order, its norms would be something like an independent logical and moral ensemble, a set of norms that both is and ought to be obeyed by people. Natural law would be an objective order of rules or norms something like the natural laws of modern science. Its application, the observable pattern of phenomena that can be subsumed under the concept of law, would link external nature, social and political institutions and the inner life of individuals. Did the Greeks, who first introduced the idea into the universe of political philosophy and jurisprudence, understand natural law as an immutable set of rules? What is the meaning of natural law for the philosophical imagination of the Greeks and the juristic creativity of the Romans?

1. NATURE AND JUSTICE IN CLASSICAL GREECE

Greek philosophy offers a convenient starting point for exploring the genealogy of human right. The surviving philosophical fragments of the Presocratics, the earliest philosophers, are full of references to justice, injustice and right. Heracleitos believed that things regarded as opposites are in fact united and cannot exist without their contrary. There is no upward path without the downward (fr. 69), there would be no heat if there were no cold (fr. 39), justice would be unknown were it not for injustice (fr. 60).[2] And in his most famous fragment, Heracleitos tells us that "war is universal and justice is strife". But if justice is strife, its cessation would mean the end of the world. The oldest extant text of Western philosophy is a fragment by Anaximander on justice, which has become the subject of an important philosophical and philological debate culminating in a famous essay by Heidegger.[3] The fragment reads: "but where things have their origin, there too their passing away occurs according to necessity; for they are judged and make reparation (*didonai diken*) to one another for their injustice (*adikia*) according to the ordinance of time".[4] An archaic, original injustice, an *adikia* that comes before

[2] Hayek believes that Heracleitos is the earliest philosopher to emphasise the primary character of injustice. However this is inaccurate as the Anaximander fragment is earlier. F. A. Hayek, *Law, Legislation, Liberty*, Vol. 2 (London, Routledge and Kegan Paul, 1976) 162, n.9 and see J. Burnet, *Early Greek Philosophy* (4th ed., London, A & C Black, 1930) 166.

[3] Martin Heidegger, "The Anaximander Fragment" in *Early Greek Thinking* (D. F. Crell and F. Capuzzi trans.) (New York: Harper and Row, 1975).

[4] This is our translation and emphasises the legal and moral aspects of the fragment. Heidegger's essay discusses the various (mis)translations of the fragment. Nietzsche in his early but posthumously published *Philosophy in the Tragic Age of the Greeks* (M. Cowan trans.) (Chicago, Regnery, 1962) translates it thus: "Whence things have their origin, they must also pass away according to necessity; for they must pay the penalty and be judged for their injustice according to the ordinance of time". The classical translation of *Fragment of Presocratics* by Diels states that "but where things have their origin, there too their passing away occurs according to necessity; for they pay recompense and penalty to one another for their recklessness, according to firmly established time" quoted in Heidegger, op.cit., supra n.3, 41. Finally J. M. Robinson, *An Introduction to Early Greek Philosophy* (Boston, Houghton Mifflin, 1968) p.34 translates it as follows: "Into those things from which existing things have their coming into being, their passing away too, takes place according to what must be; for they make reparation to one another for their injustice according to the ordinance of time".

time marks the beginning of beings and imposes a debt or culpability on people, things and institutions. History (the ordinance of time) is the field in which the reparation or restitution of the originary injustice will be attempted and will fail as everything will return of necessity to its original injustice. But while injustices were clearly felt, in Homeric times, the development of a theory of justice had to wait the discovery of nature.

Archaic Greece did not distinguish between law and convention or right and custom. Custom is a strong cement, it binds families and communities firmly but it can also numb. Without external standards, the development of a critical approach towards traditional authority is impossible, the given goes unchallenged and the slaves stay in line, a view expressed by Heracleitos, who said that justice and injustice are man-made and God does not care about either. Leo Strauss has argued that "originally, the authority par excellence or the root of all authority is the ancestral. Through the discovery of nature, the claim of the ancestral is uprooted; philosophy appeals from the ancestral to the good, to that which is good intrinsically, to that which is good by nature".[5] Greek philosophy, nature and the idea of the just were born together in an act of resistance against traditional authority and its injustices. This development is apparent in the history of the word *dike*, the key Greek term for a cluster of concepts and words connoting the rightful, lawful or just. In archaic Greek, *dike* meant the primordial order, the way of the world.[6] It included *nomoi* and *thesmoi*, customs and norms of conduct which, according to Parmenides, were binding on both gods and mortals. *Nomos*, the word later used for law, originally had the same meaning as *ethos*. As

[5] Leo Strauss, *Natural Law and History* (Chicago, University of Chicago Press, 1965) 91.

[6] For Heidegger *dike* is "not justice but the overpowering structure of Being; it emerges and shines in its permanent presence as *physis* and is gathered together in its collectedness as *logos*", Costas Douzinas and Ronnie Warrington, *Justice Miscarried* (Edinburgh, Edinburgh University Press, 1994) 88. Heidegger discusses *dike*, *physis* and *nomos* in Martin Heidegger, *An Introduction to Metaphysics* (R. Mannheim trans.) (New York, Doubleday Anchor, 1961).

Heidegger has shown, the *nomoi* were initially the pastures of horses and wandering for pasturage, later the word took on he meaning of possession and regular usage, indicating both habit and accepted practice and movement, before settling in its classical legal meaning. By the time of the classical period, the meaning of *dike* too had changed to rightful judgment, *dikaion* was the right and just and *dikaios* the rightful person.[7]

The passage from the archaic concept of *dike* and *nomos* to the classical *dikaion* and *physikos nomos* (natural law) is punctuated by the discovery of nature. *Physis* as a normative and legal concept is not used in the extant literature before the fourth century. Sophocles in *Antigone* uses instead the term unwritten laws.[8] The idea of natural law appeared fully developed, for the first time, in Aristotle who in his *Rhetoric* wrote that:

> by law I mean on the one hand particular law and on the other general law, special being that defined by each group in relation to itself, this being either unwritten or written down, and the general law being that of nature. For there is something of which we all have an inkling, being a naturally universal right and wrong, even if there is no community between the two parties nor contract, to which Sophocles' Antigone seems to be referring.[9]

[7] According to Liddell and Scott, *Greek-English Lexicon* (6th ed., Oxford, Clarendon, 1992) *dike* means custom, usage; right as depends on custom, law; a judgment; (later) lawsuit, the trial of a case. *Dikaion* means a regular way of living; due form; (later) rightful, lawful, just.

