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Part I
Natural Law and Civil Authority

1
The Rule of the State and Natural Law

Blandine Kriegel

I. The sovereign state and its law

How should we understand the development of modern politics? According to the main school of German historiography and philosophy – as represented by Ernst Kantorowicz, whose works can serve to summarise a century of German thought – there has been only one way of building modern state power. This way, beginning in medieval times, would eventually mark off the Ancients from the Moderns. In the course of this development, the ancient philosophy of Aristotle and Thomas Aquinas would have been totally cast into question, replaced by the philosophy of the Moderns: a metaphysics of the subject would substitute for ontology, displacing the philosophy of Being. Given the catastrophic events that emerged in the twentieth century in western political development – Nazism, the Soviet system – some contemporary thinkers, not the least important Leo Strauss or Hannah Arendt, have advocated a return pure and simple to the Ancients. According to them, modern philosophy, characterised by its Machiavellian defining moment, is purported to have entirely separated politics and ethics, and, on a deeper level, to have rendered obsolete the traditional concept of natural law. Hegel, as a matter a fact, was a precursor on that path, dedicating an entire essay to the critique of natural law as an erroneous abstraction, the working of which is detrimental to an affirmation of the positive living right of the various peoples of the earth.

In this chapter I shall defend a substantially different thesis. To begin, I would like to demonstrate that there is no single exclusive path of political development and no single theory of the state in modern Europe. Rather, at least two great dividing lines, of variable importance, have torn European political theory into separate interpretations.

The first dividing line runs between those modern powers of Western Europe that recovered for themselves the ancient republican doctrines, and those that did not. After the Italian city-states of the Renaissance, and the Spanish theorists of the sixteenth-century neo-Thomist Salamanca School,

it will be essentially in France, England and Holland that the republican doctrine of state power evolves. Jean Bodin, Thomas Hobbes, Baruch Spinoza and John Locke are the principal and best-known theorists of this development. The republican doctrine confronts head-on the imperial conception that continued its course in the German Empire. This same republican doctrine also reinstates the opposition – devised by Aristotle – between republican and despotic regimes. The former aim at fostering the public interest, with authority exercised through due process of law on free and equal individuals; the latter aim at maintaining private interest, with authority exercised through force on subjected individuals.

The republican thinkers benefited from the backing of English and French jurists who consistently refused, in the English kingdom as in the French, to accept the validity of imperial Roman law, heralded at the same period by the imperial 'glossators' in Germany and Italy as the principal source of law. Instead, the English and French jurists – together with the political jurists of the emerging German territorial states – engineered an entirely new political jurisprudence, for which modern political philosophy took up the task of establishing theoretical foundations.

Reception or, conversely, rejection of Roman law thus marked two distinct types of political development: on the one hand, the imperial development which was to penetrate deep into our times, especially in Central and Eastern Europe, through the Habsburg Counter-Reformation and the Holy Alliance and through Tsarist autocracy; on the other hand, the republican development which slowly made its challenge, first in the city-states, then in the monarchical republics of Western Europe, doubtless not without hesitations and unforeseen reversals.

With this republican development as their horizon, the two fundamental doctrines of modern power were born: the doctrine – essentially French – of sovereignty; and the doctrine – essentially British – of the separation of powers. Here lies the second dividing line. Each doctrine relies on a different type of state: the administrative or financial state for the doctrine of sovereignty; the state of justice for the doctrine of the separation of powers. I shall concentrate my discussion on sovereignty. I intend to show that modern political jurisprudence relies on a dual foundation that, in the event, proved capable both of accommodating and rejecting individual rights, in fact the rights of man. But I shall also try to show that these rights are necessarily based on natural law.

The early modern doctrine of power can be summed up in a word: sovereignty. Since the Renaissance, the law of the sovereign state has served as a foundation stone for every development in the law of modern states. The republic, or the state ruled by law – we could also define it as a state whose legitimacy derives from a society organised for the good life, the general interest of the common good – confers a decisive role on law. Already in the sixteenth century – in the midst of the most strident of the civil wars against

Henri III – Jean Bodin defined the principle of sovereignty: 'A commonwealth (or republic) may be defined as the rightly ordered government of a number of families, and of those things which are their common concern, by a sovereign power.'[1] A century later, the principle was dramatically restated by Charles Loyseau: 'Sovereignty is the defining moment and culmination of power, the moment when the state must come into being.'[2] The concepts of legitimate power and of beneficent power are present in these early definitions. Supreme power, as Bodin defined it, is also, as Loyseau emphasised, *the very essence of the state*: 'Sovereignty is the form which gives being to the state; it is inseparable from the state; without it, the state vanishes.'

