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HUMAN RIGHTS
AND MORAL REASONING

A comparative investigation by way of three theorists
and their respective traditions of enquiry:
John Finnis, Ronald Dworkin and Jürgen Habermas

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Ad Maiorem Dei Gloriam

INTRODUCTION

In a detailed bibliography concerning human rights, Gregory Walters praises *Rights and Christian Ethics* by Kieran Cronin for taking «the secular philosophical debate seriously, while providing Christian justifying reasons for acting upon rights and human rights»¹. In order to outline the orientation of his study, Cronin introduces his book by retelling a thought-experiment conducted by Joel Feinberg². The imaginative hypothesis is the invitation to imagine a land without human rights. Picture a place or places Feinberg asks, where the principle of rights is neither conceived nor exist. Let such a society be furnished with all the requirements for moral and successful living – except it lacks a notion of human rights. It is a thought-experiment also visualised by Steven Lukes. Such thought-experiments or imaginative devices are carefully crafted narratives, used to advance theoretical argumentation. The scenario of a world that lacks «this particular feature [the principle of human rights], whose distinctiveness we may thereby hope to understand better»³, is visualised in order to ascertain «what precisely a world is missing when it does not contain rights and why that absence is morally important»⁴.

Joel Feinberg envisages a world called *Nowheresville*, peopled by moral and virtuous human beings. Yet without rights, does an otherwise morally sophisticated *Nowheresville* differ from our own world? Feinberg argues that the most notable difference between the Nowheresvillians and ourselves is the activity of claiming.

Having rights, of course, makes claiming possible; but it is claiming that give rights their special moral significance. This feature of rights is con-

¹ G.J. WALTERS, *Human Rights in Theory and Practice*, 78.

² K. CRONIN, *Rights and Christian Ethics*, xiv-xviii.

³ S. LUKES, «Five Fables about Human Rights», 234.

⁴ J. FEINBERG, «The Nature and Value of Rights», 148.

nected in a way with the customary rhetoric about what it is to be a human being. Having rights enables us to «stand up like men» to look others in the eye, and feel in some fundamental way the equal of anyone [...] To respect a person then, or to think him as possessed of human dignity, simply is to think of him as a potential maker of claims. [...] More than anything else I am going to say, these facts explain what is wrong with Nowheresville⁵.

The thought-experiment allows Feinberg to highlight the link between rights and claiming. He distinguishes three manners of claiming: «(i) making claim to [...], (ii) claiming that [...], and (iii) having a claim»⁶. The first, called a propositional claim, are rights reflecting an assertion made by the person who is claiming. The second, which he wishes to emphasise, is a performative claim or the active sense of claiming. Rights as claims are not possessions like things but actions that reveal important aspects of what it is to be considered worthy of minimal self-respect in the eyes of others. The third is the substantive claim itself, which may or may not be validly and justifiably made against others.

Steven Lukes also begins from an imaginary world that lacks the principle of human rights yet is «neither utopian nor dystopian but rather places that are in other respects as attractive as you like [...]»⁷. This second thought-experiment envisages a world populated by five different societies: each one is a caricature which, according to Lukes, represents five persuasive contemporary outlooks. In a satirical manner, he conjures up different places, each dominated by a particular principle.

In a world without rights three conceivable societies are possible – *Utilitaria*, *Communitaria* and *Proletaria*. The Utilitarians, who live under the motto «the Greatest Happiness of the Greatest Number», are a race who admires technocrats, bureaucrats and judges. With a strong sense of common purpose, they live by an agreed principle: that which counts is that which can be counted. The Communitarians also share a strong societal bond. Obsessed by identity, they understand themselves as situated within a tradition and live according to its received wisdom. *Proletaria* is not a state as such for it has withered along with previous distinctions – work from leisure, producer from production, employer from employee – that alienated humanity from itself and so freed the Proletarians from all contradictions.

⁵ J. FEINBERG, «The Nature and Value of Rights», 149.

⁶ J. FEINBERG, «The Nature and Value of Rights», 151.

⁷ S. LUKES, «Five Fables about Human Rights», 234.

According to Lukes, human rights are unknown in such places because they are incompatible with the dominant principle which orders each society. He insists that this incongruity draws attention to the central characteristics of rights. They cannot exist in *Utilitaria* because they represent restraints upon the calculation of utility or what is most advantageous for society. They cannot exist in *Communitaria* because they represent a kind of abstraction from the specific and the local. To use rights, therefore, is to be able to consider people beyond their identifying characteristics, creating a space for the individual *vis-à-vis* the community. And finally, rights presuppose and accept the imperfect human world of egoism, cruelty, and scarce resources which create conflicting interests denied in the utopia of *Proletaria*.

In the second stage of his thought-experiment, Lukes turns to two further societies, *Libertaria* and *Egalitaria*, in which rights are considered to be taken seriously. Libertarians live in a society completely dominated by market principles: their most prized possession is the right to property. Many other rights are also present, including the right to vote, freedom of speech and association. However, Lukes believes that rights are not taken seriously in such a place because «the possessors of these rights are not equally respected; not all Libertarians are treated as equally human»⁸. Finally, he asks if *Egalitaria* could be a place where rights are truly respected. «The basic liberties, the rule of law, toleration, and equality of opportunity are all constitutionally guaranteed. But they are also made real by the Egalitarians' commitment to rendering everyone's condition of life such that these equal rights are of equal worth to the their possessors»⁹.

However, Lukes is that such a place could possibly exist¹⁰. Back in the real world, Lukes argues that the dominant outlooks encapsulated in the first four imaginative societies threaten the realisation of human rights. The final Promised Land may be impossible to achieve, but he argues that political discourse should take place on a «kind of “egalitarian plateau” upon which such political conflicts and arguments can take place»¹¹. If rights are to be taken seriously, this plateau of a small list of significant rights must be accepted and defended by all.

⁸ S. LUKES, «Five Fables about Human Rights», 241.

⁹ S. LUKES, «Five Fables about Human Rights», 242.

¹⁰ Two constraints inhibit the realisation of *Egalitaria*. First, a libertarian constraint insists on the importance of economic activity. However, the free market produces a disproportion that inhibits true equality. Second, a communitarian constraint insists on the importance and value of identity. However, the building of bonds can lead to the creation of discriminatory distinctions to the detriment of equality.

¹¹ S. LUKES, «Five Fables about Human Rights», 245.

1. Scope

Thought-experiments, given sufficient imagination and rigour, are reasoned through according to an internal logic and intuition. They are employed in order to explore the boundaries of concepts – represented by Feinberg – or investigate the implications and coherence of theories – represented by Lukes. The two thought-experiments outlined above begin in the same imagined world. Nevertheless, they differ because they are reasoned through in two diverse ways: each reflects a different level of theorizing. Theoretical reflection in the moral sphere may be divided into meta-ethics and normative ethics. Making for a useful categorization, H.J. McKloskey defines them as follows:

Normative ethics which is directed at discovering the kinds of thing, actions and the like, which are good, right, obligatory, i.e. which judgments and principles are to be adopted and why. Meta-ethics which is concerned with the analysis of ethical expression, i.e. with their meanings, import, and, more generally, their logical functions¹².

Meta-ethics is the study of particular moral notions in order to establish and explicate an essential internal meaning. To this end, Feinberg unpacks the notion of rights as claims. Accordingly, Kieran Cronin advances the thought-experiment of Joel Feinberg as «primarily a meta-ethical study rather than a normative one»¹³. Although Cronin acknowledges the normative dimension of any ethical reflection, he maintains the validity of the distinction in order to clarify the parameters of his study. He focuses on the meta-ethical level, including the reflections of secular philosophy, because «Christians use the language of rights like nearly everybody else, and they are equally prone to abuse moral language by being vague in their understanding of the complex relationships between moral terms»¹⁴. His study involves two approaches to rights language. The first devotes its attention to the nature of rights language, that is, their internal logical relations and relationship with other moral terms. The second is an imaginative approach that appreciates the manner in which ethical, anthropological and religious concepts are interconnected through the category of imagination. He likens himself to a tool maker sharpening the tool and «as a tool maker, or better, tool sharpener I try to sharpen this valuable tool by clarifying its meaning and value»¹⁵.

¹² H.J. MCKLOSKEY, *Meta-Ethics and Normative Ethics*, 1.

¹³ K. CRONIN, *Rights and Christian Ethics*, xvi.

¹⁴ K. CRONIN, *Rights and Christian Ethics*, xviii.

¹⁵ K. CRONIN, *Rights and Christian Ethics*, xix.

The extent to which meta-ethical reflection can be carried out in its own terms has been challenged. Indeed, many assert the primacy of normative ethics which aims towards the assertion of norms or principles to direct human conduct¹⁶. Lukes's thought-experiment may be classified as a normative one, for it exhorts and attempts to justify behaviour according to particular principles. As Cronin takes his orientation from the first thought-experiment, this study shares theoretical features with the second¹⁷.

2. Features

Let us return to the normative thought-experiment of Steven Lukes. To reflect at a normative level is to explore the implications of moral theories in guiding human action, decision-making and the ordering of society. It is to provide a consistent justification and not merely to provide an account for human behaviour: it is to pass judgment, to recommend rules and issue warnings. For Luke's part, he wishes to assert the central role of human rights and their acceptance. The article, written during the Balkan Wars of the early 1990s, finishes with an impassioned plea:

I believe that the principle of defending human rights requires an end to our complicity and appeasement: that we raise the siege of Sarajevo and defeat them by force. Only then can we resume the journey to *Egalitaria*, which, if it can indeed be reached at all, can only be reached from the plateau of human rights¹⁸.

Further reflection on Lukes's narrative brings to light certain relevant features – each different from those of Feinberg. Firstly, it has an historical dimension. Some historical events are portrayed in order to pro-

¹⁶ A. GERWITH, «Meta-Ethics and Normative Ethics», 188. The distinction is not a radical differentiation «as meaning that normative ethics and meta-ethics are independent of one another». This is highlighted by our thought-experiments. On one hand, Feinberg includes normative elements. The above quoted extended passage describes rights as assertions necessary for a minimum of self-respect. Equally, by characterising rights as restraints and necessarily abstract, Lukes adds elements of meta-ethical analysis.

¹⁷ The fact of a world without rights is far too real for far too many. Yet a theoretical thesis may make a practical contribution. In the words of one of the central theorists, «Of course I don't want to denigrate the importance of these empirical and strategic questions: they are of sovereign and continuing importance. But the philosophical question [...] is also important, practically as well as theoretically, particularly now, when we disagree so much about what human rights are, or even whether there really are any». R. DWORKIN, «What are Human Rights?», 1.

