ockham. They were the first to argue, in the fourteenth century, against the dominant neo-Platonic views, that the individual form is not a sign

[50] ibid., 43.
[51] Jean Jacques Rousseau, *Emile or on Education* (A. Bloom trans.) (London, Penguin, 1991) IV.
[52] John Finnis, *Natural Law and Natural Rights* (Oxford, Clarendon, 1980) 207.
[53] Richard Tuck, op.cit., supra n. 9; Michel Villey, *La Formation de la Pensée Juridique Moderne*; Brian Tierney, op.cit., supra n. 10, Chapter 1.

of contingency nor is the human person the concrete instantiation of the universal. On the contrary, the supreme expression of creation is individuality, as evidenced in the historical incarnation of Christ, and its knowledge takes precedence over that of the universal forms of the classics. Nominalism rejected abstract concepts and denied that general terms like law, justice or the city represented real entities or relations. For William, collectivities, cities or communities, are not natural but artificial. The term "city", for example, refers to the sum total of individual citizens and not to an ensemble of activities, aims and relations, while "law" is a universal word with no discernible empirical referent and has no independent meaning. Society, as Mrs Thatcher a contemporary nominalist would say, does not exist, only individuals do. Medieval science avoided totalities and systems and concentrated on particulars because, argued the nominalists, all general concepts and structures owe their existence to conventional linguistic practices and have no ontological weight or empirical value. Thus, meaning and value became detached from nature and were assigned to separate atoms or particulars, opening the road for the Renaissance concept of the genius, the disciple and partner of God and later for the sovereign individual, the centre of the world.[54]

The legal implications of nominalism cannot be overstated. William argued that the control exercised by private individuals over their lives was of the type of *dominium* or property and, further, that this natural property was not a grant of the law but a basic fact of human life.[55] The absolute power of the individual over his capacities, an early prefiguration of the idea of natural rights, was God's gift to man made in his image. At the same time, the nominalists based their ethics on divine commands and deduced the whole law from their prescriptions. The law was given by the divine legislator whose will is absolute and obligatory for humans *per se* and not because it accorded with nature or reason. Indeed, Duns Scotus argued that God's will has priority over his reason and the good existed because the Omnipotent willed and commanded it and not on account of some other independent quality. In this way, the source and method of the law started changing. It was gradually moved from reason to "Will, pure Will, with no foundation in the nature of things".[56]

[54] Ernst Kantorowicz, "The Sovereignty of the Artist: A note on Legal Maxims and Renaissance Theories of Art" in *Selected Studies* (New York, J. J. Augustin, 1965).

[55] Villey, *Histoire de la Philosophie*, op.cit., supra n. 14, 157–265; *Le droit et les droits*, op.cit., supra n. 1, 118–25; Tuck, op.cit., supra n. 9, 15–31.

[56] Rommen quoted in J.M. Kelly, *A Short History of Western Legal Theory* (Oxford University Press, 1992) 145.

Similarly, the jurist's task was no longer to find the just solution but to interpret the legislator's commands for the faithful subjects.

The separation of God from nature and the absolutisation of will prepared the ground for God's retreat and eventual removal from earthly matters. The celebration of an omnipotent and unquestionable will was both the prelude for the full abdication of divine right and the foundation stone of secular omnipotent sovereignty. Legal positivism and untrammelled state authoritarianism found their early precursor in those devout defenders of the power of God. And in a move that was to be repeated by the political philosophers of the seventeenth century, the Franciscans combined absolute legislative will with the nominalist claim that only individuals exist. The combination "led pretty directly to a strongly individualistic political theory which had to undergo only a few modifications to emerge as something very close to the classic rights theories of the seventeenth century".[57] The mutation of objective natural law into subjective individual right, initiated by William, amounted to a cognitive, semantic and eventually political revolution. Villey describes it as a "Copernican moment" emphasising its theoretical and epoch-making affinities with the new scientific world. From that point on, legal and political thought placed at the centre of its attention the sovereign and the individual with their respective rights and powers.