According to these early modern political theorists, sovereign power was the antithesis of feudal power, in the sense that it was neither *imperium* nor *dominium*. It was not an *imperium*, because it was not based on military power; and it was not a *dominium,* because it did not institute a relation of subjection, in the manner of the relation between a master and a slave.

The *imperium* was the totality of civil and military powers possessed first by the Roman kings, then under the republic by the consuls and (during their tenure) the dictators, and finally by the Roman emperors. Their powers included the right to command the army, the right to wage war and make peace (*jus belli ac pacis*), and the right of life and death (*jus vitae necisque*). In itemising the attributes of the *imperium*, one will have itemised the royal powers. But the *imperium* is also the empire, the Roman conception of power that the Germanic Holy Roman Empire would seek to resurrect, beginning with Otto of Swabia in the tenth century. The early modern jurists sought to distinguish sharply between sovereign power and imperial power, in order to show that the sovereign state is not a creature of war but rather of peace, and that it prefers the peaceful negotiation of rights to the clamour of arms.

Believing that feudal power militarised politics and individualised justice, the early modern jurists concentrated their attack on two of its principles. First, they attacked the principle that power is essentially force. Legitimate sovereign power, conversely, is grounded in the law of nature rather than the law of the gun or sword. Second, the jurists attacked the assimilation of justice to struggle and of order to equilibrium in a battle. They supported the statist project of attaining a monopoly of justice and of punishment, which involves eliminating both the private feudal wars and the ecclesiastical tribunals.

Feudalism is war, *jus vitae necisque*, conscription of human life; sovereign power is peace, security and prohibition of the taking of human life. Sovereign power substitutes law for force and order for death. It consists of a powerful constraint on the Roman *patriae potestas*, on the right to determine who shall live and who shall die. It pacifies society, guarantees individual security and makes the maintenance of life its chief aim. Sovereign

power is the product of a negotiation of rights rather than an expiation of arms. The jurists are careful to disqualify domination as a definition of power; they reject the feudal relation of dependence and criticise servitude generally. Feudal domination was direct: it vassalised the individual, naturalised men and privatised politics. This raised three questions to which the statists sought to reply in the negative.

Must subjects be treated as slaves? '[Feudalism] governs its subjects as the father of a family does his slaves,' writes Bodin.[3] Two doctrines – that of property and that of the appropriation by each individual of himself – rule out domination as a definition of politics. The relation between governed and governing is understood here as a compromise; only later, with the natural law philosophers, will the model shift to that of a contract. But the compromise model suffices to eliminate a series of traditional references: master and servant, commander and soldier, father and son. Most importantly, the classical model of the social relation as that between freeman and slave is decisively broken with. Henceforth, the sovereign who abstains from taking the life or property of his subjects is no longer acting as master. The jurists invoke Christian principles in order to align feudalism with Greek slavery.

Must human beings be treated as things? Should the relations between human beings in society be modelled on the relations between humankind and nature? Medieval natural law defended social microcosms by appeal to physical macrocosms and viewed human beings as a form of nature among other forms of nature. The early modern jurists, by contrast, view the life and possessions of each individual as the unbreachable limit of political dependence. Bodin defines these individual rights in terms of 'natural liberty and the natural right to property'.[4] This nominalist view privileges subjectivity and interprets the political animal as the product of a culture that is opposed to nature. Moral beings, writes Pufendorf, are not things like physical beings: 'they only possess each other by means of institutions'.[5] Within the *res publica*, the individual himself is no longer a thing of which one can become master and owner. The techniques of governing a *res cogitans* cannot be derived from the rules for possession of a *res extensa*.