¹⁸ S. LUKES, «Five Fables about Human Rights», 246.

vide an insight into the implications of each outlook. The narrative structure provides a sense of past or historical context; for instance it refers to influential theorists that encapsulate each outlook. Secondly, the thought-experiment is multivalent: it begins from the acknowledgement of many differing outlooks that are present in the contemporary world. Lukes does not propose to present these theories in a fair manner. Rather, he treats each as a caricature¹⁹. Such a multivalent feature recognizes that there are many frameworks providing a normative function: each with many adherents. Thirdly, Lukes's thought-experiment is implicitly comparative. The narrative proceeds from a creation of models (that is, a multivalent feature), refers to selected events and theorists (that is, an historical feature) in order to highlight implications for ethical human behaviour (that is, a normative purpose). But the narrative ends in a judgment in favour of human rights because, according to Lukes, the society they imply is comparatively superior to the others. A comparative exercise may be positive or negative. The former concentrates on resemblance, correlation and compatibility: the latter focuses on contrast, distinction and juxtaposition. In this case, Lukes creates a strongly negative comparison by constructing extremes.

However, after creating such opposing societies, he is forced to make an impassioned plea for common ground or a shared plateau that will cut across the divisions. «On the plateau, human rights are taken seriously on all sides, though there are wide and deep disagreements about what defending and protecting them involves»²⁰. Contemporary constitutional democracies appear to reflect such a scenario. At least nominally, Lukes's desire already exists: a common ground in the form of a basic list of rights is adhered to by many societies. Constitutions, bills of rights and legal systems purport to uphold a list of basic rights which informs public debate, facilitates adjudication and supports the ordering of society. Rights-talk attracts widespread allegiance and assertion in public discourse and public policy, particularly in western liberal democracies. However, this language is not without its problems: critically, it can lack a universally accepted moral grounding. What is lacking in Lukes's thought-experiment can also be lacking in society; namely, a concerted enquiry that facilitates the justification of rights. If, along with Lukes, we wish to defend the principle of human rights, mere appeal to their importance is not enough. Rights need to be justi-

¹⁹ S. LUKES, «Five Fables about Human Rights», 233. He writes, «a caricature being an exaggerated and simplified representation which, when it succeeds, captures the essentials of what is represented».

²⁰ S. LUKES, «Five Fables about Human Rights», 245.

fied and justifiable to all in order that they may be acceptable to all and so all may be guided by them. It requires going further than Lukes's appeal. We must agree to more than a *common* ground. Rather we must provide a *solid* ground – or at least engage in an enquiry that seeks such a goal.

3. Aim

A normative study will conceive of rights as coordinates within a larger theoretical framework that aims to propose criteria of judgment in moral issues. The analysis of the «fact» of rights cannot be separated from the «value» of rights, that is, from the value they attain within a broader historical and cultural framework or frameworks. Joan Lockwood-O'Donovan warns:

The meanings attached to the term «rights» in both popular and scholarly usage cannot be properly ascertained in detachment from this theoretical context which has been formative for political, moral and theological orientations in this century²¹.

In order to ascertain the meaning(s) assigned to the term «rights», the conceptual lines of the theoretical context must be traced. Such a study is necessarily multi-disciplinary because the conceptual lines cross a range of fields; law, jurisprudence, political philosophy, history, ethics and theology, to name but a few. Furthermore, the conceptual lines are drawn in a different manner according to different theorists and traditions of enquiry. Therefore, as cautioned by Lockwood-O'Donovan and as achieved by Cronin, the secular philosophical debate needs to be taken seriously.

The resulting aim of this study is to trace some of the lines of convergence and paths of divergence between three normative theories, each representative of a different tradition of enquiry, in order to consider a foundation of rights that is consonant with Christian theology.

In the process, I shall parallel the characteristics previously identified in the normative thought-experiment of Steven Lukes. Firstly, the study will trace the concrete and conceptual development according to three traditions of enquiry, thereby acknowledging the many historical processes informing the reflection on rights. Secondly, by closely reading three selected theorists, representative of those traditions, it will involve a multivalent approach. It will recognise a pluralism of theories that engage in a reflection on rights. Finally, this dissertation shall compare

²¹ J. LOCKWOOD-O'DONOVAN, «Historical Prolegomena», 43.

the theorists (and traditions) in order to highlight issues and arbitrate between approaches so that insights may be coherently placed within a theological horizon.

4. On Method

These characteristics mirror some aspects of Bernard Lonergan's reflections on method²². In the process of moving between data and results, Lonergan identifies stages or functional specialisations, which reflect the necessary elements of the dynamic structure inherent in all cognitive activity; be that the undifferentiated use of common sense or a detailed investigation of science. The functional specialities find their distinctiveness by way of distinguishable and interrelated goals. By relating the ideal goals of the relevant functional speciality to the particular goals of this study, it is possible to sketch a heuristic framework or schema for the presentation of this study. Each successive stage will presuppose the results of the former and completes them by moving closer towards a final goal. The historical, multivalent and comparative characteristics outlined from Lukes's thought-experiment parallel Lonergan's schema of functional specialties of «History», «Interpretation», and «Dialectic». The functional specialty of «Foundation» categorizes the final goal which is to view rights from the perspective of Christian theology.

The stages provide the following schema – unfolding in four parts²³. Under headings provided by Lonergan, it begins with a detailed «History», in two chapters, in order to place the authors and their reflections within their appropriate historical context. The second part is «Interpretation», or a close analytical reading of the chosen theorists and central texts, in three chapters. The third section is «Dialectic», or a critical and comparative evaluation. Arising from this is the final part, «Foundation», placing the insights gained from each of the authors within the basic horizon of theology. Taken together, the stages provide a schema for the study, «moving towards an ever greater viewpoint»²⁴.

²² B. LONERGAN, *Method in Theology*, 133. Cf. ID., *Insight*; ID., «Metaphysics as Horizons»; ID., «Transition». He outlines eight functional specialisations: research, interpretation, history, dialectic, foundation, doctrines, systematics, and communications.

²³ The listing provided by Lonergan is modified for a more classical order in which the historical section precedes the interpretative section.

²⁴ D. TRACY, *The Achievement of Bernard Lonergan*, 243.

4.1 *History*

Lonergan identifies three levels of history: basic, special and general²⁵. This study shall focus on the level of special history: it will discern the historical theoretical movements which inform each normative theory. Theoretical traditions provide dynamic frameworks within which theorists reflect. On tradition, the sociologist Edward Shils writes:

They change in the process of transmission as interpretations are made of the tradition; they change also while they are in the possession of their recipients. This chain of transmitted variants of a tradition is also called a tradition, as in the «Platonic tradition» or the «Kantian tradition». As a temporal chain, a tradition is a sequence of variations on received and transmitted themes²⁶.

The continuity of tradition may be connected by common themes, means of presentation, or in a lineage from a common origin²⁷. A theoretical tradition offers both points of departure for each theorist and a guiding pattern to their overall work²⁸. I have added three appendices, albeit in an undetailed manner, to the end of the thesis in order to facilitate reading the history section.

A crucial feature in choosing the selected theorists of this study is that they act as important contemporary representatives of their relevant theoretical tradition. Jürgen Habermas stands in the European continental tradition of Critical Theory and the Frankfurt School, Ronald Dworkin in the American tradition of Liberalism, and John Finnis in the natural law tradition of Aristotelian-Thomism²⁹. The goal of this section is to draw attention to some historical and theoretical sources of these traditions. By doing so, I shall identify the historical and cultural orientations associated with present-day rights language. Furthermore, I

²⁵ B. LONERGAN, *Method in Theology*, 128. Basic history refers to specific events, times and places. Special histories tell of movements whether cultural, institutional, or doctrinal. General history is a total view, offering an historian's full expression of his/her evaluation. As a point of note, this thesis uses male terms for Part One and female references thereafter.

²⁶ E. SHILS, *Tradition*, 13.

²⁷ E. SHILS, *Tradition*, 32-34.

²⁸ Because each theorist is deeply informed by their respective tradition, Alasdair MacIntyre criticises many historians of ideas for presenting historical context «as mere background». A. MACINTYRE, *Whose Justice? Which Rationality?*, 390.

²⁹ The names of each tradition are claimed by each theorist. Such claims are often challenged by others claiming the same tradition – many of which will be considered in the respective chapter.

will draw attention to the relationship between contemporary theoretical conceptions of rights and diverse opinions on the precise beginnings of the current understanding of rights.

4.2 *Interpretation*

Interpretation refers to the goal of a clear presentation of texts in order to grasp their «meaning in its proper historical context, in accord with its proper mode and level of thought and expression, in the light of the circumstances and intention of the writer»³⁰. I will study the central texts of three selected theorists: namely, John Finnis's *Natural Law and Natural Rights* (1980), Ronald Dworkin's *Taking Rights Seriously* (1978) and Jürgen Habermas's *Fakizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (1992). Other works by these authors are also studied to the extent that they throw light on the theme.

In selecting three theorists, this dissertation is recognizing a pluralism of approaches to the explication and justification of rights. Therefore, it exhibits the multivalent characteristic of a normative study identified previously. Each work maps the many conceptual lines that create the framework in which rights derive their meaning. As a result, each work is multi-disciplinary. They embrace fields as diverse as philosophy, sociology, jurisprudence, and ethics. However, this study shall only concern itself with these fields to the extent that the authors deal with them and, more specifically, to the extent that they relate to the theme of rights.

In order to facilitate exposition and subsequent comparison, each theory will follow broadly similar categories, while allowing for individual methodological differences of approach. Generally, each section begins with a theoretical location and analysis of the general theoretical framework, followed by a close reading of their texts according to the touchstones of right (that is, the order of justice), human rights and law. Each chapter will conclude with a presentation of points that link each theorist to his tradition (outlined in previous chapters) and critical to the comparative study (outlined in subsequent chapters).

4.3 *Dialectic*

In the third stage, the study proceeds beyond the presentations of the selected theories and traditions. It moves beyond the fact of difference in order to analyze the reasons for disparity and conflict and to identify

³⁰ B. I. LONERGAN, *Method in Theology*, 127.

similarities and relationships between concepts. It is a comparative exercise that highlights irreducible differences and acknowledges complementary positions. The goal of this stage of the study will be to outline many of the divergences and convergences. Lonergan writes:

By dialectic, then, is understood a generalized apologetic conducted in an ecumenical spirit, aiming ultimately at a comprehensive viewpoint, and proceeding towards that goal by acknowledging differences, seeking their grounds real and apparent, and eliminating superfluous oppositions³¹.

Each theory offers a different perspective on rights because each offers different visions of the totality within which they place rights. As a result, they offer different justifications, evaluations and meanings of rights. Some differences are complementary; viewpoints or horizons of knowledge may supplement one another and so offer a fuller picture. Other horizons may involve genetic differences; a perspective may be differing from another because it already offers a fuller more differentiated account. Still others may be dialectical, that is, horizons may be profoundly opposed – what is considered true or good in one is considered false or evil in another.