The second scholastic school, argued that natural law is a branch of morality and linked religious rules of conduct with modern reason. The Spanish scholastics totally abandoned the idea of *jus* as an objective state of affairs and adopted fully an individualistic conception of right. A crucial text in this transition was the seventeenth century *De Legibus* by the Spanish Jesuit Franciso Suarez. Suarez argued that the "true, strict and proper meaning" of *jus* is, "a kind of moral power *facultas* which every man has, either over his own property or with respect to that which is due to him".[58] Grotius too saw *jus* as a quality or power possessed by a person. Grotius returned and expanded the Stoic tradition according to which *jus naturale est dictatum retae rationis*.[59] But by asking the law to accord with the rational nature of man, he finally abandoned both the classical and the Christian traditions of natural law. Nature, perceived as solely a physical universe, became radically separated from humanity, it was emptied of the ends

[57] Tuck, op.cit., supra n. 9, 24.

[58] Finnis, op.cit., supra n. 52, 206–7.

[59] Grotius, *De Jure Beli et Pacis Libre Tres* (Law of War and Peace, F. Kelsey trans.) (Indianapolis, Bobbs-Merrill, 1962) vol.I, 9.

and purposes of the classics or the animistic soul of the medievals and stood without meaning value or spirit, a frightening and hostile force. The right, no longer objectively given in nature or the commandment of God's will, follows human reason and becomes subjective and rational. The naturally right becomes individual rights.

The theological influence was still evident in the work of all great philosophers of the seventeenth century. *Omnia sub ratione Dei* was their rallying cry, a slogan destined to a transient but all-important existence. It destroyed the medieval world view but it soon succumbed to its own humanistic tendencies and led to the death of God. Descartes explicitly linked new physics and theology, Hobbes and Locke organised their civil state under the auspices of God. All great philosophers wrote a kind of political theology and believed that God underwrote their systematic efforts. A laicised deism replaced Christ with the God of Reason and eventually with Man become God. But in a different sense the great Enlightenment writers, Descartes, Hobbes, Locke and Rousseau, despite their differing conceptions of natural right and social contract, represented the rebellion of reason against the theocratic organisation of authority. The modern natural rights tradition, which turned violently against ancient cosmology and ontology and redefined the source of right, was a reaction to the co-optation of natural law by religion and the accompanying loss of juridical flexibility, political latitude and imaginative utopianism which characterised the classical tradition. The secular theology of natural rights placed the abstract concept of man at the centre of the Universe and transferred to him the adoration offered by the medievals to God. The forward looking and prudential aspects of the theory of the "best polity" were undermined but, at the same time, the openness of classical natural law became a potential horizon of individual identity and right.

Medieval constitutional theories and utopias had been organised around the ideas of the fall and the divine legislator. But the early modern undermining of the secular power of theology, meant that the relative natural law, which regulated humanity in a state of sin, could no longer be used to justify oppressive social and political regimes. The grace of divine authority and the aura of its earthly representative could not captivate the soul of the people and, in its place, modern natural law attempted to re-construct the constitution using reason alone. Epicurean ideas, according to which the *polis* was the outcome of an original contract, and the Stoic belief that the law should be in harmony with the reason of the world, acquired

renewed importance. But this was the natural law of modern merchants and not of ancient sages; it attributed contemporary legal and social arrangements to a primordial assembly and a freely-entered contract.

The idea of an original contract was accompanied by the device of a state of nature in which men lived before entering society or the state. Against the ancients, for whom nature was a standard of critique transcending empirical reality, the nature of Rousseau, Hobbes and Locke was an attempt to discover the common elements of humanity, the lowest common denominator behind the differing individual, social and national characteristics and idiosyncrasies. This quest for the permanent, universal and eternal, had to deduct from empirical people whatever historical, local or contingent factors had added to their "nature". The natural man or *noble savage* was not a primitive forefather of the patrons of Parisian salons or of London merchants but had similarities with them. As species representative, man *qua* man, he was an artificial construct of reason, a naked human being endowed only with logic, strong survival instincts and a sense of morality. According to John Rawls, who famously repeated the mental experiment, natural man toils and contracts behind a "veil of ignorance".[60] The fiction drew its power from the importance contract had acquired in early capitalism. It was only in an emerging market society that all important institutional and personal questions could be addressed through the putative agreements of rational individuals. But despite assurances to the contrary, the man of nature was not totally naked: his "natural" instincts and drives differed widely from one natural lawyer to the next. For some, natural man was competitive and aggressive, for others peaceful and industrious, for others both. Eternal nature seemed to follow current social priorities and political concerns and to be quite close to the preoccupations, hopes and fears of the contemporaries of the theorist.