[8] It wasn't Zeus, not in the least
who made this proclamation, not to me
Nor did that Justice (*Dike*), dwelling with the gods
beneath the earth, ordain such laws for men.
Nor did I think your [Creon's] edicts had such force
that you, a mere man could override
the great unwritten and certain laws of the gods.
They are alive, not just today or yesterday;
they live forever, and no one knows.
when they were first legislated.
Sophocles, *Antigone* in *Three Theban Plays* (R. Fagles trans.) (London, Penguin, 1984) 446–57. The term *physis* is first related to law, in Demosthenes' oration *"Peri Stephanou"* (On the Crown, C. Vince and J. Vince trans.) (London, Heinemann, 1974). A similar formulation is found in Aristotle, *The Art of Rhetoric* (H.C. Lawson-Tancred trans.) (London, Penguin, 1991) A 1368b: "The law is either particular or common. By particular law I mean that written down in a constitution, and by general I mean those unwritten laws which are held to be agreed by all". This and the quotation immediately below are the earliest references to link the common, unwritten laws with nature.

[9] ibid., 1373b.

Nature as a critical concept acquired philosophical currency in the fifth century when it was used by the Sophists against custom and law and, by Socrates and Plato in order to combat their moral relativism and restore the authority of reason. The Sophists represented the privileged youth of Athens who, in equal measure, despised the old religious taboos and the constant training for war. They set *physis* against *nomos* and individual opinion against tradition and gave *physis* a normative meaning, in which "to reason" meant to "criticise".[10] They argued that the *nomoi* are social conventions and laws and not part of the natural order. Nature as the highest norm justifies, in a rather eclectic way, whatever the instincts lead humans to desire.[11] Callicles in *Gorgias* and Thrasymachus in the *Republic* anticipated Nietzsche, when they argued that human laws were an invention of the weak in order to protect themselves from the strong. The nature of the Sophists combined the savage with the universal and stood both for the right of the strongest and for equality for all. With the Sophists, the critique of law and the figure of the naturally free and self-serving individual entered the historical scene.

Plato's response to the sophist challenge was to re-define the normative character of nature by showing that, far from contradicting law, it sets the fundamental norm of each being. Plato's late dialogue, the *Laws*, extended the concept of *physis* to include the whole cosmos. But this was not a return to the pre-classical *dike*. The new order was that of the soul and of the transcendent spiritual world it inhabits; it was the highest and most natural order and animated the empirical cosmos.[12] The distinction between the two natures followed the Platonic opposition between the worlds of forms and reality but acquired political significance much later. As Louis Dupré argues, it "laid the philosophical basis for the later attempts to integrate the classical concept of nature with that of a Hebrew-Christian Creator beyond nature".[13] But that had to wait. The significance of the debate between Plato and the Sophists was that by juxtaposing *physis*

[10] Ernst Bloch, *Natural Law and Human Dignity* (D. J. Schmidt trans.) (Cambridge, Mass, MIT Press, 1988) 7–9.

[11] The classical treatment of *nomos* in Greek thought is Jacqueline de Romilly, *La Loi dans la pensée Grecque: des origines à Aristote*, (Paris: Les Belles Lettres, 1971); see also Martha Nussbaum, "The Betrayal of Convention: A reading of Euripides' *Hecuba*", in *The Fragility of Goodness* (Cambridge, Cambridge University Press, 1986) 397–421.

[12] Plato, *The Laws* (T. J. Saunders trans.) (London, Penguin, 1988): "When [the ignorant] use the term 'nature', they mean the process by which the primary substances were created. But if it can be shown that soul came first, not fire or air, and that it was one of the first things to be created, it will be quite correct to say that soul is preeminently natural", 892 c.

[13] Louis Dupré, *Passage to Modernity* (New Haven, Yale University Press, 1993) 17.

and *nomos* in their various meanings, it opened the whole basis of classical civilisation and institutional existence to radical questioning and innovation and gave rise to political philosophy and jurisprudence. Turning nature into norm or into the standard of right was the greatest early step of civilisation but also a cunning trick against priests and rulers.[14] To this day, when knowledge and reason are subjected to authority they are called "theology" or "legal learning" but they cannot be the philosophy practised by the Greeks.[15]

Classical natural right was radically anti-historicist, or to use a term anachronistically, it had something "objective" about it. But as the radical split between the subject and object, a mainstay of modernity, had not occurred yet, the right reason revealed in nature had none of its modern characteristics. Unlike "objective" statements, natural right was neither static, nor certain, nor did it mirror an inert nature. To understand its meaning, we need to bracket our contemporary assumptions about nature and culture and place it within the teleological cosmos of antiquity.

Classical ontology believed that the cosmos, the universe and everything in it, animate or inanimate, has a purpose, *telos* or end. The Greek cosmos included the *physis* of beings, the *ethos* of social mores, the *nomos* of customs and laws and, most importantly, the *logos* or rational foundation of all that exists, which founded the cosmos as a closed but harmonious and ordered universe. Entities were arranged in a hierarchical way, each holding its unique and differential place within the overall scheme according to its proper degree of perfection, "at the top the incorruptible imponderable luminous spheres, at the bottom, the heavy, opaque material bodies".[16] The end of a being determined its place in the whole and was identical with its nature. "The nature of each is his purpose" wrote Aristotle and Aquinas, in his *Commentary on Aristotle's Physics*, repeated that

[14] The French political philosophers Ferry and Renaut have argued that Strauss is an extreme anti-modernist who advocates the return to classical culture. They have totally missed however the critical intent of Strauss' analysis. This is necessary for their argument, according to which, Strauss' naturalism is a rather sterile authoritarianism and cannot be rescued from Aristotelian cosmology. Luc Ferry and Alain Renaut, *From the Rights of Man to the Republican Idea* (Franklin Philip trans.) (Chicago, University of Chicago Press, 1992) 32–4. For a response to their peculiar Heideggerian liberalism, see Bernard Bourgeois, *Philosophie et droits de l'homme* (Paris, P.U.F., 1990).