While complementary or genetic difference can be bridged, dialectical differences involve mutual repudiation. Each considers repudiation of its opposites the one and only intelligent, reasonable, and responsible stand and, when sufficient sophistication is attained, each seeks a philosophy or a method that will buttress what are considered appropriate views on the intelligent, the reasonable, the responsible. There results a Babel³².

Many commentators have referred to the Babel-like situation that surrounds the use of a rights language³³. To vary the metaphor, contemporary western society may use the one language of rights but many within that society differ in the grammar of rights. By way of dialectic and the mapping of divergence and convergence, I will proceed towards a judgment on an authentic grammar of rights.

4.4 *Foundation*

The final stage proper to this study is «Foundation». It is at this level, that the study will reach its final goal. The manifold possibilities exhibited in dialectic, with regard to rights, are put in the light of Christian

³¹ B. LONERGAN, *Method in Theology*, 130.

³² B. LONERGAN, *Method in Theology*, 247.

³³ Cf. A. MACINTYRE, *After Virtue*; M.A GLENDON, *Rights Talk*; C. WELLMAN, *The Proliferation of Rights*.

theology. Theological categories are made to bear on the insights gained through dialectic. By doing so, this study shall discern the level of appropriateness between rights as categories of ethical argumentation and the fundamental categories of theology. In the words of Lonergan,

So as theology is an ongoing process, as religion and religious doctrine themselves develop, the functional specialty, foundations, will be concerned largely with the origins, the genesis, the present state, the possible developments and adaptations of the categories in which Christians understand themselves, communicate with one another, and spread the gospel to all nations³⁴.

By doing so, the thesis wishes to respond to the invitation of John Paul II: «It is thus the task of the various schools of thought – in particular the communities of believers – to provide the moral bases for the juridical edifice of human rights»³⁵. It therefore wishes to contribute to the growing awareness, as observed and encouraged by the Second Vatican Council, of the «sublime dignity of the human person, who stands above all things and whose rights and duties are universal and inviolable»³⁶.

5. Status Quaestionis

The above conventional distinction between meta-ethics and normative reflection may be characterised by certain central questions. The former, concerning the formal analysis and clarification of terms, tends to focus on questions such as «what is a right?», «how may a right be identified?» or «what separates it from other terms?» The latter, concerning with the justification and guidance of social behaviour, tends to focus on questions such as «what are the grounds for using rights?» or «who or what do they serve?». But the distinction is neither sharp, nor sustainable. Therefore, to raise the question of rights is necessarily to engage with a cluster of questions. As a result, the evaluation of justificatory frameworks shall necessarily move from normative to meta-ethical considerations. The above methodology is proposed as a creative means by which to chart these questions and issues. It moves from exposition (history and interpretation), to evaluation (dialectic) and finally to a judgement or commitment (foundations). These categories provide a means by which the research may be organised. By way of the conclusion at the end of each chapter, and refer-

³⁴ B. LONERGAN, *Method in Theology*, 293.

³⁵ JOHN PAUL II, «Address to the Diplomatic Corps», 243.

³⁶ *Gaudium et Spes*, 62.

ences through the footnotes, certain ideas will be flagged in order to facilitate the reader in making connections between the categories.

Although at each stage many issues are considered, one question guides the thesis as a whole: what is morally and theologically at stake in the use of human rights³⁷? In other words, what is implicit in their use? Whom do they serve? What do they protect? And what fundamental values or grounds are they manifesting? Is rights language worth using? Simply put, what can be said is happening when a person reasons about moral issues in the language of rights? It is the question of what is at stake in the use of rights – for instance, justice, protection of the individual, or ownership – that motivates the contemporary defence of human rights. But it is also the key question to the scepticism or caution regarding rights: the stake or price is considered dangerously high and potentially detrimental to more important moral values. Furthermore, the question divides many of its supporters: each propose different ideas of what is exactly at stake.

This thesis may be characterised as an investigation. It explores, and evaluates by way of comparison, the historical and contemporary stances on the above question(s) and considers the findings in light of the commitments of Christian faith. The level of theorising, aim and method shapes the parameters of this thesis. For example, by considering general normative frameworks, the thesis will not consider particular rights as such – except in so far as it develops the broader normative discussion. Furthermore, in taking three significant theorists and traditions, it excludes consideration of other philosophical traditions – for instance, feminism or pragmatism³⁸. Finally, in placing the resulting comparative study in the light of Christian theology, the thesis does not take account of other world religions or cultures³⁹. I hope, however, that the dialogical spirit of the thesis could be open to such reflections absent from consideration in this thesis⁴⁰.

³⁷ Indeed, it is the question that dominates Luke's thought-experiment. The central question he proposes: «what way of thinking does accepting the principle of defending human rights deny and what way of thinking does it entail»? S. LUKES, «Five Fables about Human Rights», 234.

³⁸ On rights and Feminism, cf. N. MCGLEN – K. O'CONNOR, ed., *Women's Rights*; E. WOLGAST, *Equality and the Rights of Women*. On rights and Pragmatism, cf. R. RORTY, *Philosophy and the Mirror of Nature*.

³⁹ Cf. A. POLLIS – P. SCHWAB, ed., *Human Rights*; T. DUNNE – N. WHEELER, ed., *Human Rights in Global Politics*.

⁴⁰ It is conceded that the central selected theorists and those theorists chosen to represent the respective traditions of enquiry are all men and, in the main, European. Because of the predominance of its use in historical text, the male pronoun will be used in the historical section before transferring to the female pronoun for contemporary discussions.

6. Conclusion

The purpose of this study is to portray clearly, and compare fairly, three normative theories of rights, each a representative of a different tradition of enquiry, in order to present a foundation of rights that is in harmony with Christian theology. As a study on the normative aspect of rights, it complements meta-ethical studies similar to that of Kieran Cronin. In comparison to his image of a tool-sharpener, I suggest that by entering into a reflection on differing normative theories in order to create a comparative study, an appropriate analogy may be «conversation». By way of comparison, this study facilitates a conversation that may lead to a fusion of horizons. Of course, a horizon is broadened and furthered when one moves to raised ground. Perhaps, therefore, such a study will facilitate the establishment of the plateau, or common and solid raised-ground, longed for by Steven Lukes.

PART ONE

HISTORY

CHAPTER I

Genesis of Rights

1. Introduction

In the Prolegomena to *De jure belli ac pacis libri tres*, published in 1625, Hugo Grotius concedes:

Throughout the Christian world I observed a lack of restraint in relation to war such as even barbarous races should be ashamed of [...] it is as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes¹.

The three volumes that follow advance an ethics of war and a systematic account of a proposed international law. In order to promote peace and place restraints on the excesses of war, Grotius (1583-1654) claims a common law binding between nations. He argues that in opposition to «the doctrine which some promote, that all rights disappear in war, we should never undertake a war except for the prosecution of Right, nor should we wage it except within the limits of Right and good faith»².

To this end, he outlines three meanings of the word *ius* or right in Book One. Firstly, and by way of referring to the title of his work – the Right of War and Peace – he writes, «Right in this context means simply, what is just»³. *Ius* is synonymous with *iustum* or justice. It is the most general meaning of the term, applying to social relationships, and

¹ *De Jure Belli*, Prol. 28. Cited in J. ST. LEGER, *The “Etiam si Daremus”*, 23.

² *De Jure Belli*, 797. Unless otherwise stated, all translations and page numbers from O. O'DONOVAN – J. LOCKWOOD-O'DONOVAN, ed., *From Irenaeus to Grotius*, 787-820.

³ *De Jure Belli*, 797.

is negatively defined by Grotius as that which is not in conflict with the nature of society. After some short references to authors of classical antiquity, he promptly progresses to a second meaning.

There is a second distinct sense or «right» deriving from the first, which is attributed to a subject. A right is a moral quality attaching to a subject enabling the subject to have something or do something justly. A right, in this sense, attaches to the subject even though it is sometimes associated with a thing⁴.

The second sense of *ius* is attributed to the individual. According to Grotius, such a moral «quality» may be either a «faculty» (*facultas*) or a «fitness» (*aptitude*). Right as a faculty is «a legal right properly or strictly so called»⁵. The designation of *ius* as *facultas* includes power over oneself, by which he means liberty, or power over others or things, by which he means ownership. Right as fitness refers to fairness or a reasonable claim that is not enforceable by law. His primary interest concerns the former. The third and final sense of *ius* is *lex* or «law», that is, «“law” in a broad sense as a rule of moral action obliging us to do what is correct»⁶.

It is the second meaning, or more specifically the first part of the second meaning, that is of central importance for the development of Grotius’s case for restraint in war. Right, as a faculty or power in an active manner over oneself or one’s property, acts as a means of defining the first meaning of right, that is, justice. It gives content to what is just. If the law of nations is to reflect a true justice, then rights will also provide the content for the third sense of *ius*, that is, to the law.

Grotius’s theory resonates with the modern understanding of rights. He justifies a definition of right according to the capacities inherent in or predicated upon an individual: the person possesses intrinsic «rights» simply as a human being. By making this second sense of right relate «specifically to the abstract ‘person’ (*persona*), Grotius was believed by several of his contemporary jurists to have departed significantly from the traditional or Roman sense of the term right (*ius*)»⁷.

⁴ *De Jure Belli*, 797. «Ab hac juris significatione diversa est altera, sed ab hac ipsa veniens [...] Qualitas moralis personae, competens ad aliquid juste habendum vel agendum». Latin citations from B. TIERNEY, *The Idea of Natural Rights*, 324-326.

⁵ *De Jure Belli*, 797. «Ab hac juris significatione diversa est altera, sed ab hac ipsa veniens [...] Qualitas moralis personae, competens ad aliquid juste habendum vel agendum».

⁶ *De Jure Belli*, 799. «Est et tertia juris significatio quae idem valet quod Lex [...] ut sic Regula actuum moralium obligans ad id quod rectum est».

⁷ R. H. COX, «Hugo Grotius», 388.

In the history of the development of rights, Hugo Grotius stands at a juncture. Observing the theorists who follow, Richard Tuck, in *Natural Rights Theories*, maintains that Grotius's theoretical innovations «made the political theories of the later seventeenth and eighteenth centuries possible. He is the most important figure in the history which we are tracing [...]»⁸. But equally, we may look to those who preceded him. In *The Idea of Natural Rights*, Brian Tierney asserts that «his conceptual apparatus of law and rights, the ideas that would under-gird the whole subsequent work, was of medieval origin»⁹. Many lines of medieval thought converge in his thinking and many lines of early modern thought diverge in response to his work. Therefore, he stands at a threshold between two eras – the medieval and the early modern – discernable by the significant development «in the theopolitical tradition [of] a new and distinctive approach to political thought, effectively independent of theological premises»¹⁰. With specific regard to rights, this point concludes the period in which language of rights first appeared and developed and initiates a second period «of what can be termed the classic texts of rights theory, stretching from Grotius through to Locke»¹¹.