The fictional contract became a device for philosophical speculations about the nature of the social bond and political obligation, the model constitution and the rights of empirical men in London and Paris. Abstraction, the removal of concrete characteristics, was seen as logically necessary. The philosophical construct was asked to act as a refutation of both feudal society and absolutist government, through the operation of a revolutionary and previously unheard of termination clause which authorised the people to overthrow their

[60] John Rawls, *A Theory of Justice* (Oxford University Press, 1972). The veil conceals all the major individualising characteristics from the contractors.

government in case of non-performance of its contractual obligations; and as the blueprint for the constitutional arrangement still to come. In this second function, the contractual device introduced the rationalism of the Enlightenment into the constitution. Legal norms and social relations were shamelessly deduced from axiomatic normative propositions (original evil and desire for security, original goodness and sociability, individual freedom and the need to restrict it, etc.).

The various schools of modern or rational natural law, despite their differences, shared a number of characteristics.[61] First, they all believed that social life and the state are the result of free individual activity. We can detect here the heavy influence of legal mentality. It is deeply pleasing to a lawyer, steeped in the doctrine of contract, to believe that legal forms and free agreements lie at the basis of society. Social contract theories adopted the contract doctrine of "constructive knowledge": the contractors willed all reasonable consequences of their agreement, while what could not have been rationally willed was not willed at all (restrictions on property and capital accumulation, for example, were unreasonable and a political system that enforced them brought the contract's termination clause into operation). Secondly, if the legal and social order derives from an original agreement, it was realised through the power of reason and logic to deduce a complete and gapless system of rules from a few axiomatic principles. The essence of the state was to be rationally reconstructed from its valid elements and justified only by means of reasoned argument, based on its founding principles in the contract; indeed reason was declared the essence of the state. The prestige of the natural sciences was thus transferred to political philosophy and natural law became a pure discourse of deduction modelled on mathematics.

The natural sciences in their quest for predictability and certainty discarded irregularities; natural law followed suit. The methodological purity of mathematics complemented perfectly the belief in universal homogeneous concepts and eternal laws, which became a central tenet of rational natural law. The iron laws and the strict necessity and homogeneity of Newton's mechanical nature were reinterpreted as a normative universality and were co-opted in the fight against the hierarchical society of feudal privilege. Rational natural law and natural rights became the discourse of revolution. The liberal version of Thomas Paine inspired the Americans, the democra-

[61] Bloch, op.cit., supra n. 11, 53–60.

tic of Jean-Jacques Rousseau the French. No political philosophy or version of natural law was worthy of the name, if it was not grounded on universal principles or did not aim at universal ends. The great discoveries, the marvellous inventions and the triumph of the mercantile and urban economies, aided by the levelling exchange-value of money, combined to increase the cachet of the universal. But the discourse of the universal soon became the companion of capitalism and the upholder of the market, the place where, according to Marx, human rights and Bentham reign supreme. The rationalism of natural law too, having consigned the classical conception of politics and the search for the "best polity" to the history of ideas, became the legitimatory discourse of utilitarian governments and was used against the emerging socialist and reform movements. A side-effect of this rampant rationalism was the intellectual impoverishment of jurisprudence: the violence at the heart of law and of public and private power, which had helped re-organise the world according to the new political and economic orthodoxies, was written out of the texts of law, which became obsessed with normative questions, with the meaning of rights, sovereignty or representation. Much of the unrealistic rationalism which still bedevils jurisprudence hails from this golden age of natural law. This idealism not only totally obfuscates law's role in the world, it also distorts our understanding of legal operations because:

> it serves no purpose to pick out partial relations and even partial tendencies in real life and insert them into the head as an arithmetical problem . . . in order to come up with a logic that formally is like iron, but remains weaker and unreal from the point of view of content . . . formal necessity, that is, the absence of contradiction in the deduction and form of a proposition, is hardly a criterion of its truth in a dialectical world.[62]

But alongside this law-abiding and sombre nature, which accorded with the bourgeois interests in calculability and certainty, a different conception of a *natura immaculata* lurked below the surface, in the pure and harmonious nature of classicism, the edenic visions of romanticism and the perfectibility of utopian socialists. This marginal conception of a purified and perfect nature linked with the classical tradition of nature as standard and provided a critical and redemptive perspective against the injustices and oppressions which the social system, justified by rational natural law, tolerated and even promoted.