Do political relationships derive from property relationships? In a definition that would obsess the historiography of the nineteenth century, Loyseau calls feudalism 'power by means of property'. This deep and pithy truth leads to a fundamental objection against feudalism: treating people as goods, feudalism confuses public relationships among individuals with the private relationship between a human being and a thing. In reacting to this confusion, the early modern political jurists developed a double agenda: first, to undo the amalgamation of power and property; second, to secure the autonomy of both the governance of human beings and the possession of things. The major premise of this line of reasoning is its claim that public offices belong neither to lords nor to a prince, nor even to the state, for they

are the state itself. We can observe in passing that this dissociation of power from property – giving rise to the autonomy of politics – is responsible for the fundamental difference between the early modern political and legal theory on the one hand, and nineteenth-century social philosophy on the other, for the latter continues to tie power firmly to economics.

For the early modern political and natural jurists, then, sovereignty is first and foremost the absolute autonomy of the state. The law of the sovereign state aims at two targets simultaneously: externally, it fights against the imperial idea; internally, against the feudal world. In its double animosity, it strives to establish a modern state and to rationalize the work of politics in two main directions.

First, the sovereignty principle recognises the necessary plurality of states and, hence, of an international order which is opposed to the notion of a single universal Empire. This recognition early prompted the search in Europe – no later than the second half of the seventeenth century – for a continental balance of states. The law of the sovereign state is associated with the appearance of modern international law that, from 1625 onwards, found definite expression in Grotius' *Law of War and Peace*. Here the basic equality and inherent plurality of sovereign states are clearly stated. Their relations must, henceforth, be regulated by consent and peace, putting an end to all conceptions of a universal empire. Within these relationships between states, *la bella diplomatica* – in the wonderful Italian terminology, a war waged through display of '*diplome*', i.e. titles and documents – replaces war as we know it. One no longer fights with soldiers and muskets, but with legal briefs and documents. The ambassador replaces the mercenary. Times are ripe for protracted negotiations, for the frantic search for juridical memories, for the editing and revision of law codices; times are ripe for the triumph of legists and constitutions, for the ascendancy of states ruled by law.

Second, the law of the sovereign state increasingly affirms the priority of domestic politics over foreign policy, the supremacy of civilian rule over the military factor. The first duty of the state becomes good administration, the delivery of good justice across the whole 'square field' or '*pré carré*' in the formula of Vauban, at first military and civilian adviser to Louis XIV but later his opponent. Arbitration of conflicts through law directly undermines the pre-eminence of the *dominium*; it leads to a complete severance of the links between power and property. This rationalising of the state already entails an elementary enunciation of individual rights. Thus, Bodin begins his doctrine of sovereignty by establishing that it is limited, from its inception, by divine and natural law; that it encompasses fundamental rights, such as liberty, full property in goods acquired – these are the first historical formulation of the rights of man – and, then, the fundamental laws of the realm. In this way the rights of man are introduced through the establishment of the republican state.

Yet, at the very heart of this theory of the sovereign state that fought so strenuously against empire and feudalism, there remains something still belonging to a different and more ancient world. To recognise this imperial residuum will assist our understanding of the inherent contradictions of sovereignty. For sovereignty remains welded to power, public power perhaps, but still power. Its strength comes from a sheer decision of will-power. Bodin, once again, devised the mechanism in his *Six Books of the Republic* of 1576, when he adamantly refused to adopt the model of common law jurisprudence with its debates, controversies, precedents and deliberations, to which he opposes administrative decision-making, established *a priori* through decrees and commands. Henceforth, sovereignty will rely on will-power, initially the singular will of a monarch in a monarchy, but, quite soon, the 'general will' of the people under a republic, following the system of calculus elaborated by Rousseau, two centuries later. But the ruler, whether individual or collective, will none the less remain *legibus solutus*, liberated from the laws, absolute. From this slow development of the power of will, which in the event becomes the will of power for a subject relentlessly called to strike heroic attitudes, we can easily retrace the early re-emergence of absolutist deviations and imperial temptations under the absolute monarchy of Louis XIV, in *ancien régime* conditions or, in nineteenth-century France, under the First and Second Empires.

The problem raised here is how one imposes limitations on sovereignty. The original limits, as conceived by Bodin for the moral, religious and juridical realms, will tend to become eroded, if not forgotten. Sovereignty within the state will tend to become sovereignty of the state, a state now unbound, recognising no authority or constraint other than its own positive right to rule. Such a state has entered into conflict with all other political rights – most conspicuously, the rights of man.