To facilitate an historical study, an approximate typology of a rights theory may be sketched from Grotius's account. Michel Villey refers to it as a characteristic if inelegant model¹². The three senses of *ius* – as a simple relation, a subjective right and an objective norm¹³ – reveal three significant matters of concern. Firstly, it relates to justice: it focuses on the ordering of social relationships and human life within society in a just manner. Secondly, it emphasises the ability or power of individual persons associated with reason or freedom to make specific claims as persons. Villey refers to the former as an objective right and the latter as a subjective right¹⁴. Finally, a rights theory is bound to is-

⁸ R. TUCK, *Natural Rights Theories*, 58.

⁹ B. TIERNEY, *The Idea of Natural Rights*, 326.

¹⁰ O. O'DONOVAN – J. LOCKWOOD-O'DONOVAN, ed., *From Irenaeus to Grotius*, 787.

¹¹ R. TUCK, *Natural Rights Theories*, 2.

¹² M. VILLEY, *Leçons D'Histoire*, 221.

¹³ P. HAGGENMACHER, *Grotius*, 462. «Dans ce chapitre liminaire du Traite, Grotius lui attribue au contraire trois sens nettement distincts: le terme *ius* y désigne tantôt une simple relation; tantôt le droit subjectif; tantôt la norme objective».

¹⁴ M. VILLEY, *La formation*, 242. He defines subjective right as follows: «Le droit subjectif de propriété, c'est par exemple le *pouvoir* d'user, de jouir, de disposer de la chose, attribuée au propriétaire, lui-même reconnu, garanti, sanctionné *juridiquement*. Cette notion complexe résulte de l'association de deux idées, celle de *droit* et celle de *pouvoir*».

sues of the law in its capacity to guide human behaviour. The three aspects are mutually interconnected. Yet, the primary and constitutive role is performed by the second axiom. This typology or model of a rights theory involving three broad interconnecting and essential themes – archetypal in Grotius – presents a means of identifying its origins and development¹⁵. For, «if we are to explore origins we need to know first what we are seeking the origins of»¹⁶. To chart the evolution of rights in theory and socio-political history is to trace the development of this typology. Furthermore, the typography will act as primary categories by which the thought of the central theorists of this dissertation may be organised.

Tierney writes that within «patterns of language»¹⁷ a term such as a «right» is defined by its place within a larger framework, that is, by its association with other ideas. A term is delineated and described by its correlation or equivalence with other cognate terms. Therefore, the history of an idea encapsulated in a term, such as the term right, is necessarily the history of a language or discourse in which that term is employed. Furthermore, the meanings of terms are to a degree theory-dependent. As such, an exposition of a complex term requires a consideration of the theories that involve such a concept, «and in general those theories are embodied in particular texts»¹⁸.

This, and the following chapter, is organised accordingly, by unpacking the crucial associations within the «lattice work». It takes the primary texts that comprise the canon of a tradition (or those that help mould the tradition) and highlights the relevant terms to which the term right is connected. It does so by outlining the broader theory within which the terms find their relative value – for instance, *ius* and *iustum* in Aquinas's account of the Natural Law in the

¹⁵ Tierney claims that a right as normally understood in contemporary discourse is «a sphere of personal autonomy within which an agent is not obliged to act but is free to determine his or her own course of action, for instance to exercise the right or not exercise it as he or she chooses». B. TIERNEY, «Natural Law and Natural Rights», 395. Tuck writes that it is «this sort of rights theory which is the most important and interesting, for it is the only sort in which the concept of a right has a truly independent role». R. TUCK, *Natural Rights Theories*, 7. However, others argue that such definitions may place rights within a «straight-jacketed conceptual structure». J. FINNIS, «Aquinas on *Ius*», 409. In presenting a rights theory as a typology of interrelated relevant themes, rather than a specific definition, this chapter attempts to avoid preempting the contemporary debate into the definition(s) of a right.

¹⁶ B. TIERNEY, *The Idea of Natural Rights*, 48.

¹⁷ B. TIERNEY, *The Idea of Natural Rights*, 54.

¹⁸ R. TUCK, *Natural Rights Theories*, 2.

Summa Theologiae. In turn, the text needs to be placed within a wider «context that sustains a particular style of discourse and renders it intelligible»¹⁹. An account of the history of the language of rights therefore entails both text and context, that is, significant theoretical texts and the influential socio-political events and developments²⁰. However, the contextual sub-sections of this thesis that situate the textual analysis can only give an impressionistic picture – leaving open the charge of obscuring some movements or misconstruing others.

The purpose then, of this and the following chapter, is twofold. Firstly, it traces a history of the language of rights. Secondly, and by way of the historical exercise that maps theorists and theories, thereby identifying the main concerns of each tradition (and how they differ or interrelate), it sketches important points relevant to the central discussion. A fuller picture is created.

The study begins with the revival of legal studies in twelfth century²¹.

2. The Twelfth Century

In the middle of the twelfth century (1139/40), Gratian began his *Concordantia discordantium canonum* – a Concord of Discordant Canons, commonly known as the *Decretum* – with several texts and comments on the different sources and distinctions of *ius*. The aim of the *Decretum* was both to compile and attempt to unify the various canon law declarations and collections. In this regard, it mirrored the purpose of the Justinian Code *Corpus Iuris Civilis*, which provided a central text for Roman law, five hundred years earlier. Rediscovered in the eleventh century and nurtured by the newly established universities, such as that in Bologna (1113), it inaugurated a revival in legal studies and influenced Gratian's work²². Together they became authoritative texts in jurisprudence and political reflection of the Middle Ages.

¹⁹ B. TIERNEY, *The Idea of Natural Rights*, 47.

²⁰ Cf. App. A. Appendix A provides a timeline of texts, contexts, major historical events and commentators.

²¹ Commentators mostly agree that individual rights did not exist in Greek philosophy and Roman Law; cf. J. W. JONES, *The Law and Legal Theory*, 191; G.B. HERBERT, *The Philosophical History of Rights*, 1-47; A MACINTYRE, *After Virtue*, 69. Others argue that rights are compatible and present; cf. F. MILLER, *Nature, Justice and Rights*.

²² Cf. K. PENNINGTON, «Law, legislative authority».

2.1 *Ius and Facultas*

The *Decretum* begins:

The human race is ruled by two (means) namely by natural law and by usages. Natural law (*ius naturale*) is what is contained in the Law and in the Gospel by which each is commanded to do to another what he wants done to himself and forbidden to do to another what he does not want done to himself²³.

Gratian follows this description by distinguishing between categories of human law: unwritten custom, civil law, the law of a city or a people, and the different types of laws in classical Rome. He consistently uses the term *ius* to refer to either a moral code or an objective law, revealed by Scripture or accessible by reason. Although an important step in medieval jurisprudence, «he presented only raw, unassimilated ideas»²⁴. For it was the Canonists or Decretists that followed, who based their reflections and teachings on the text, who expanded Gratian's scheme and definitions with more precise terminology.

In particular, they needed to discriminate between the different senses of *ius naturale*. Brian Tierney claims that «It soon became a common exegetical technique among the early Decretists to provide long lists of all the possible meanings of the term *ius naturale* [...]»²⁵. To Gratian's designations of *ius naturale*, they added a subjective definition, that is, they defined *ius* in terms of the ability, faculty, power, force, of the individual itself. He quotes Rufinus (c. 1160): «Natural *ius* is a certain force instilled in every human creature by nature to do good and avoid the opposite»²⁶; and Odo of Dover (c. 1170), «more strictly, natural *ius* is a certain force divinely inspired in man by which he is led to what is right and equitable»²⁷;

²³ «Humanum genus duobus regitur, naturale videlicet iure et moribus. Ius naturale est, quod in lege et Evangelio continetur: quo quisque iubetur alii facere quod sibi vult fieri et prohibetur alii inferre quod sibi noli fieret». Cited in B. TIERNEY, *The Idea of Natural Rights*, 58.

²⁴ K. PENNINGTON, «Law, legislative authority», 425.

²⁵ B. TIERNEY, *The Idea of Natural Rights*, 60; ID., *Rights, Law and Infallibility*.

²⁶ «Est itaque naturale ius vis quedam humane creature a nature insita ad faciendum bonum cavendumque contrarium». Cited in B. TIERNEY, *The Idea of Natural Rights*, 62.

²⁷ «In tertia significatione et strictiori dicitur ius naturale vis quedam diuinitus homini inspirata qua ad id quod iustum est et equum ducitur». Cited in B. TIERNEY, *The Idea of Natural Rights*, 63.

and Sicardus, «*ius* is called natural [...] from human nature, that is a certain force or power naturally instilled in man [...]»²⁸.

The legal anthologies of the *Decretum* and the *Codex* differed in one crucial respect. By and large, the authoritative text of Roman law was fixed in the sixth century. Canon law, however, was continually being expanded. Canonist scholarship, through the newly-established universities and a series of lawyer-popes such as Innocent IV (c.1200-1254), played a key role in how canon law – and the related issues of jurisdiction, authority, and nature of law – developed²⁹. «In a world where rights were constantly being asserted and demanded, the language of the jurists reflected the realities of their age»³⁰. The source of a subjective definition was the everyday discourse and context of the twelfth century.

The interpretations and definitions of *ius* by the Decretists suggest the origins of the language of rights. Although they do not offer an overt and coherent theory of rights, they do echo the typology identified and outlined above in embryonic form. Turning to the everyday sources, we may schematise the «realities of the age» according to broad three broad themes that reflect the typology – social relations, the status of the individual and the role of law. They parallel the three categories by which Anthony Black discerns the «salient political values» of the medieval era – the purposes of political communities, the relation of the individual to the community and the state in relation to law³¹.

2.2 Historical Context

First: although the jurists of this period developed an explicit conception of a right as a faculty or power of the individual, they «were not concerned with the degree of self-determination individuals have or ought to have, so much as with the type of entity or structure a society may be said to be»³². A wide range of Medieval Latin terms reflected the strong social bonds of the era³³. According to Walter Ullmann, *cor-*

²⁸ «Nam ius naturale dicitur [...] ab humana natura, hoc est quedam uis et potential homini naturaliter insita ad faciendum bonum et uitandum contrarium». Cited in B. TIERNEY, *The Idea of Natural Rights*, 63.

²⁹ J.P. CANNING, «Introduction: politics», 358.

³⁰ B. TIERNEY, *The Idea of Natural Rights*, 58.

³¹ Cf. A. BLACK, *Political Thought in Europe*.

³² J. BURNS, «The Individual and Society», 598.