[15] Strauss, op.cit., supra n. 5, 92.

[16] Blandine Barret-Kriegel, *Les Droits de l'homme et le droit naturel* (Paris, P.U.F., 1989) 46. It should be emphasised here that this cosmology is intrinsically linked with the inegalitarian nature of classical natural right and of its societies. For Aristotle, slavery was natural and therefore not an affront to natural right.

nature acts for an end.[17] The nature of a thing or being is, first, its efficient cause, its *energeia* or potential for perfection, secondly, its developing essence and, finally, its end or aim, the purpose towards which it moves, its actualised potential when it matures and becomes a perfect specimen of its kind.[18] The end or *telos* is a state of existence at which disposition or potency reaches fulfilment or perfection. The nature of the acorn, for example, is to become a mature oak tree, the purpose of the vine to produce sweet-tasting grapes. Similarly, the purpose of a human is to achieve his potential, to pass from the nascent to his fully developed state: a child's end is to become a virtuous adult, a carpenter's to produce excellent tables, a cobbler's the perfect sandals. Aristotle's concept of nature was therefore rich and complex: both the efficient and final cause, the germ present at birth and the aim beings tend to realise naturally.

But if the nature of a thing or being is its state of fulfilment or perfection and every stage in life is a station from its transient presence to its natural end, being cannot be distinguished from becoming and essence from existence. Nature itself, unlike the inert matter of modern science, represents the principle of motion in a purposeful cosmos, in which acorns, lambs and infants can only be understood as a developing order of meaningful and future-looking interrelations. For Aristotle, *physis* was motion, "a source or cause of being moved and of being at rest in that to which it belongs primarily in virtue of itself".[19] Being was always on the way, in a journey that will never end, because perfection was always a step too far, a state always still to come.

Observing the nature of the cosmos and of things and beings in it involves imputing on them aims, purposes and ends politically, in the *polis*, always in conjunction with other things and beings. These teloi are not arbitrary; they are determined by the dispositional characteristics of each being, by its order of needs and wants which, by pointing to its natural constitution, creates a strong moral duty to strive and achieve it. The good of an entity is the completion of the move towards its end, the ever-deferred transition from potency to actuality. A being's nature corresponds to its specific operation or work; a

[17] An account of Aristotle's teleology is found in Alan Gothhelf, "Aristotle's Conception of Final Causality", 30/2 *Review of Metaphysics*, 226–54, 1976. For Aquinas's Aristotelianism, see Anthony Lisska, *Aquinas's Theory of Natural Law* (Oxford, Clarendon, 1996) Chapter 4.

[18] Aristotle, *Metaphysics* (D. Bosctock trans.) (Oxford, Clarendon, 1994) 4.4, 1051a17; *Politics* (H. Rakham trans.) (Cambridge Mass, Loeb, 1990) I, 1, 1252a.

[19] *Physics* (D. Bosctock trans.) (Oxford, Oxford University Press, 1996) II, 1,192b, 21–3.

being is good if it does its proper work well, if it follows its nature. Its perfection constitutes its well being or *eu zein* and offers precise guidance in ethical and practical matters. In this sense, the good life is life according to nature and no separation between is and ought exists. The natural teleology of the ancients, their purposeful nature, could thus become the basis of a strong ethics of virtue and value. Right according to nature is what contributes to the being's perfection, what keeps it moving towards its end; wrong or unjust is what violently removes it from its place, disrupts its natural trajectory and "prevents it from being what it is".[20] Natural right is therefore both transcendent to reality, an "ideal", and can be confidently discovered through observation and reasoning, although this does not make it "objective" in the modern sense. The idea of an eternal inert nature is totally alien to early natural law.

Within this broad framework, the various schools of classical philosophy interpreted nature differently. For the Sophists, *physis* was the essence of things which was not sacred or solemn, but simply what endures through change and remains constant behind diversity. Their philosophical successors, the Cynics and the Hedonists, associated nature with the simplicity of animality and the indulgence of private pleasures. The Cynics fought tradition and artifice in its many forms and attacked all institutional invention, from luxurious living to property, family and the polis. The Hedonists taught pleasure; against the dog-life of Diogenes, Aristippus led a life of luxury and preached that natural is what contributes to happiness, the only criterion for judging the value of institutions. Depending on whether the character of innate nature was meant to suffer or enjoy, frugality and pleasure became the twin aims of natural law. To this day, the Cynics and the Hedonists are the forefathers of many revolutionary movements, although preaching the universal right to pleasure without hypocrisy is more dangerous, for the rich and powerful, and harder to fulfil than the message of meagre frugality of the Cynics.[21]

Many times in the history of natural law, an initially revolutionary idea was co-opted by the established powers, tamed and domesticated. Epicurus turned the hedonist pleasures of the flesh with their revolutionary potential into the private and tranquil enjoyment of the philosopher and made a life in contemplation the prerequisite of human dignity. His insistence on the privacy of the undisturbed delights of the mind led him to doubt the sacred origin of the polis;

[20] Ferry and Renaut, op.cit., supra n. 14, 34.
[21] Bloch, op.cit., supra n. 10, 9.

he taught, instead, that cities were established through a contract of free and equal individuals who entered it to protect their security. The purpose of the polis and the basis of obligations that carry the force of natural law is utility; the aim of the law is to prevent mutual injury and harm. But despite the individualistic character of Epicureanism, its suspicion of public powers and its critique of injustice, nature and its pleasures remained totally private and had no immediate effect on the social organisation which was sustained by slaves with no obvious stake in the realm of happiness.