II. Human rights

The rights of man were born and raised within the realm of the rule of the state, but soon they had to break away from their place of birth. A mistake is frequently made when defining them: it is widely believed that the rights of man have been inscribed in positive law from time immemorial. Nothing is further from the truth. Everyone knows, of course, the two great declarations of the Enlightenment (the American Declaration of Independence of 1776 and the French Declaration of 1789), and it is assumed that from that time onwards, the rights of man entered the realm of modern politics. But this is to commit not one, but two mistakes.

First mistake: it is necessary to distinguish between America and Europe. If the delay in the principles becoming institutionalised was rather short in the United States – they appear in the US Constitution by 1787 – it has taken the French Declaration so much longer. Not until 1946, and the victory

over Nazism, did they appear in the preamble to the Constitution of the Fourth Republic.

But one can also commit a second, and opposite mistake, by underestimating the antiquity of their genesis. If we consider the philosophical principles implicit in human rights, one has to go much further back, at least one century before the Declarations, to discover them in the doctrines of political philosophers. Here, we must slightly change our geopolitical setting. If the law of the state can be retraced essentially to a French origin, human rights – despite the influence of the Declaration of 1789 – clearly derive from an English cultural setting or, more precisely, an Anglo-Dutch setting. Three philosophers – Hobbes, Spinoza and Locke – deduced the fundamentals. In this field their legacy is paramount, for they have bequeathed to us the complete list of these rights, together with their philosophical foundations.

The complete list first. To Hobbes, we owe the demonstration of the right to safety: every single man has a right freely to possess his own body; every man has a right to preserve his own life. As a correlate, a necessary consequence, no one can be a slave or possess a right of life and death over someone else (in other terms, this is the end of the old Roman imperial right of life and death over the soldier-citizen). To Spinoza, we owe the liberty of consciousness: every man has the right to think the way he wishes, nobody should constrain a judgement of consciousness. All civil liberties of opinion and expression derive from there. To Locke, we owe the freedom of property: every man has a right to appropriate for himself a part of nature under the guise of objects, which he owns. The correlate is here that only individuals and not governments may claim the right to dominate nature; economics must remain separate from politics. To all of them, finally, we owe that fundamental conception, the equality of individuals, which rests on the idea that humankind is fundamentally one.

The rights of man. The unity of humankind. This set of ideas does not stem from pagan times, as that subtle expert on Roman law, the late Professor Michel Villey, established long ago. The rights of man have little in common with the rights of Rome. How could the former have been conceived when *homo* as opposed to *civis* – the citizen – designated a man without any right, a slave, as Hannah Arendt once pithily remarked? But furthermore, it is impossible to inscribe any right of man in law until you have expressed the philosophical or theological notion that humankind is one. This very idea is incompatible with a pagan world where cities and even gods are different by nature, heterogeneous in principle. The notion of one single humankind is limited to monotheism, in our tradition, to the Bible. That is why all thinkers on that subject have sought it in the Scriptures or, to adopt Spinoza's terminology, in the model-state of the Hebrews.

Can the rights of man find a foundation other than biblical revelation? All the theorists of the rights of man have answered affirmatively. Where,

to the minds of the seventeenth-century rationalist thinkers, does the foundation of these rights lie? The philosophical foundation is to be discovered only in 'natural law'.

But, here, confusion and misunderstandings have to be avoided. Neither Hobbes nor Spinoza nor Locke, nor any of the early theorists of the rights of man, are medieval nostalgics, not to mention Torquemada-style inquisitors. They believed adamantly that man possesses a nature, that it is sheer folly or stupidity to deny its existence, to reject or refute its working. So what do they think is the essence of human nature? They answer, precisely: human nature entails nature combined with law, *natura cum lege*. Our philosophers do not think like Aristotelians, they do not think that human nature reflects a hierarchical cosmos ordained by inequality, but, conversely, as contemporaries of Galileo and Newton, they borrow from modern science the concept of a nature combined with law. This concept is closely related to the notion of the infinite universe, where mathematical constraints lead, at the same time, both to a rigorous definition of the relationship between objects, and to a description of these objects of the world as fundamentally equal.