³³ A. BLACK, *Political Thought in Europe*, 15-16. There are many words applicable to society and legal or political groupings (*civitas*, *universitas*, *corpus*, *provincial*, *ducatus*, *commune*) and similarly numerous words for rank (*status*, *honor*, *ordo*, *gradus*, *dignitas*).

pus or a body offered a favoured organic analogy. Inspired by Pauline theology, it suggested, firstly that the members (*membra*: limbs) related to society as separate functions within a wider whole, and secondly that society had a necessary order, social harmony and common purpose³⁴. Applied to the public sphere, an organic model created a descending model of government and law and provided legitimacy to the social hierarchy. In this system, rights inhered in the offices that people held and resulted only after being granted by a higher authority. For example, a bishop or a baron could resist a royal command, but only by appealing to his status as bishop or baron.

Yet along side a theocratic model, Ullmann distinguishes a second and opposing model of society in which individual rights could be claimed. Feudalism, the practical system of government, was based on strong bonds of fidelity between lord and vassal. «There were rights and duties on both sides: the lord had rights and duties against the vassal, and the vassal had rights and duties against the lord»³⁵. The contractual nature of feudal society created a reciprocal arrangement that could recognise the individual. To a degree, feudal law was capable of accommodating some of the political, social and economic developments of the early medieval era. Henrich A. Rommen argues that the growth of rights and liberties for more and more groups proceeded pragmatically. The many charters that established new urban centres across Europe conceded from the feudal lords «immunities and privileges» to the Burghers and merchant guilds. Though mediated through the guild or town, he argues that rights were granted to individuals. The charters held all duty bound and could not be arbitrarily revoked. Rommen identifies both substantial and procedural rights throughout Europe. He lists the freedom to marriage, freedom from arbitrary taxation, freedom of movement to facilitate trade and pilgrimages, and freedom of disposition of property. Examples of procedural rights include trial before courts of one's own town, protection against arbitrary arrest, and presumption of innocence³⁶. These charters were to foreshadow the *Magna Carta* (1215).

Second: in contrast to the many terms for society or rank, this period does not have a term for the individual³⁷. Yet this period is, according

³⁴ W. ULLMANN, *The Individual and Society*, 11.

³⁵ W. ULLMANN, *The Individual and Society*, 63.

³⁶ H.A. ROMMEN, «The Genealogy of Natural Rights», 406-414.

³⁷ A. BLACK, *Political Thought in Europe*, 31. Instead the individual is referred to, according to contexts, as *homo*, *fidelis*, *civis*, *subiectus*, *singularis persona* or just *quisque* ('anyone').

to Colin Morris, the point of the discovery of the individual³⁸. The sources of this twelfth century humanism were in Christianity and the classical Greco-Roman era. On one hand, Ullmann argues that Christian doctrine fostered a strictly social model³⁹. On the other, Morris points to the essential role of Christianity in highlighting the worth and value of the individual: «From the beginning, Christianity showed itself to be an ‘interior’ religion [...] Ultimately a Christian origin can be ground for many elements in the European concept of the self»⁴⁰. Although the community was strongly corporate, the emphasis on community in everyday Christian practice diminished. Instead, the developments of *devotio moderna*, private confession and Eucharistic practices, gave rise to strong personal devotion and awareness of the self. The second source of the respect of the individual was the classical, Greco-Roman past. In particular, Morris points to the influence of Cicero and Seneca. The social and political transformations in the early Middle Ages, encouraged by the urbanisation and new economic realities, supported in the medieval mind a turn to the individual. He writes:

If there is any one force which may be particularised as creating the new individualism, I have tried to show that it was the uncertainty created in the minds of men by the opportunities and challenges of a more complex world⁴¹.

This insight by Morris becomes a recurring motif throughout the following centuries.

Third: writing of the early formation of western law, Harold Berman observes the close connection between the turn to the individual and developments in law after the revival of legal studies in the twelfth century. In particular, canon law as a living adapting law code began to express and further develop the focus on the individual intention, consent and will. For example the developments in law concerning crime were associated with the exploration of individual

³⁸ Cf. C. MORRIS, *The Discovery of the Individual*. The central characteristics are the conscious and deliberate concern for self-discovery, an interest in the relations between people and in the role of the individual within society and an assessment of people by their inner intentions rather than by external acts. Cf. R. L. BENSON – G. CONSTABLE, ed, *Renaissance and Renewal*.

³⁹ Cf. W. ULLMANN, *A History of Political Thought*; ID., *Jurisprudences*; ID., *Law and Jurisdiction*; ID., *The Church and the Law*; ID., *The Papacy and Political Ideas*.

⁴⁰ C. MORRIS, *The Discovery of the Individual*, 11. Previously, the term *humanitas* was used in a pejorative sense to mean human weakness, yet within a theological framework, it becomes a more positive term.

⁴¹ C. MORRIS, *The Discovery of the Individual*, 160.

intent; law relating to marriage led to reflections on consent; and law relating to contract revolved around the expressed will of the individual⁴². Law in the middle ages had an elevated position because it was associated with the expression of justice. Issues of injustice were considered in the light of the law. The great theoretical project of the era, therefore, was the relationship between law and justice – as implied by the next section.

3. The Thirteenth Century

Although warning against an overly artificial connection between an intellectual history and the larger social and political history, Stephen Ozment writes, «The intellectual history of the high Middle Ages, like its larger political and social history, is also marked by self-discovery and definition»⁴³. The primary catalyst was the encounter with the philosophical corpus of Aristotle: «The absorption of Aristotle’s writings in the Latin West from the early twelfth to the late thirteenth centuries created an intellectual watershed that left no theoretical inquiry unaffected»⁴⁴. Of itself, the rediscovery of Aristotle may not have initiated an intellectual revolution. C.H Lohr claims the philosophical and scientific principles and categories proposed by Aristotle facilitated and advanced a spirit already present in the age and noted in the previous section.

The works of Aristotle which were thus made available by about the year 1200 did not gain the influence they had because they were fortuitously translated, but they were translated because the masters wanted no longer to simply transmit, because they wanted to learn themselves. The spirit of reason, of curiosity, of criticism which they found in Aristotle matched their own spirit and helped to crystallise their self-image⁴⁵.

The appropriation of Aristotle mirrored the influential role of Roman law in the twelfth century. Indeed, advancements in ethical, legal and political theory and the consequent developments in rights language were primarily produced by an assimilation of Roman law and the

⁴² Cf. H. BERMAN, *Law and Revolution*.

⁴³ S. OZMENT, *The Age of Reform*, 5.

⁴⁴ O. O'DONOVAN – J. LOCKWOOD-O'DONOVAN, ed., *From Irenaeus to Grotius*, 237.

⁴⁵ C.H. LOHR, «The Medieval Interpretation of Aristotle», 84. Lohr distinguishes three stages in which works of Aristotle were made accessible to Latin Christendom. The first began with Boethius' translations of Aristotle's treatises on logic and rhetoric in the sixth century. The second phase, coinciding with this section, began in the late twelfth century and saw the translation of the entire corpus of Aristotle. The third stage began in the late fifteenth century and coincided with a revival in scholasticism.

study of Aristotle⁴⁶. They confronted and engaged with each other and with the surviving feudal and Christian models – outlined in previous section – in order to respond to the new social and political exigencies of the time.

The assimilation of Aristotle through new texts and the subsequent commentaries provided a comprehensive and systematic view of the natural world⁴⁷. Firstly, this section shall outline the central points informing the debate concerning *ius* and nature (*natura*), which was transformed in this period. Secondly, it will consider the culmination of the synthesis of Aristotle into the Christian framework provided by Thomas Aquinas and the relationship he charts between *ius* and justice (*iustum*).

3.1 *Ius and Natura*

In the previous section, it was observed that the Decretists systematically listed the many different senses of *ius naturale* (natural law):

natural law is the teaching of Scripture, or it is what is left undetermined by divine command or prohibition; it is the human capacity to distinguish right from wrong; it is natural equity; it is also the natural instinct of all animals and as well as a general law of all creation⁴⁸.

In the process of providing such a list, the canonists also provided for an understanding of *ius* as a right as *facultas* or power belonging to an individual – that is, a possessive, active or subjective right.

At first, such lists gathered accepted authoritative definitions. However, the Decretists consciously attempted to respond to the problems concerning conflicting definitions of the natural law presented to them by the preceding traditions by trying to provide a coherent account⁴⁹. This methodology can be seen as part of a wider enterprise of *concordia discordantium* that attempted to harmonise relevant texts taken

⁴⁶ J.P. CANNING, «Introduction: politics», 360.

⁴⁷ W. ULLMANN, *History of Political Thought*, 167-174, 168. He writes, «Aristotle's thought was pervaded by the idea of nature as the driving force, which was conceived in teleological terms: «Nature does nothing superfluous», or «Nature behaves as if it foresaw the future», or «Nature does nothing in vain», were some of his often recurring statements which, with their strong teleological bias, could hardly fail to fall on receptive ears – and yet, what a difference there was between his and the traditional teleology: the laws of nature determined man's thinking and reasoning capacity».

⁴⁸ D.E. LUSCOMBE, «Natural morality and natural law», 708.

⁴⁹ G.C. KOSSEL, «Thomistic Moral Philosophy», 386.

from divergent authorities⁵⁰. By doing so, jurisprudence created their own resources – including rights – to be drawn upon by later scholastics in their engagement with the philosophy of Aristotle. Such jurisprudential reflection is one of three elements informing scholastic reflection on the *ius naturale* according to Michael Bertram-Crowe⁵¹.

As noted above, the *Decretum* firstly associated the natural law to Revelation and the Gospel, before considering various types of law⁵². In this, Gratian was accepting the authority of the early Church Fathers and the authority of the Stoic influenced Roman law categories conserved by Isidore of Seville (c. 570-636) – representative of the other strands influencing early Medieval thought.

The former refers to the authoritative role of St. Paul and the Church Fathers. It is not a completely independent tradition for the early Church fathers were greatly indebted to stoic moral philosophy. But the Christian tradition found in St. Paul (Rom 2: 14-15) a confirmation of their own views. The Fathers were content to use a conception of the natural law similar to that of Cicero but they placed it within a Christian framework: «the impersonal deity or nature of the Stoics gives way to the Christian God, sovereign lord and lawgiver; and the knowledge of the natural law and its precepts becomes more intimately a matter of conscience»⁵³.

The latter refers to Stoic philosophy transmitted by way of Roman Law. In the Book V of *Etymologies*, concerning legal terms, Isidore of Seville replicates a tripartite categorisation found in the *Digest*. The Justinian *Digest* distinguished the *ius naturale* (the law of nature) from two other types of law: *ius civile* or the law of the state, *ius gentium* or the law of the nations. But the Roman jurists, and subsequently the canonists, differed on the definition and interpretation of each of these terms. For instance, Ulpian (c. 170-228) viewed the *ius naturale* as that which is common to all animals – sexual union, procreation, and education of offspring. He categorised the *ius gentium* as specific to human beings only and concerned such issues as slavery, private property, honouring of contracts, free access to the sea, and the like. Others, such as Gaius (c.180), remained closer to the stoic ideal. He defined the natural law or natural right as similar to the *ius gentium* dictated by natural reason (*ratio naturalis*) and arising from the origins of humanity. Similarly, another Roman jurist, Paulus, wrote that the natural law

⁵⁰ C.H. LOHR, «The Medieval Interpretation of Aristotle», 89.