The final and most dramatic mutation in the early relationship between *physis* and *nomos* was introduced by the Stoics. The Stoics remained faithful to the superiority of a private life of tranquillity and reflection. They preached and practised *ataraxia* or imperturbability, the supreme duty of self-control over passions and irrationality. But while for Epicurus, happiness according to nature led to a life of dignity, the Stoics made well-being the outcome of a life dignified by the pride of being human. The dignified person was someone whose "head was held high . . . the person who held himself upright, who from the outset related to natural right . . . A pride that was universally formal set an all-encompassing attitude of kinship on the autonomous individual".[22] The Sophists had set *physis* against *nomos*; the Stoics expanded *nomos* into the necessary bond of the universe and identified the two. The new natural law was universal and even divine, its sacred character communed a sublime pathos to its followers. This passion against passions transgressed class divides for the first time and united slave (Epictetus) and emperor (Marcus Aurelius). The Stoics kept referring to a golden age, governed by unwritten laws whose content was the innate equality and unity of all in a rational empire of love. "An extremely anthropocentric, yet divinely sublime, nature governed by necessity was held over positive society and became the sole criterion of valid law".[23]

While the Stoics were not particularly interested in jurisprudence, and their quietism allowed them to accept both democracy and monarchy, they made a lasting contribution to legal thought. Their universal humanity, based on the rational essence of man and equal rights for the whole human race, was a dramatic departure from the Greek world of free and slaves or Hellenes and barbarians. "The contact with the ancient prophets of Israel, who were the first to lay claim to an analogous position, was a singular event full of

[22] ibid., 12.
[23] ibid., 13.

consequence. The unity of the human race, the natural right to peace, formal democracy, mutual aid . . . came to be the beginnings of a more or less definite concept".[24] But these revolutionary ideas were initially confined to the inward looking and austere gaze of the philosopher or the idealised but absent perfection of the hellenistic world. Their more concrete application would have to wait for the law of the Roman Empire and the political declarations of early modernity.

We can conclude, that despite their differences, classical philosophers saw nature as a standard, which must be discovered because it is occluded by a combination of convention and ancestral authority. Philosophy starts when it distinguishes between the truths about a topic given by law, convention or the received opinion (*doxa*) and the truth or the good arrived at through the dialogical critique of received wisdom and the observation of its nature. For the classical philosophers, nature was not just the physical world, the "way things are" or everything that exists but, a term of distinction, a norm or standard used to separate the work of philosophical and political thought from what obstructs or hides it. Nature was philosophy's weapon, the unsettling and revolutionary promethean fire used in its revolt against authority and the law. Its "discovery" and elevation into an axiological standard against convention emancipated reason from the tutelage of power and gave rise to natural right.

The possibility of judging the real in the name of the ideal can only start when what is right by nature confronts the rightful by custom or past practice. The concept of right was freed from its subjection to history or common opinion and became an independent tool for critique. The autonomisation of right was the necessary precondition for the development of a theory of justice from which current arrangements can be criticised. Thus nature was used against culture to create the most cultured of concepts. But if nature was a tactical move motivated by the need to combat the claims of authority which ruled early Greek society, its "discovery" was not so much a revelation or unveiling but an invention or creation. Nature must present itself as what was occluded by culture because philosophy cannot come into existence or survive, if it submits to ancestral or conventional authority. In this sense, the origins of philosophy and the discovery of nature were revolutionary gestures, directed against the claims to authority of the past and of law-as-custom and giving rise to critique in the name of justice.

[24] ibid., 16.

II. PLATO AND JUSTICE AS IDEAL

The cunning and manipulative oratory of the Sophists, the simple or the luxurious life of Cynics and Hedonists, the inward looking Epicurean or the philosophically egalitarian Stoic did not detract from the central methodological and substantive position of the classics. Observing the natural constitution of humans indicates that people live in cities or *poleis*, they are Aristotle's political animals *zoa politica*. No bare individual human nature exists outside of the group, no separate individuals can be found in a natural condition, except for monsters. Love and affection, pity and friendship form the natural kernel of natural right, because pleasure is achieved in association with others. Human nature can be perfected only in the political community and, as a result, the virtue of justice acquired central importance. Individual happiness was to achieve one's "standards of excellence" and political activity aimed to facilitate perfection and the realisation of virtue. A citizen can become excellent only in a just city and a city can become just only if its citizens live a life of virtue. Accordingly, personal morality and political ethics had the same end, peaceful activity in furtherance of virtue. The perfect natural order encompassed the perfect political order. Nature included the germ of law.

Justice, the natural aim of political life and the topic of paramount importance in classical philosophy, was a necessary accompaniment of natural right. The enquiry about justice involved two inter-related dimensions, which can be analytically distinguished: one concerned the political order, the other was more specifically legal. The first is associated with Plato and later the Stoics, the second with Aristotle. Taken together, they present a thoroughgoing use of the method of natural right in the consideration of the social bond. We will examine them in turn, emphasising those aspects of the classical doctrines which are mostly relevant to the genealogy of human rights.

The philosophy of Plato is preoccupied with the question of justice. His *Republic* remains to this day one of the most sustained discussions of the topic in world literature. The quest is conducted in the form of a dialogue between Socrates, the defender of justice as the right order in the city, and various Sophists, presented as purveyors of common-sensical opinions. The dialogue proceeds through the refutation of various definitions and arguments about justice, which Socrates shows to be wrong and to describe injustice rather than

justice.[25] The Socratic quest for true justice is a refutation of injustice through reason.

Socrates starts by dismissing conventional theories which present justice as giving people their due, telling the truth and paying one's debts or finally doing good to friends and harm to enemies. He then turns to the main challenge. The cynical view of the Sophist Thrasymachus, that what passes for "justice" is the expression of the interests of the rulers, the wealthy and the strong and, as a result, the truly righteous man always loses out.[26] It is in the interest of the virtuous, accordingly, to act unjustly and promote his own profit since injustice gives more strength, freedom and mastery than the misnomer "justice". The challenge of Thrasymachus goes to the heart of the rationalist dialectic. He chides Socrates to stop "playing to the gallery by refuting others . . . It's easier to ask questions than to answer them. Give us an answer yourself, and tell us what you think justice is".[27] But while Socrates shows that the position of Thrasymachus is logically contradictory and morally untenable, he ends the exchange by admitting that he does not know the meaning of justice. He holds to the belief, however, that justice is good and injustice evil and that justice is always more advantageous than injustice.[28] Reason commands that it is better to suffer an injustice than to commit one.