What is common to the definitions devised by all three philosophers, Hobbes, Spinoza, Locke? The rights of man do not stem from a violent break with nature. Hobbes insists: the right to safety is not a liberty, it is an obligation. It is a law of nature discovered by reason that implies that no one should ever attempt to harm his own life. Let us not misunderstand our philosophers here. They were not naïve to the point of believing that men do not kill, rob or oppress consciousness, as everyone can experience murder, theft and manipulation of the mind in daily life. Their point is simple: with each transgression of what the Decalogue forbids, the inevitable consequence will be the withering of human society into barbarity. If men want to live together in societies, they must abide by these laws, or risk the destruction of what is specifically human in their societies.

Reformulating the whole problem at the end of the eighteenth century, Kant will simply state that nature has taken care of instituting man, and man alone, as the keeper or the trespasser of the law, his own law. But if there exists such a thing as a law of nature, it also means that the rights of man are not English, French, Dutch, European or western, as non-European conservative thinkers, opposed to the rights of man, have always stated. Rather, their value may be considered as universal since all men are endowed with a single identical name: humanity. Here, Kant has himself drawn the ultimate consequence: the rights of man cannot be properly instituted without a humankind finally unified through the peaceful coexistence of states ruled by law, that is to say by a universal republic.

The political rights embedded in the rights of man are thus linked with humankind itself, and although their formulation appeared in the development of the modern state, their foundations are entirely different, anthro-

pologically and philosophically, from the doctrine of state sovereignty. That doctrine relies on two bases: first, uniformity, because – as Bodin maintains – the sovereign acts only by establishing rules; second, will-power, because the rules the state proclaims are decreed by a decision. Hence one can easily ground the anthropology and the philosophy of the sovereign state on a doctrine of will-power and decision-making, fundamentals that may be unearthed in the metaphysics of Descartes. But one can do no such thing with the doctrine of human rights, since it is, from its inception, based on relationships between individuals. Its universality is vastly different from the universality of empire, based on conquest. It belongs, rather, to the universal ambition of a modern universal republic.

What are the metaphysical foundations of theory resting solely on the strength of the *ego cogito*? The dualisms of mind and body, will and understanding, are the guiding forces behind the modern project to make man 'master and possessor of nature'. From this point onward, nature is delivered up to the brute force of 'animal machines' and to the eternal silence of the infinite spaces that filled Pascal with dread. Nature is dispossessed of values and qualities. Man's only remaining connection to nature is quantitative, lying in the clear and distinct mathematical ideas of number, figure, extension and time that make up his *ratio*. Viewed in this light, nature is the object of finite knowledge but it cannot be the object of infinite moral engagement. Of mind and world, thought and reality, subject and object, something has fallen by the wayside, and something else has come to the fore. The concept of natural law is gone. The order of human nature is now conceived in terms of art and making, a product of convention and intellection. Man is now set on the path to discover being anew through a hard and complicated demand. The adventures of modern subjectivity begin, as man sets himself to inventing new possible worlds.

This is the conception of human nature held by a good many thinkers of the modern natural right school. Hugo Grotius, for example, explicitly formulated the idea that law is founded, above all else, on reason: 'The law of nature is a dictate of right reason.' Echoing Gregory of Rimini's hypothesis, he adds that 'everything we have just said would hold true in one way or another even if one granted – what one cannot grant without committing a horrible crime – that God did not exist, or that he exists but takes no interest in human affairs'.[6] For Grotius, legal acts are to be measured not by an external standard of natural law or the will of God, but by the rational nature of man, by what human consciousness deems reasonable. The force of law has ceased to be natural and objective; it has become rational and subjective. Natural right now receives rational foundations that are autonomous and secular, severed from natural law. A similar view of nature devoid of values and spirit is at the root of Pufendorf's hostile, almost horrifying account of the state of nature. For both Grotius and Pufendorf, civil society is founded on man's natural need for sociability, and the common-

weal is only a human invention. If God no longer exists or has no concern for human affairs, if the state of nature is a state of war where lawless passions are unleashed, then one must imagine a conventional foundation for legitimate power. Civil right must stem from a contract of submission or association promulgated by an act of free will, and civility must be reconstituted through the will of the human subject.