⁵¹ M. BERTRAM-CROWE, *The Changing Profile*, 110 ff.

⁵² Cf. Ch. I, Sec. 2.1.

⁵³ M. BERTRAM-CROWE, *The Changing Profile*, 58.

consisted of what is equitable and good⁵⁴. The exact definition of the terms and their mutual relationship provided much of the dynamic of the debate in the Medieval Era. Isidore presented a definition of natural law similar to that proposed by Gaius and influenced by Stoic philosophy: «what is common to all nations and is set up by a natural instinct and not by any positive institution»⁵⁵.

Stoic philosophy entered into the Latin West by way of the influential writings of Cicero (106-43 BC). The formerly mentioned Rufinus «drew upon Cicero to describe man's capacity to distinguish between good and evil as a natural power»⁵⁶. Cicero, in *De Legibus*, asserted the natural law as independent from convention. An early Church Father, Lactantius (d. 320), records Cicero's characterisation of law:

There is a true law, right reason, agreeable to nature, known to all men, constant and eternal, which calls to duty by its precepts, deters from evil by its prohibitions [...] Nor is there one law at Rome and another at Athens, one thing now and another afterwards; but the same law, unchanging and eternal, binds all races of men and all times; and there is one common, as it were, master and ruler – God, the author, promulgator and mover of this law. Whoever does not obey it departs from (his true) self, condemns the nature of man and inflicts upon himself the greatest penalties even though he escapes other things which are considered punishments⁵⁷.

The stoic tradition also provided a wealth of ethical and political ideas. Medieval society was open to ideas concerning duty, friendship, community and the virtues, including justice, found in *De Officiis* and *De Senectute* of Cicero, were all judiciously placed within a wider Christian framework. Therefore, when Aristotle's teaching on «the

⁵⁴ D.E. LUSCOMBE, «Natural Law and Morality», 705.

⁵⁵ «Jus naturale est commune omne nationum, et quod ubique instinctu naturae, non constitutione aliqua habeatur ut viri [...]» Cited in M. BERTRAM-CROWE, *The Changing Profile*, 69.

⁵⁶ D.E. LUSCOMBE, «Natural morality and natural law», 708.

⁵⁷ «Est quidem vera lex recta ratio naturae congruens, diffusa in omnes, constans, sempiterna, quae vocet ad officium jubendo, vetando a fraude deterreat; quae tamen neque probos frustra jubet aut vetat, nec improbos jubendo aut vetando movet. Huic legi nec abrogari fas est nec derogari ex hac aliquid licet, neque tota abrogari potest, nec vero aut per senatum aut per populum solvi hac lege possumus, neque est quaerendus explanator aut interpres ejus alius, nec erit alia lex Romae, alia Athenis, alia nunc, alia posthac, sed et omnes gentes et omni tempore una lex et sempiterna et immutabilis continebit, unusque erit quasi magister et imperator omnium deus, ille legis hujus inventor, disceptator, lator; cui qui non parebit, ipse se fugiet ac natura hominis aspernatus hoc ipso luet maximas poenas, etiamsi cetera supplicia, quae putantur effugerit». Cited in M. BERTRAM-CROWE, *The Changing Profile*, 38.

naturalness of the *polis* became available in the West in the thirteenth century, it served to reinforce a position already familiar through Cicero and the Roman Law»⁵⁸.

By providing a relatively comprehensive system, the texts of Aristotle helped continue the enterprise of *concordia discordantium* which was bringing together the three above traditions. However, they also provided a new framework that deepened reflections on the meaning of nature and its place in judging right and wrong and thereby guiding the law⁵⁹.

Aristotle's (384-322 BC) framework, outlined in the *Nichomachean Ethics*, is a teleological structure: all objects of inquiry, such as physical nature, ethics or politics, may be understood by identifying its *telos*, that is, the purpose or end to which that object necessarily orientates itself⁶⁰. Inherent laws guide everything in nature, including man, towards its purpose or fulfilment. For the human person, well-being or happiness (*eudaimonia*) is the ultimate goal of a moral or practical life. It is the aim then of ethics and politics to determine the means to achieve *eudaimonia* – for instance, ethics concerns the virtues or good human character required to attain this goal which is experienced as the good. By identifying the proper ends, it is possible to discern the laws that attain that end. The human person is uniquely capable, by way of reason, to identify the laws that guide its own actions. By observation of the actions of people, the natural law or moral principles may be discerned. One conclusion drawn by Aristotle is that man is by nature a political animal. In the *Politics*, Aristotle asserted that man is naturally sociable and inclined towards others for it is only through society that man may achieve well-being. The state therefore is a natural occurrence that serves and is guided by serving the moral well-being or the good of its citizens.

In the ferment of the three traditions and the Aristotelian framework, the central issue of theologians and lawyers concerned the scope and meaning of the *ius naturale*, its corresponding relationship with the *ius gentium*, and the wider context of Christian revealed law (*ius divinum*).

⁵⁸ D.E. LUSCOMBE – G.R. EVANS, «The Twelfth Century Renaissance», 311-313.

⁵⁹ D.E. LUSCOMBE, «Natural Morality and Natural Law», 707.

⁶⁰ The teleological structure is evident from the first line of the *Nichomachean Ethics*: «Every art and inquiry, and similarly every action and intentional choice, is held to aim at some good». It is paralleled by the beginning of the *Politics*: «Since we see that every city is some sort of partnership, and that every partnership is constituted for the sake of what is held to be good, it is clear that all partnerships aim at some good, and that the partnership that is most authoritative of all and embraces all the others does so particularly, and aims at the most authoritative good of all. That is what is called the city or the political partnership». Cf. C. LORD, «Aristotle», 118-154.

3.2 *Thomas Aquinas*

The response to Aristotle created two extremes: on the one hand, a reactionary rejection of the new philosophy by the theological schools of the Augustinian tradition, and on the other, an overenthusiastic acceptance of the Latin Averroists who subordinated theological doctrine to philosophical rigidity and consequently incurred ecclesiastical condemnation⁶¹. Thomas Aquinas (c. 1225-1274) articulated a third way – *a via tertia*. To this end, he compiled a series of detailed commentaries on Aristotle's major works and integrated many of the ideas into his own works that were responding to the intellectual, pastoral or political needs of his time⁶². This is particularly true of his time spent as professor in Paris (1268-72) and in Naples (1272-73), during which he produced the second part of his *Summa Theologiae*.

3.2.1 *Ius and Iustum*

The place of Aquinas's exposition on right takes place in the second part (*Secunda Pars*) of the *Summa Theologiae*. It develops «the ethical implications of the theological and philosophical anthropology introduced in the *Prima Pars* (first part)»⁶³. The *Prima secundae* examines general subjects relating to human nature and conduct. The *Secunda secundae* considers particular matters in morality, consisting of individual considerations of each of the theological and cardinal virtues and their corresponding vices.

The article «On right» (*De jure*) immediately precedes the definition of justice (*De iustitia*) and an extensive examination of the virtues and vices associated with justice. Aquinas, by following the method of Aristotle, needed to firstly identify the end or object of justice – for each moral virtue is understood in terms of the moral goodness towards which it aims. To this end, he asks «if right is what justice is about?»⁶⁴ Aristotle, in Book V of the *Nichomachean Ethics*, identified *dikaion* as that object which concerns the virtuous disposition of the just person⁶⁵.

⁶¹ Cf. G. LEFF, *Paris and Oxford Universities*. The teaching of Aquinas was prohibited at the Oxford University by rule of the founding Charter. Tereasa Iglesias-Rozas notes: «At the time, around 1250s, Aquinas was professor at the University of Paris propounding his doctrines amidst great intellectual and human hostilities with the academics of the time. Oxford took sides in this debate and refused to hear Aquinas's philosophy». T. IGLESIAS-ROZAS, «Reasons for Action», 238.

⁶² L.E. BOYLE, «The Setting», 1-16.

⁶³ S. POPE, «An Overview», 32.

⁶⁴ *ST* IIa IIae, q. 57, a. 1. «utrum jus sit objectum iustitiae».

⁶⁵ Cf. ARISTOTLE, *Nichomachean Ethics*, II, VI; ID., *Politics*.

Translated as *iustum*, or the just thing or what is just in a given situation, it is immediately paralleled by Aquinas with the then more authoritative tradition of Isidore, «who tells us that *ius* is so named because it is *iustum*»⁶⁶.

As the just thing, *ius* or right is defined as objective or independent justice: «the right and just is a work that is commensurate with another person according to some sort of fairness»⁶⁷. There are two features to this definition. Firstly, the just thing always concerns the other: «that which is correct is constituted by a relation to another, for a work of ours is said to be just when it meets another on the level, as with the payment of a fair wage for a service rendered»⁶⁸. What is right is that which is due to another. Secondly, it is objective. It is determined by the demands of the equity (*aequalitas*) intrinsic to a relationship: «an impersonal objective interest is fixed. We call it the just thing, and this is indeed a right. Clearly, then, right is the objective interest of justice»⁶⁹. As a result, *ius* as that which is due to another is according to the proper ordering in the external relations between people as established by natural or positive law.

On this foundation, the following articles turn to the categories associated with *ius* presented to him in the traditions outlined in the previous section. He agrees to the question «if natural right and positive right is a fair division of right?»⁷⁰ The division is based on a twofold means of ascertaining what is due or right. On one hand, positive right accrue from reasonable agreements between parties as in the case of private contracts. On the other hand, natural right arise from the very nature of things created by God. *Ius*, therefore, is established by rational judgement in reference to both natural and positive law. Stephen Pope writes: «What is right constitutes the deepest intelligibility of human laws, and it is the task of human law

⁶⁶ *ST* IIa IIae, q. 57. «SED CONTRA est quod Isidorus dicit quod *jus dictum est quia est iustum*».

⁶⁷ *ST* IIa IIae, q. 57, a. 2. «Dicendum quod, sicut dictum est, *jus sive justum est aliquod opus adaequatum alteri secundum aliquam aequalitatis modum*».

⁶⁸ *ST* IIa IIae, q. 57, a. 1. «Illud enim in opera nostro dicitur esse justum quod respondet secundum aliquam aequalitatem alteri, puta recompensatio mercedis debitae pro servitio impenso».