But Socrates soon admitted that while philosophy is committed to the rule of reason, reasoning alone cannot prove the superiority of justice. He was the first to understand one of the great conundrums of moral philosophy, namely that moral knowledge does not necessarily and automatically lead to moral action. As Ovid put it later, *video meliora proboque; deteriora sequor* (I know the good and approve of it, but I follow evil). To persuade his audience, therefore, Socrates supplements his argument with a number of non-rational claims: righteousness should be practised because it brings happiness, an argument which is both close to Thrasymachus' detested utilitarianism and is acceptable only to those already righteous. Although he dismisses the theory of justice as retribution, he narrates the religious myths of Radamanthus and Er with their threats of divine retribution for evil deeds in the afterlife. Finally, he admits that while philosophy,

[25] Hayek, op.cit., supra n. 2, Vol. 2, 162.

[26] The Sophist Callicles in *Gorgias* had argued, in a proto-Nietzschean manner, that men are divided by nature into the strong and the weak and that law and convention are the creations of inferiors who use the talk of justice to drag their superiors to their own low level. Plato, *Gorgias* (W. Hamilton trans.) (London, Penguin, 1960).

[27] Plato, *Republic* (D. Lee trans.) (London, Penguin, 1974) 336c.

[28] ibid., 354b.

the practice of wisdom and knowledge, is the best teacher of conscience and the city, the external authority of parents and legislators may be the only realistic source available for teaching virtue to the many.

The philosophical Republic is a programme for the best polity, a quasi-constitution for the city that practices justice. It must be constructed by the philosopher who, in using reason, clarifies and promotes the requirements of human excellence according to nature. But the Socratic quest also pays attention to the exigencies and contingencies of the historical situation. No polity can survive or acquire legitimacy, if it does not acknowledge the importance and take account of the "unenlightened" opinions of its citizens, their conventions and customs. The success of the Republic, the application of natural right to politics in other words, depends on the uncertain and always fragile acceptance of the philosopher's design by his fellow citizens and on a large measure of chance.[29] It is a utopia, it does not exist in the present, and its realisation in the future cannot be guaranteed. Natural right revealed in reason is the necessary precondition of the just polity, but it is not sufficient. It must be adjusted to practical and political circumstances and considerations, it must restrain its rationalism and tailor its truth to the opinions and emotions of the many.

The other striking characteristic of the dialogue is that despite the many rational and non-rational arguments canvassed, Socrates offers no definition of justice. Justice is first replaced by reason, later by the idea of the good, which is presented as its substance and ultimate value. But while the good of the individual and of the *polis* provide the necessary criteria for choosing between competing courses of action, the good itself is not accessible to reason. Similarly with justice: Socrates affirmed repeatedly that justice and the good exist and are the highest value. But every attempt to define or describe them was soon abandoned as the dialogue circled around justice and the good without resolution. The closest we come to the meaning of justice is when Socrates compares the constitutions of the ideal city and of the soul. They both follow the principle of "doing one's own and proper task" *suum agere*. The right constitution leads to a balanced relationship between the three classes of citizens in the city and the three parts of the soul in man. The perfection of the parts and their harmonious and proportionate relationship makes the city just and

[29] Strauss, op.cit., supra n. 5, 139.

the citizen virtuous. But *suum agere* is a totally formal principle, and can scarcely determine what is to count as proper and as due to each. But this only sustained attempt to describe the characteristics of justice was soon abandoned, when Socrates acknowledged that the comparison of state and soul may not be appropriate.[30]

This endless and inconclusive circling around justice and the good leads eventually to the recognition that the good may be *epekeina ousias*, beyond Being and essence, at the other side of knowledge and reason. As Plato admitted in his seventh Epistle, we can never fully know the good "for it does not admit of verbal expression like other branches of knowledge".[31] Justice too, the political expression of the good, cannot be discovered in laws and in written treatises, as it has no essence or its essence lies beyond immediate life in the "city in the sky". But, while it cannot be rationally defined, justice exists and reveals itself to philosophers and lawgivers in mysteriously divine ways. The quest for justice exemplifies the paradox of reason, formulated by Socrates "in the most extreme manner: reasoning leads to unreason. Faith surfaces three times and in three forms: faith in otherworldly justice, faith in authority, and faith in revelation".[32] Behind the meandering dialogues lies Socrates' ultimate argument for justice: his sacrifice on the altar of a justice that cannot be defined or its superiority proven rationally but which must be acted upon, even at the greatest of costs. Socrates' death is the strongest argument about the inherent injustice of the law. After his sacrifice the burden of proof lies with those who believe in law's justice.

The Republic is the first attempt to raise justice into a universal ethical idea, totally independent of its historical context. People must leave the cave or prison of empirical existence and enter the ideal world of forms before they can grasp the operation of the good and of justice. What is most remarkable in the dialogue, however, is its unswerving attack on all conventional and traditional views. The truth about justice may not be accessible at all, in which case we have an obligation to remain silent in these matters.[33] It may be that the only contribution philosophy can make is to denounce the many

[30] *Republic*, n. 27 supra, 435.

[31] Plato, "Epistle VII" in *Phaedrus and Epistles VII and* VIII, (W. Hamilton trans.) (London, Penguin, 1973) 341c. For a full discussion of the Platonic search for the meaning of justice and the good and his admission of defeat, see Hans Kelsen, "The Metamorphoses of the Idea of Justice" in P. Sayre, *Interpretations of Modern Legal Philosophies* (New York, Oxford University Press) 1947.

[32] Agnes Heller, *Beyond Justice* (Oxford, Blackwell, 1987) 73.