It is not at all unreasonable to observe that the fundamental inspiration at work in this theory's juridical subjectivism is the essential division in Cartesian psychology between the nature of things and the nature of man. It is just as pertinent to note that this theory's conception of the equality and natural freedom of individuals also reinforces the part played by consent and contract in the establishment of political society, and thereby finds a place for particular civil rights. But the fact remains that the voluntarism of the school of natural rights is simply too weak to provide a juridical basis for human rights. In the end, Grotius and Pufendorf are nothing more than theorists of voluntary servitude and absolute monarchy.

Even among the voluntarists, however, there is disagreement, especially regarding their recognition or rejection of natural law. Everyone in the school recognises natural right, but natural law is another matter. This difference in viewpoints is linked to different conceptions of human nature and the relation of man to the world. Grotius and Pufendorf stop short of Hobbes' theory of human right. In *Leviathan*, Hobbes deems those rights wholly alienable in so far as personal safety is not legitimately submitted to a contract. He had established, previously, a distinction between natural law and natural right: 'Because right, consisteth in liberty to do, or to forbeare; whereas law, determineth, and bindeth to one of them: so that law, and right, differ as much, as obligation, and liberty.'[7] What is natural law? Hobbes gives a clear answer: 'A law of nature is a precept, or general rule, found out by reason, by which a man is forbidden to do, that, which is destructive of his life.'[8] On this fundamental natural law the first human right is established, the right to safety, inalienable and unchanging from the state of nature to civil society.

There is an alternative path, suggested by Hobbes, Spinoza and Locke. Despite widespread confusion about juridical subjectivism, the rights of man, and the school of natural right, I suggest that a distinction be made. There are, it seems to me, significant divisions that must be examined within this school, which is far from a homogeneous entity. The divisions can be seen quite clearly in the different conception of the state of nature held by natural right theorists from Hobbes to Rousseau. To one, the state of nature is sociability; to another, solitude; to others, either instinct or morality, war or peace.

In fact not all the natural right thinkers are Cartesian; neither Spinoza nor Locke holds the voluntarist views about nature, man, natural right and natural law that were sketched above. In his *Ethics*, Spinoza writes explicitly of the problematic alienating of individual natural right in the process of

constituting civil society: 'In order, then, that men may be able to live in harmony and be a help to one other, it is necessary for them to cede their natural right, and beget confidence one in the other that they will do nothing by which one can injure the other.'[9] This does not mean that men cede their right to a superior whose mere will determines justice. Convinced that the doctrine of final causality turned nature on its head, Spinoza did not take up the idea of a geometrical expanse devoid of immanent law. Instead, he showed the following: that at the heart of nature, essence and existence have equal value; that all is necessity and there is no contingency; that because nature is immanent there is but one world, since God could not have fashioned things other than they were made nor in any other order; and that there is thus no free creation. In Book 2 of the *Ethics*, Spinoza adds that there is no real distinction between mind and body because thought and extension are equal attributes of nature, and that there is no distinction between concept and nature because 'the order and connection of ideas are the same as the order and connection of things'.[10] In Book 4, he then maintains that there are no insurmountable contradictions or unbridgeable gaps between nature, man and the city:

> Reason demands nothing which is opposed to nature, it demands . . . that every person should love himself, should seek his own profit – what is truly profitable to him – should desire everything that really leads man to greater perfection, and absolutely that every one should endeavour, as far as in him lies, to preserve his own being.[11]

Reason is rooted in natural law, which seeks our conservation and utility in the affirmation and full blossoming of life. It is natural for man to live by reason and to live with other men:

> In the same way, the rational association of men is founded on natural law: For that is most profitable to man which most agrees with his own nature, that is to say, man (as is self-evident). But a man acts absolutely from the laws of his own nature when he lives according to the guidance of reason, and so far only does he always necessarily agree with the nature of another man.[12]

Natural law has thus not been eliminated since the realm of nature has not been left behind. As Spinoza suggests, one cannot escape nature; it encapsulates society and culture. The full range of sentiments suited to civil life can be deduced from within the natural order itself. What is more natural than a sentiment? Instead of opposing the natural right of individual force with the conventional and voluntarist character of civil legislation, Spinoza speaks of civil laws finding their roots in natural law. A natural movement governs the progress achieved in establishing the body politic and civil society. Nature's movement does not consist in an exercise of the

will, but in attaining the knowledge that man needs nature and other individuals, and that nothing affirms and preserves his life more than other men who have made the same discovery.