⁶⁹ *ST* IIa IIae, q. 57, a. 1. «Et propter hoc specialiter justitiae prae aliis virtutibus determinatur secundum se objectum, quod vocatur justum; et hoc quidem est *jus*. Unde manifestum est quod *jus* est objectum justitiae».

⁷⁰ *ST* IIa IIae, q. 57, a. 2. «*utrum jus convenienter dividatur in jus naturale et jus positivum*».

to render specific formulations of what is right in particular contexts»⁷¹.

Aquinas had developed the definition of law as an ordinance of reason in earlier questions of the *Prima Secundae*, which concerns the intrinsic (power and habit) and extrinsic (law and grace) principles of human action⁷². Law and grace, as extrinsic principles, move the human person from without towards their ultimate end: «Law explicitly teaches one how to act and grace grants the power to do so»⁷³. The analysis of the concept of law is based on an analogical division into five categories: eternal, natural, human, divine law, and the law of sin. Aquinas based the natural law on the teleological principle that all beings by their nature have ends or goals towards which they are inclined. The end of all action and the practical reasoning involved in moral action is the good, «For every agent acts on account of an end and to be an end carries the meaning of to be good»⁷⁴. Therefore, achieving such an end is the first and primary principle of action and practical reason. «Hence, this is the first precept of law that ‘good is to be done and pursued, and evil is to be avoided’»⁷⁵.

He categorised more specific precepts of the natural law according to our natural inclinations. First, man, in as much as he is part of all things, has a natural inclination towards the good of self-preservation. Second, man, in so far as he is an animal, has inclinations such as procreation. Third, by virtue of his rational nature which is proper to him, «he has a natural inclination to know the truth about God, and to live in society»⁷⁶.

Aquinas did not offer a full account of the content of natural inclinations. He did propose a distinction between the primary and secondary precepts⁷⁷. The primary precepts are self evident and embrace all animal behaviour. The secondary precepts are established by a process of reasoning on the natural ends of man. By arguing for two senses to the natural law, he could combine two elements of the Roman Law tradition. Although he doesn't mention him by name, the

⁷¹ S. POPE, «An Overview», 41.

⁷² *ST Ia IIae*, q. 90-97.

⁷³ S. POPE, «An Overview», 35.

⁷⁴ *ST Ia IIae*, q. 94, a. 2. «Omne enim agens agit propter finem, qui habet rationem boni».

⁷⁵ *ST Ia IIae*, q. 94, a. 2. «Hoc est ergo primum praeceptum legis, quod ‘bonum est faciendum et prosequendum, et malum vitandum’».

⁷⁶ *ST Ia IIae*, q. 94, a. 2. «sicut homo habet naturalem inclinationem ad hoc quod veritatem cognoscat de Deo, et ad hoc quod in societate vivat».

⁷⁷ Cf. *ST Ia IIae*, q. 94. a. 4.

first sense is associated with the Ulpian's definition of the natural law «in which all animals share». The second sense is associated with the named Gaius and his definition of the *ius naturale* as that which is «between all men».

To return to his exposition of *ius*, Aquinas asks «is the *ius gentium* the same as a natural right?»⁷⁸ In deference to the tripartite division which was given authoritative status by Isidore, he acknowledges that the *ius gentium* is a separate category of law. However, he asserts that it is a form of the *ius naturale*. Following the distinction made earlier between primary and secondary precepts, Aquinas argues «by looking at it purely and simply in itself» that there is a natural law in the strong sense. He gives a biological example of the natural right of procreation or of parents to care for, that is, to give their proper *ius* or due, «to their young in order to rear them»⁷⁹. There is another sense to the natural law. It arises from reflection on human behaviour in its appropriateness to human nature. The *ius gentium* is part of natural law in this sense and, according to Aquinas, provides legitimacy for the institution of private property and servitude⁸⁰.

In the final article, he distinguishes the rights of a father and a master from political right because they lack the full sense of otherness present in the latter⁸¹. Justice, then, and the *ius* which is orientated towards it, is in its fullest sense within political society.

After determining *ius* to be the object of justice, Aquinas turns to the definition of justice itself. His point of departure is the definition provided by the Justinian *Digest*: «the lasting and perpetual will of rendering to each one his right»⁸². From this point, Aquinas goes on to consider the specific aspects of justice as a virtue and injustice as a vice. Aquinas's claim that justice is the moral virtue proper to the will is consistent with the connection between justice and right.

Since the will is a rational appetite, it is not surprising to find that the proper object of its characteristic moral virtue [*ius* or right] is not only discerned through rational judgement (this is true of every virtue), but is de-

⁷⁸ *ST* IIa IIae, q. 57, a. 3. «utrum jus gentium sit idem cum jure naturali».

⁷⁹ *ST* IIa IIae, q. 57, a. 3. «et parens ad filium ut eum nutriet».

⁸⁰ For example, private property and ownership are considered to be the legal positivising of the natural right resulting from a concrete elaboration of man's natural dominion over material things. Cf. J. PORTER, «The Virtue of Justice», 280.

⁸¹ Cf. *ST* IIa IIae q. 57, a. 4.

⁸² *ST* IIa IIae, q. 58, a. 1. «Videtur quod inconvenienter definiatur a jurisperitis quod justitia est *perpetua et constans voluntas jus suum unicuique tribuendi*».

terminated by reference to laws, whether natural or positive, which are by definition ordinances of reason⁸³.

In sum: right, and natural rights, for Aquinas is determined by *iustum* (justice), rationally conceived and established in *natura* (nature).

3.2.2 Excursus: Aquinas and Rights

The place of Aquinas in a history concerning rights is coloured by the overall narrative of the history of ideas. According to the many works of Michel Villey, in defining *ius* as the right objective state of affairs Aquinas briefly restored classical meaning of *ius* and the true foundation of a philosophy of law provided by Aristotle⁸⁴. He argues that there is a breakdown of this position in the history of ethics and jurisprudence (by William of Ockham and the nominalists), which facilitated the first developments a subjective rights theory. The account provided by Villey views subjective rights as a corruption of the classical position⁸⁵.

Aquinas, therefore, is placed outside the historical development of rights (except as a counter-foil to which following theorists may be said to react). The exclusion is sustained by a rigorous division of the right into a dualism of subjective and objective right.

Villey has devised a sort of Manichaeic universe. There is an Aristotelian thought-world, full of light and sweet reason, and an Ockhamist thought-world, where all is darkness and blind will. The good theory of objective right can flourish only in the first thought-world, the bad theory of subjective rights only in the second⁸⁶.

Aquinas's presentation of *ius* as objective appears to contradict the possibility of a subjective meaning but such a view is too constricted for three reasons. Firstly, a simple two-fold division does not allow for the full plurality of meanings of the word *ius*. Annabel Brett, in *Liberty, Right and Nature* writes,

⁸³ J. PORTER, «The Virtue of Justice», 276.

⁸⁴ M. VILLEY, *La formation*, 244.

⁸⁵ Cf. M. VILLEY, *La formation*, 244. «Bref, le propre du langage juridique classique est de viser un monde de *choses*, de biens extérieurs, parce que c'est seulement dans les choses et le partage fait dans les choses que se manifeste le rapport juridique entre les personnes. La science du droit a les yeux tournés vers les *choses* et c'est en quoi l'authentique langage juridique est essentiellement *objectif*».

⁸⁶ B. TIERNEY, *The Idea of Natural Rights*, 30. Ockham does indeed have a crucial role in the development of rights which will be discussed in the following section.

The language of rights today is fluid between several different senses of the term. However, history of subjective right has not been written in a way that reflects the pluralistic nature of the present concept. The plurality of the concepts of subjective right today has been recognised largely through attention in the way the term «right» – as attributed to the individual – functions as an element in the languages of legal, moral and political discourse [...] the subject is still largely shaped by the attempts to locate an origin for the idea of subjective as opposed to objective right⁸⁷.

In order to identify the many meanings the term acquired, the history of right(s) needs to be a history of language – in this case, a history of the usage of the Latin term *ius*. This leads to the second objection; a strict dualism does not allow for the plurality of concepts to which *ius* is correlated. A history of the use of language (that is, a textual history in the light of social context) ought to allow for the development and intermingling of many correlative terms which together help define the many senses of right. Examples of such terms are the headings to the sections by which the historical section of this thesis is organised.

Thirdly, Villey's dualism portrays two competing notions and therefore does not allow for the fact that they may be mutually related. Some models of ethics and jurisprudence may create such a contradiction, but it need not be the case for all the proposed theories in the history of ideas. This final point can be discerned of Aquinas. In the article «*De jure*», Aquinas harmonises the definitions of justice offered by Aristotle and Roman Law by utilising the language of due and duty – the right thing is due *from* the just man *to* another citizen. But, as Annabel Brett argues, implicit is the right that a citizen may *claim* from another according to what is established in justice: it becomes his right – *ius suum* – a phrase commonly used by Aquinas to refer to justice. As a result, subjective rights may be implied. It is in this light that Aquinas can consider particular issues of justice and injustice. «This enables him to cover topics such as restitution, which involve the notions of *dominium* and *suum*, in the same terms of *iustum* defined as the *obiectum iustitiae*. As we shall see, future Thomists would make the shift in sense explicit»⁸⁸.

Brett's study refers to the Thomists of the seventeenth century⁸⁹. But the establishment of natural rights from the natural law – that is *iura* possessed by the person established by the *ius naturale* – is proposed «at every stage in the development of the doctrine – in the twelfth-

⁸⁷ A. BRETT, *Liberty, Right and Nature*, 2-3.

⁸⁸ A. BRETT, *Liberty, Right and Nature*, 92.

⁸⁹ Cf. Ch. I, Sec. 5.3.

century renaissance of law, in the eighteenth-century Enlightenment, and still in the twentieth-century discourse»⁹⁰. For example, in the contemporary resurgence of rights-language and theoretical reflection on rights, Jacques Maritain argued that natural rights are consistent and founded on the natural law: «How could we understand human rights if we had not a sufficiently adequate notion of natural law? The same natural law which puts down our most fundamental duties, and by virtue of which every law is binding, is the very law which assigns to us our fundamental rights»⁹¹. John Finnis, one of the central theorists, argues that a doctrine of natural rights is contained in the works of Aquinas⁹². His own account, inspired by Aquinas, will be analysed as part of the central discussion of this thesis.

3.3 *Historical Context*

It was maintained previously that the appropriation of Aristotle into Latin Christian Europe in the thirteenth century marked a turning point in the Middle Ages. Differently, H.R. Pirenne denies that an intellectual revolution took place. Instead, a social and economic revolution took place: increasing urbanisation and economic activity were creating new social conditions. He writes

Every department of social life was transformed; [...] Never, until the end of the 17th century, was there such a profound social – I do not say intellectual – revolution. Hitherto men had been mainly restricted to the relation of producer and consumer. Now they are increasingly ruled by their political relations⁹³.