[62] ibid., 191.

This concept of nature would eventually combine with the idea of social utopia and provide the radical side of human rights.

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At the end of this historical journey, it is important to remember that classical natural law was built on the intrinsic connection between natural right and justice. The same terms, *dikaion* and *jus*, connoted both the just and the law, and the business of the classical lawyers was to discover the just solution to a conflict. This linguistic link survives today in the double meaning of the word justice, as the transcendent ideal of law and as the administration of the judicial system. But classical right was not a moral law that lurks in the human conscience as a universal superego and places all under the same moral commands. It was rather a methodological principle which allowed the philosopher to criticise sedimented tradition and the jurist to discover the just solution in the case in hand. Classical natural law contained a passion for justice but it did not coincide with it. Natural right enters the historical agenda, directly or in disguise, every time people struggle "to overthrow all relations in which man is a degraded, enslaved, abandoned or despised being".[63] Justice, on the other hand, has too often been associated with a moralistic, patriarchal attitude, in which distributions and commutation protect the established order and perpetuate the inequalities and oppression natural law tries to redress:

> Genuine natural law, which posits the free will in accord with reason, was the first to reclaim the justice that can only be obtained by struggle; it did not understand justice as something that descends from above and prescribes to each his share, distributing or retaliating, but rather as an active justice of below, one that would make justice itself unnecessary. Natural law never coincided with a mere sense of justice.[64]

For those fighting against injustice and for a society that transcends the present, natural right has been the method and natural law has defined the content of the new. This is the link between natural law, natural and human rights. But the voluntarism of modern natural law cannot provide a sufficient foundation for human rights. Its inevitable intertwining with legal positivism meant that the tradition which created natural and later human rights has also contributed to the repeated and brutal violations of dignity and equality which have accompanied modernity, like its inescapable shadow.

[63] Bloch, op.cit., supra n. 11, xxviii–xxix.
[64] ibid., xxx.

4

Natural Right in Hobbes and Locke

From Plato's *Republic* to early modernity, philosophy placed the search for the best polity at its centre. Thomas Hobbes continued this tradition which brought together political thought and legal concerns. His early works were general theories of law. The later *De Cive* and *Leviathan* and the posthumous *Dialogue* changed somehow their emphasis, in an attempt to create a science of politics which according to Arendt, "would make politics as exact a science as the clock did for time". For most commentators, the main achievement of Hobbes lies in his political theory, which has also been denounced by others for its authoritarianism and parochialism. If one could analytically distinguish between political and legal theory, a difficult task for that period, it is arguable that Hobbes made a more lasting contribution to the science of law: in his radically new method of analysing legal foundations, in his re-definition of the traditional juridical concepts of law, right and justice, finally, in his adjustment of traditional sources and ends of law to the concerns of modernity. The influence of Hobbes has waned in politics, with the rise of the purer liberalism of Locke and the democratic tradition of Rousseau. But his reinvention of the juridical world remains unsurpassed. We can summarise his contribution by saying that Hobbes is the founder of the modern tradition of individual rights, the first philosopher to replace fully the concept of justice with the idea of rights. If this aspect of his work is understood, legal positivism becomes the necessary accompaniment and partner of rights discourse and some of the liberal critiques of Hobbes lose much of their validity.

Hobbes' revolutionary contribution to jurisprudence is perfectly illustrated by the following statement from the beginning of the XIV Chapter of *Leviathan*, entitled "Of the first and second Naturall Lawes, and of Contracts", which is worth quoting at length:

> THE RIGHT OF NATURE, which Writers commonly call *Jus Naturale*, is the Liberty each man hath, to use his own power, as he