[33] Plato, *Epistle VII*, 337.

injustices, to refute the falsehoods of the common sense and to make it understand the natural purpose of the *polis*. At the end, Socrates seems to accept that as no rational argument can conclusively justify his theory of justice, he must offer his own sacrifice as ultimate proof and the gravest offence against reason. In doing so, his arguments and his action are joined in a paradoxical formulation which may be called the *aporia of justice*: to be just means to act justly, to be committed to a frame of mind and follow a course of action that must be accepted before conclusive rational justification.[34]

The classical theory of justice can be described therefore as an ethical and political doctrine, which aims to bring about through debate, persuasion and political action the "best polity or regime" in which human perfection and virtue in association with others can be achieved. Its methodological tools are the observation of nature and rational argument. But it would be misleading to say that this regime is "given" or "found" in nature. Natural right offers an alternative to historical determinism and to conventional and authoritative opinion. Because justice is by definition critical of what exists, philosophy adopts nature as the source of its prescriptions and claims a natural "objectivity" for its right. But this ideal is not given by God, revelation or even an immutable natural order. It is a construction of thought and its actualisation is deeply political. From Anaximander to Socrates, early philosophy claimed that men need and have a sense of injustice. They unceasingly build legal and moral systems to achieve justice but justice is not fully of this world. The rightful individual and social order strive to transcend the infamies of present but, justice is accessible to human thought in a limited way and its realisation is very difficult, even improbable. As Strauss put it, "the best regime, which is according to nature, was perhaps never actual; there is no reason to assume that it is actual at present; and it may never become actual . . . in a word, the best regime is . . . a 'utopia' ".[35] Justice is thus caught in an unceasing movement between knowledge and passion, reason and action, this world and the next, rationalism and metaphysics.

[34] The aporia of reason and justice is even stronger in the Jewish tradition. To be just, the Jew must obey the law, without any reason or justification. For Buber, Jews act in order to understand while Levinas denounces what he calls the western "temptation of temptation", the – "Greek" – demand to subordinate every act to knowledge and to overcome the "purity" and "innocence" of the act. Emmanuel Levinas, *Nine Talmudic Readings* (Bloomington, Indiana University Press, 1990) 30–50.

[35] Strauss, op.cit., supra n. 5, 139.

III. ARISTOTLE AND LEGAL JUSTICE

Aristotle's *Nicomachean Ethics* and, in particular, its chapter on Justice are foundational texts for Western law.[36] The discipline of law *stricto sensu* was enunciated in the *Ethics* and juridical activity was presented, for the first time, as relatively autonomous from morals or politics. According to the legal historian Michel Villey, very little can or has been added to legal theory or to the idea of justice presented there.[37] Aristotle starts by distinguishing between general and particular justice. Justice belongs to the virtues, not as one of them but as the totality of virtue. General justice is the "moral disposition which renders men apt to do just things, and which causes them to act justly and to wish what is just". It has two characteristics: first, it is identified with the whole of virtue as exercised in the *polis* and, secondly, it is addressed to the "good of others" *allotrion agathon*.[38] But general justice is much more than the morality of the moderns. Aristotle's *dikaios aner*, the just man, has all the virtues and exercises them for the good of the others and the city. In this sense, general justice resembles the Platonic definition without the strong metaphysical element. It has elements of political and social morality and it is related to the law but is wider than either. As the law covers many aspects of human existence, the just and the lawful may coincide. The "unjust" man is first a law-breaker, secondly, he who takes more than his due. But Aristotle adds, in an early corrective to legalism, that law-breaking is unjust, only if the law is "rightly enacted".[39] The prime example of an unjust law is that which does not foster the other-regarding good.

But it is particular or legal justice which opens a wholly new way of looking at legal relations. To understand its strange to modern ears nature, we should start by examining the end and nature of law. Justice today is a principle or ideal towards which societies aspire, the (absent) soul of the body of laws. For Aristotle, however, this distinction between law and justice did not exist. The word used to express this intimately connected cluster of ethical, legal and political concepts was *dikaion*. The *dikaion* means the right or just state of

[36] For a discussion of Aristotle's ethics see W.F.R. Hardie, *Aristotle's Ethical Theory* (Oxford, Oxford University Press, 1980), J.O. Urmson, *Aristotle's Ethics* (Oxford, Blackwell, 1988).

[37] Michel Villey, *Le droit et les droits de l'homme* (Paris, P.U.F., 1983) Chapter 4.

[38] Aristotle, *Nicomachean Ethics* (J.A.K. Thomson trans.) (London, Penguin, 1976) Bk V, 1129b30–1130a18.

[39] ibid., 1129b14.

affairs in a particular situation or conflict, according to the nature of that case. Particular justice exists in cities; when its demands are contested by two parties, it requires the intervention of a third disinterested person, the *dikastes* or judge. His judgment is the *dikaion*, the lawful and the just solution. The *dikaion* is therefore the object of judicial decision-making, the action of the just man and the end of law. It is a state of affairs in the world, a distribution of things or the just share decided by the judge and, as the object of justice, the aim of human acts and the outcome of judicial consideration. As juridical art, the *dikaion* aims at the right proportion between things or "an external relation to be established between persons on the basis of things".[40] The rightful judgment distributes proportionately things to people, gives them their fair or just share according to the pattern of right relationships. The jurist is not concerned with upholding individual entitlements or rights but with observing the cosmic and civic order, from which he derives guidance. The way of things and of the world teaches the judge patterns of proportionate distributions, which he must respect and promote. The idea of proportion is crucial; it brings justice close to the aesthetic beauty immanent in the harmony of the world.

The *dikaion* should not be confused with morality or general justice and it does not result from the application of moral precepts or legal rules. Greek cities had moral rules and Antigone's unwritten laws fall into that category, but these were clearly distinguished from legal justice. The idea of law as commandment or rule accompanied by sanctions originated in Jewish and later Christian concepts of law and was not of great importance in classical Greece.[41] Particular justice, the art of the judge, was not about morality, utility or truth but about the sharing of external goods, of benefits, burdens and rewards. It was concerned with distribution and retribution and constituted the proper object of the juridical art. The task of the judge was precisely to reach the right outcome in the sharing of external goods. Plato too wrote that the aim of the juridical art (*dikastike*) is to discover the *dikaion* and not to study the laws, which are only supplementary to this task; an unjust law is not law properly speaking, because the role of the jurist is to find the just solution.[42] The judge,

[40] Ralph McInerny, "Natural Law and Natural Rights" in *Aquinas on Human Action* (Washington, D.C., Catholic University of America Press, 1992) 217.

[41] Michel Villey, "Dikaion-Torah" in *Seize Essais de Philosophie du Droit* (Paris, Dalloz, 1969).