Unlike other modern natural right theorists, then, Spinoza does not ground legal theory in the subjectivity of the will. He writes that 'a man who is guided by reason is freer in a state where he lives according to the common laws than he is in solitude, where he obeys himself alone'.[13] Civil society for Spinoza does not rest on subjective individualism. Instead, he keeps a place for the idea of a legal standard that is also a natural need for a natural being. More than anything, Spinoza gives man's right to security a natural foundation by making the individual right to self-preservation and self-determination the immanent law of civil association.

Locke's foundations are no more Cartesian than Spinoza's. Of course, along with everyone else in the natural right school, Locke recognises the existence of a state of nature, distinct from the state of civil society. The natural state is a state of perfect freedom and equality but in no way a state of licence, being subject to natural law. As it is for Spinoza, natural law for Locke is first and foremost the right to life: '[B]eing all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions.'[14] Man may freely dispose of his person and his property, but he must not destroy himself since life itself does not belong to him. Likewise, the possibility of seeking compensation against aggression is founded on the right to self-preservation, the 'right of preservation of the human race'. Matters of natural law – life, the body, security – cannot be the object of despotic determination because they are divine gifts flowing from man's membership in the human race. For Locke, the state of nature is in no way a state of war wherein life is laid bare to enmity and destruction. On the contrary, the state of war is the opposite of the state of nature, since natural law and justice are lacking in war. As Locke puts it: '[H]e who attempts to get another Man into his Absolute Power does thereby put himself into a State of War with him.'[15]

The state of war forges a bond of servitude and domination. To bring an end to that state and to rediscover order and natural justice was precisely the 'one great Reason of Mens putting themselves into Society, and quitting the State of Nature'.[16] The establishment of political society does not appear to Locke, any more than to Spinoza, as an escape from the rule of natural law. It is rather an attempt to fulfil natural law by other means and thus overcome the state of bondage and war that disrupted the state of nature. Locke similarly denies that the bond of paternity is a model for society. The beginning of political society is the union of man and wife in their procreative destiny to continue the species. The law of nature is still binding in society, 'as an Eternal Rule to all Men, Legislators as well as others'.[17] Political society is established wherever people associate in a body politic and appoint for themselves judges to settle their differences in accord with

explicitly declared laws. But in doing this, civil society does not abolish the natural law. What men abjure, what individuals relinquish in civil society, is only 'the executive power of the laws of nature', that is, the natural right of justice. Natural law itself never disappears. When legislators make laws, 'the rules that they make for other men's actions must, as well as their own and other men's actions, be conformable to the law of nature – that is, to the will of God, of which that is a declaration – and the fundamental law of nature being the preservation of mankind, no human sanction can be good or valid against it'.[18]

In short, the Moderns are divided. Some follow Descartes' concept of nature and subjectivity. For them, nature is remote and separated from the subject, right resides within reason alone, and society is founded on an act of calculating will. The entire legal structure is reconstructed on the basis of individuals who make up its indivisible elements, while the civil order is reconstituted on the basis of geometry, as if human beings were lines and points. At times, these natural right thinkers see men forming associations based on conventions and rights granted to individuals, at times they see them agreeing to voluntary servitude. Real human rights, however, are consigned to oblivion, obliterated by the civil rights to which they give way.

But other natural right thinkers oppose division between man and the world. When an individual renounces his natural right, he does not thereby remove himself from the natural law. When he surrenders his right to act alone and so seek revenge, he delegates his initiative to a larger body and thereby establishes a more complete form of justice. This preserves his life and perpetuates his species, for the sake of life itself. As a being created by God and existing in nature, man preserves his own life, but he can neither sever himself from life nor seize complete control of it. The sole foundation of society and the only legitimation of the political order do not lie in delegating the executive power of the natural law that founds sovereignty and justice, so as to guarantee the conservation of life and to ensure human rights to security, freedom, and equality. Human rights determine civil rights, but natural law remains an abiding principle.

This brief investigation teaches an important lesson about the development of human rights. If these rights have their origin not in subjective idealism and legal voluntarism, but rather in those works of modern legal theory which preserve a link with natural law, then it is essential for those who believe in human rights that these rights be rooted in the idea of natural law.

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