[42] Plato, *The Laws*, supra n. 12, IV, 715.

like all citizens, must seek the good and the judicial vocation is justice.

Aristotle's description of the judicial art is detailed and practical and follows the method of natural right. A just distribution involves two elements: a recognition of a state of affairs, of an equitable proportion subsisting amongst things, and a distribution of the disputed things according to this arrangement. First, observation; for classical philosophy, the source of natural law was the natural organisation of the cosmos. The just outcome is already inscribed in the nature of things and relationships, in the cosmic order of interrelated purposes and ends and awaits its recognition and pronouncement by the judge. The cosmos and everything in it, including the *polis*, are part of a universal harmony, the various parts and constituents are properly balanced. The city does not enjoy perfect justice, of course. But families, social groups and cities, which have come into being spontaneously and, gradually developed their political relations, values and constitutions, are prefigurations of the perfect order. They can serve as models because the hope of the perfectly just city presupposes that we can extract the idea of justice from its existing imperfect approximations. Observing reality is the first step to the discovery of the just solution.

The judge acts like a botanist or anthropologist: he observes the connections and relations amongst his fellow citizens, the way in which they arrange their affairs, in particular the way in which they distribute benefits and burdens. But the just decision is always provisional and experimental, transient and dynamic in the same way that human nature is always on the move, between the actual and the potential and continuously adjusts to changes, new circumstances and contingencies. Finding the *dikaion* is the aim of the classical jurist but that is never fully and finally achieved; it remains always a step away, full justice is deferred, not yet here and never fully done. In this sense, seeking the just involves the observation of the external world as well as a futural or transcendent element. "If we understand the word law as synonymous to a formulated rule, there is no natural law" writes Villey.[43] Natural right is a methodological principle that helps in the discovery of the just solution, not in our conscience or some strict set of rules, but in the external world of human relations. The natural law is an unwritten law, its content is never fully known; it has nothing to do with the idea of a positive rule or commandment prevalent in modernity.

[43] Michel Villey, *Leçons d'Histoire de la Philosophie du Droit* (Paris, Dalloz, 1962) 240.

Furthermore, finding the just solution was a discursive practice and a political act. It involved the learned choice of the judge who considers all the circumstances of the case and the particular conditions persisting at the time.[44] The jurist discovers the *dikaion* by using the art of law: its key principle is *audem alteram partem*: there are always at least two conflicting parties who must be heard and that makes the style of argument rhetorical and the method dialectical. The dialectic was an integral part of classical thought; until the Renaissance, it was the main scholarly method in theology, philosophy and law. The dialectically just solution is not deduced from a general rule, nor is it the outcome of a logical exercise but the application of knowledge about the nature of things. It will be discovered in reality, through a consideration of arguments, examples and an observation of the relationship amongst the parties. The judge considers the pleadings of the parties and compares their conflicting and contradicting opinions as partial expressions of reality. By putting terms and arguments to debate, judges arrive at their decisions dialectically: not the only or truthful opinion but the best in the circumstances. The final ingredient was political: in decision-making, the legislator or judge supplements the observation of nature, the dialectical confrontation and the rational justification with an act of will which cannot be fully theorised. Dialectics is always provisional, open to new arguments, experiences and concerns. Legal judgment, conducted in the realms of *praxis* and *techne* rather than science, *episteme*, is always accompanied by a degree of uncertainty, which is brought to an end by the decision. The *dikaion* is therefore an act of judicial will which, starting from a combination of natural observation and argumentative confrontation, adds a precise meaning and determination (the punishment for such a tort is the sacrifice of two goats) and brings the issue to a close.

In Roman civil law, the method became explicitly casuistical, it started and finished with the case at hand. The casuists stayed close to the facts of the case from which they extracted the solution (*ex facto jus oritur*). They explored existing opinions relating to the case, they looked at doctrinal authorities, at opinions of jurisconsults and at available rules. Examples from the past, unjust outcomes, hypotheticals and cases previously considered, were used to illuminate the present situation. The authorities were not treated as true or binding, they had persuasive only power. The judge intervened by

[44] "One cannot know in advance the content of positive justice; it depends on the free decision of the law-giver", Aristotle, *Ethics*, op.cit., supra n. 36, VII. 6.1.

confronting the contradictory claims of the parties, clarifying words and terms, putting the litigants in direct confrontation. This polyphonic procedure in which litigants and authorities, witnesses and precedents, opinions, reasons and arguments, "the sic and the nunc", are brought into dialogue is the gist of the dialectic, and the way through which *jus* emerged. And as social shares were part of the wider cosmic order, a just distribution was politically and ethically right but also a beautiful expression of the wider cosmic harmony.

Finally, Aristotle's theory of justice cannot be understood outside its intricate connection with *phronesis* or practical wisdom. For Aristotle, virtue is the geometrical mean between excess and lack or defect. The moral agent is the prudent man or *phronimos* who acquires his moral sense and discrimination in the course of a life full of experience. His practical judgment is always situated in the concrete circumstances of the case at hand. Aristotle argued that equity, *epieikeia,* is the rectification of legal justice *nomos* in so far as the law is defective. Laws are general but "the raw material of human behaviour" is such that it is often impossible to pronounce in general terms. Thus "justice and equity coincide, and both are good, [but] equity is superior".[45] As people and life have an "irregular shape" the law should be like the leaden Lesbian rule: "just as this rule is not rigid but is adapted to the shape of the stone, so the ordinance is framed to fit the circumstances".[46] There is no model or blueprint to guide the judge, his true vocation is often to decide the just without criteria or rules. The variety of circumstances and the unique situation in each case means that, to achieve equity, the judge must decide from case to case without resort to strict criteria. To be just, the judge must develop and fine tune the art of evaluating the conflicting forces, relations and claims. The mean, so central in Aristotelian ethics, cannot be defined outside each specific situation. Justice is the work of the just, but whether the judge is just or not cannot be judged prior to his judgment. Particular justice as the art of evaluation, calculation and distribution cannot be theoretically specified outside of its context.

This is why Leo Strauss, more interested in the political than legal aspect of justice, found Aristotle less important than Plato. Strauss believed that the Aristotelian emphasis on circumstance and situation turned justice and natural right into concrete judgments and actions and turned them away from general schemes and theories. But Strauss

[45] Aristotle, *Ethics*, op.cit., supra n. 36, V, x, 1137a35–b24.
[46] ibid., V, xi, 1137b24–1138a11.

too agreed that for both Plato and Aristotle natural law had a changeable character and recognised the variability of the demands of justice.[47] "There is a universally valid hierarchy of ends, but there are no universally valid rules of action", Strauss concluded. While the hierarchy of ends is sufficient for passing judgment on the "level of the nobility of individuals and groups and of actions and institutions . . . it is insufficient for guiding our actions".[48] General justice, the "whole of virtue", which demands the "good of the other" remains an elusive, always deferred horizon against which legal judgment and political plan must be precariously conducted. It may be that Lyotard's verdict that "it is impossible to produce a learned discourse upon what justice is" applies equally to classic and modern efforts to create a theory of justice.[49] The reservations of Strauss remain important nonetheless. "The only thematic treatment of natural right which is certainly by Aristotle and which certainly expresses Aristotle's own view covers barely one page of the Nicomachean Ethics".[50]

Aristotle is a theorist of justice and, despite Villey's attempts to identify the two, natural right and justice follow different and often conflicting paths. Their invention in classical Greece at around the same time helped their confusion but, their later trajectory separated them. In normal times, justice remains a virtue imposed from above. Even in its Aristotelian prudent and equitable version, justice uses a number of elements which distance it from natural right. First, legal justice, rather than challenging existing hierarchies, presupposes a natural and institutional equilibrium which acts as the empirical and logical background of proportional judgments. Secondly, Aristotelian judges are prudent patriarchs. The golden age of Stoics, on the other hand, had no authority or judge and, Themis, the goddess of custom, had no use of scales for weighing people and things. Justice was central for those who try to devise the best, most acceptable, form of exercising power, not for philosophers concerned with dissent and opposition to established customs or laws. As Bloch argued, "Plato

[47] Strauss, op.cit., supra n. 5, 3157.
[48] ibid., 162–3.
[49] Lyotard states that "I am closest to Aristotle, insofar as he recognises – and he does so explicitly in the *Rhetoric*, as well as in the *Nicomachean Ethics*, that a judge worthy of the name has no true model to guide his judgments, and that the true nature of the judge is to pronounce judgments and therefore prescriptions, just so, without criteria", Jean-François Lyotard and Jean-Loup Thébaud, *Just Gaming* (W. Glodzich trans.) (Manchester, Manchester University Press, 1985) 26.
[50] Strauss, op.cit., supra n. 5, 156.

and Aristotle made out of justice that which Stoicism never made out of nature, namely, the genius of domination".[51] For Plato, justice regulates the soul as much as the city, it has a disciplining function: it co-ordinates and subjugates the faculties of the person and ensures that each citizen carries out his alotted duties and responsibilities. Despite its utopian element, Platonic justice remained philosophically aloof and politically authoritarian.

Aristotle's pragmatic politics made him less authoritarian, but justice as a legal virtue was scarcely likely to send the slaves marching to the *agora* of Athens. Stoic natural law, with its philosophical quietism, did not do that either; it laid however a possible foundation for future rebellion. In the hierarchical Aristotelian cosmos, classes and people were assigned their exact value and cosmic significance by their natural state but, at the same time, they were constrained to that state alone. Individual justice and the just man had an independent place in Aristotle, but his actions did not refer to intentions, emotions and passions. It was rather an external quality which could be decided, as Villey put it, objectively. Judicial impartiality was its model, alongside the situated and flexible objectivity of nature. Both were necessary for deciding what the citizen's share was. Very little in the standards of law, virtue or value could change under such a concept of justice. They remain the measure of dominant relations which, justice, with its mathematical aptitude, could calculate and weigh exactly. From the perspective of radical natural right, justice was not a critique but a critical apology of positive law. There is considerable distance between this patriarchal conception of justice and the *physis* that philosopher and rebel set precisely against the assignments and distributions of law.

We can conclude that the discovery of nature and the method of natural right was the rebellion of philosophy against the weight of custom and of the past. Natural right claimed the truth of nature against common sense and the dignity of argument and dialectic against the banality and oppression of received opinion. But as the nature of the classical teleological world was a dynamic concept, never finished or perfected but always on the move, natural right, the outcome of the observation of nature and of the dialectical confrontation of opinions, was also provisional and changeable according to new contingencies. As the dictate of observed nature, natural right was quasi-objective; as the outcome of dialectics, it was deeply

[51] Bloch, op.cit., supra n. 10, 39.

interpretative and political. Both objective and constructed, natural right became a non historicist but deeply historical and cultural standard for judging the world.

When this method is applied to the polity, justice is shown to have two aspects, a political and a legal. Political justice explores the overall organisation of the *polis* and tries to imagine the perfect constitution, the most beautiful and harmonious arrangement of the social bond. But justice or the just is also the end, both the aim and outcome, of legal action. Justice as an ideal, is never fully of this world; it forms the horizon against which current practices are judged and found lacking. The just as the outcome of the juridical process is both present and future-looking. The concept of justice is therefore split: an ideal or general justice which promises a future perfection and judges reality in its name and, a legal or particular justice which upholds and redresses proportional equality in the everyday dealings of citizens, but also reproduces the existing balance between free citizens and slaves, men and women, Greeks and barbarians. Legal justice could also face both ways, its provisional judgments reached against the horizon of a purposeful order and a perfect justice always deferred to the future. But this will have to wait. The Greeks were indebted to philosophers, tragedians and dissidents, rather than to judges, for upholding natural right against the justice from above. They remain to this day a powerful lens that helps see through the hazy air of oppressive and unquestioning received opinion into a truth which is both future-looking and timely. Occasionally, we need a remote satellite in order to get the best view of our own earth.

3

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

1. 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.1.1.

[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, 1 Paul.

[8] *The Institutes of Gaius* (F. De Zalueta ed., Oxford, 1946), 1.

[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 1.

[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] Ems 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 Johns 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 *polit*ically 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.I.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.