Prudently, he subsequently warns that we must not, of course, exaggerate. Yet significant social changes were occurring and, as outlined in the previous section, influencing the origins of a rights-language. The growth in trade and urbanisation developed most strongly through the North Italian city-states, the marine republics of Venice, Genoa, and Pisa, and the cities of the Hanseatic League in Northern Germany. The status of the individual was enhanced within the environs of the city. A German proverb of the time *Die Stadtluft macht frei* – the air of the city makes free – referred to protection from feudal serfdom⁹⁴. By end of the twelfth century a «form of Republican self-government had come to

⁹⁰ B. TIERNEY, *The Idea of Natural Rights*, 34.

⁹¹ J. MARITAIN, *Man and the State*, 95. ID., *The Person and the Common Good*.

⁹² J. FINNIS, *Aquinas*, 132-186.

⁹³ H.R. PIRENNE, *A History of Europe*, 225; ID., *Economic and Social History*.

⁹⁴ H.R. PIRENNE, *The Medieval Cities*, 201.

be adopted almost universally by the leading cities of Northern Italy»⁹⁵. Yet, such freedom was still within a corporate framework.

The high Middle Ages had no more characteristic feature than the organisation called the guild, formed by people pursuing the same craft or trade, partly for the advancement of common interests, partly for charitable purposes and common religious devotion, partly for purely social purposes⁹⁶.

The individual, albeit rooted within a corporate framework, was fostered by the new models of self-governance and self-reliance that characterised the guild and would help fracture the traditional feudal model.

From the eleventh to the fourteenth century the primary political struggle in Europe lay between the Holy Roman Empire and the Papacy. On one hand, the Roman Church following the Investiture Controversy and the ecclesial reforms of Gregory VII (c. 1025-1085) and St. Bernard of Clairveaux (1090-1143) gained in self-confidence. On the other the Holy Roman Empire continued to think of itself as the true heirs of the authority in Europe and protector of Christendom. Yet, it was not a struggle of disparate entities. Rather, the spiritual authority of the Papacy widened the scope of its jurisdiction and temporal power. Theoretical justifications of authority, sourced in motifs of scripture, were based on an elaboration of the St. Peter's vicariate as the continuation of the earthly kingship of Christ. Given further validation by the developing studies in canon law, the doctrine of *plenitudo potestatis* – fullness of power – was advanced and deepened by canonists. Equally, the role of the Emperor was endowed with the sacred and claims for its authority were deepened by the influence of the newly studied Roman Law. The Emperor and other emergent royalties counteracted Papal claims by defining their own jurisdictional identity as a *corpus* or independent body. Although originating as the *corpus mysticum* by assimilating the term it also transferred the authority to the temporal head⁹⁷. At a political level, the imperialistic intentions of both developed militarily; beginning with Frederick Barbarossa's (1152-90) first expedition to Italy in 1154 to deepen his claim as Roman Emperor and continuing for the following two centuries. Against both parties, the cities of Northern Italy, growing in economic independence, asserted their political autonomy with greater assurance, inspiring new ideals of liberty⁹⁸.

⁹⁵ Q. SKINNER, *The Foundations*, 4.

⁹⁶ J. KELLY, *A Short History of Western Legal Theory*, 116.

⁹⁷ Cf. E. KANTOROWICZ, *The King's Two Bodies*.

⁹⁸ Q. SKINNER, *The Foundations*, 3-21.

Rights language would develop against the backdrop of these two trends – economic and political. New economic advancements highlighted and focused attention on the laws and rights of ownership; and papal and political pretensions to supreme power focused attention on the rights over one's own destiny. The next section shall focus on the development of rights-language in the light of these two trends.

4. Late Medieval Era: 1250-1400

In *Opus nonaginta dierum*, reputedly written in ninety days as the title suggests, sometime during 1332-1347, the Franciscan William of Ockham writes

although it may be conceded that in the state of innocence our first parents had dominion, in some sense, over temporal things, nevertheless it should not be conceded that they then had ownership of temporal things: this is because the term *dominium* [lordship] has some meanings which the term *proprietas* [property, ownership] does not have⁹⁹.

Ockham (c. 1285-1349) draws attention to the different meanings of the term in order to refute the strict correlation of *dominium* to possession of property. Instead, he attributes to Adam and Eve, our first parents, a power of ruling or governing that did not involve the possession of the material goods of the first creation. Although strictly referring to lordship with associated ideas of control, mastery and power, there are two fundamental conceptions of *dominium* in the later medieval era. Jane Coleman writes,

The *dominus* is the proprietor, the possessor of land and of *servi* attached to the property, and he draws revenues from the exploitation of both. This *dominus* possesses *dominium* which is essentially an economic capacity [...] The *dominus* was also he who possessed jurisdiction, authority to govern, to establish justice, to levy taxes in return for maintaining the security of his *subditi*, and to wage war within established limits¹⁰⁰.

The two conceptions – ownership and jurisdiction – lie at the heart of Ockham's contention regarding Adam and Eve. What may appear to be a mere exegetical point, in fact arises from two deep polemical and political struggles concerning property and power of the thirteenth and fourteenth centuries which coalesce in the writing of the text. First, Ockham's treatise is a polemical attack on the Papal bull, *Quia vir*

⁹⁹ OCKHAM, *Opus Nonaginta Dierum*, 37. Page numbers from A.S. MCGRADÉ – J. KILCULLEN, ed., *A Letter to the Friars Minor*.

¹⁰⁰ J. COLEMAN, «Property and Poverty», 626.

reprobis (1328), of John XXII (1249-1334), which questioned and condemned the earlier doctrinal and legal basis for the Franciscan evangelical rejection of property. Second, it was written, in exile, under the protection of Ludwig of Bavaria (d. 1347) who was a German King and a secular ruler in long jurisdictional struggle with the Papacy.

This section shall trace the development of two conceptions of *dominium*, and their mutual relation to *ius* in which the notion of subjective rights moves from jurisprudence to the centre of political discourse, by way of the Franciscan poverty dispute and the Conciliarist movement. As a result, the presentation of this section moves frequently between text and context, making for a brief historical subsection.

4.1 *Ius, Dominium and Property*

Richard Tuck, in *Natural Rights Theories*, agrees with the suggestion of Brian Tierney, in which the first modern rights theory was established among medieval jurists of the twelfth century. However, he maintains their theory was not of subjective rights, as defined in the introduction to this Chapter, but «one built around the notion of a passive right»¹⁰¹. Instead, the rights expounded by the early jurists were those that upheld that which was granted to the claimant. The basis of the right, therefore, was the duty of others to recognise the justice of claims. Such an approach to rights, according to Tuck, was connected to canon law.

Ecclesiastical law was of course greatly concerned with general questions of welfare: in the Church, Europe had an institution unprecedented in the Roman world in that it was actually designed (at least in part) for charitable purposes. It is not surprising that a theory about rights as claims should have evolved from within an institution which was so concerned with the claims made on other men by the needy or deserving¹⁰².

This understanding of *ius*, however, began to change significantly by later medieval jurists. Active rights implied the imposition of a duty upon another and so determined how they ought to act towards the possessor of that right. In this transition, the key relationship, according to Tuck, is between *ius* and *dominium*, normally translated as «property» and «right». He maintains that by the «fourteenth century it was possible to argue that to have a right was to be the lord or

¹⁰¹ R. TUCK, *Natural Rights Theories*, 13; cf. Ch. I, Sec 1.

¹⁰² R. TUCK, *Natural Rights Theories*, 15; cf. W. ULLMANN, «Public Welfare», 1-39.

dominus of one's relevant moral world, to possess *dominium*, that is to say, *property*»¹⁰³.

Taking classical Roman law as their point of departure, the early medieval jurists maintained a clear distinction between *dominium* (ownership) and *possessio* (possession, use). In particular, they distinguished between *dominium* and usufruct, or the advantageous use and gain of profit from a piece of property belonging to another. The former strictly speaking entitled property: the latter did not¹⁰⁴. A decisive shift away from this distinction was made by Accursius (c.1191-1263), a commentator or post-glossator of the University of Bologna in the early thirteenth century¹⁰⁵. In his gloss, or interpretations, *dominium* was taken in a looser or more extended sense than earlier accounts. Accursius distinguished between ownership as *dominium utile* and possession as *dominium directum*. The former described what the usufructuary possessed, while the later described what a superior lord possessed. Such a schema applied the notion of *dominium*, that is, the concept of control or mastery over one's own world as ownership to both parties. What was the preserve of the lord was now extended to the vassal or the usufructuary. Therefore, *dominium utile* could be taken as any claim over a thing (*ius in re*), and that claim could be defended against all other men. The picture shifts: a tenant making a claim to his right to his tenement makes a claim of *dominium utile* rather than merely *possessio*; the lord makes his claim to his right of dues as *dominium decretum* rather than simply *dominium*. As a result, the picture is «now two-sided rather than mutual»¹⁰⁶. According to Tuck, «The process had begun whereby all of a man's rights, of whatever kind, were to come to be seen as his property»¹⁰⁷.

The degree to which the account of Accursius was accepted by subsequent jurists reflected the ongoing social and economic transition from the older customary feudal relationship to the one based on monetary contract. In practical terms, what was happening was that the law

¹⁰³ R. TUCK, *Natural Rights Theories*, 3.

¹⁰⁴ J. COLEMAN, «Property and Poverty», 611-615, 612.

¹⁰⁵ Accursius' work stands at a juncture of medieval legal studies between two conventionally divided phases: the first is that of the «Glossators» (1100-1250), the second is that of the «Commentators» (1250-1400). The names reflect different methodologies. The earlier teachers attached «glosses» or side-notes to the passages of the classical texts. The later scholars attempted coherent commentaries interpreting the text in response to the needs of their society. Cf. J. KELLY, *A Short History of Western Legal Theory*, 122.

¹⁰⁶ J. COLEMAN, «Property and Poverty», 616.

¹⁰⁷ R. TUCK, *Natural Rights Theories*, 16.

was beginning to protect the users¹⁰⁸. Subsequent jurists began to emphasise a more active meaning to *ius*. Jacques de Revigny wrote: «it is a *ius* to demand something, as when you promise me a horse I have the *ius* to demand it, but not a *ius* in it»¹⁰⁹. Bartolus (1313-1357) defined *dominium directum* as «the unrestricted *ius* of disposing of a corporeal object unless prohibited by law»¹¹⁰. Accordingly, the sense of *ius* was becoming an active claim rather than a passive grant. According to Tuck, the deepening association of *dominium* and *ius* was to lead to later explicit rights theories.

On one hand, the transitions reflected new economic and political realities. On the other hand, the terminology was later appropriated and adapted in ideological disputes. The first significant dispute concerned the nature of property or, more specifically, the controversy regarding apostolic poverty practised by the Franciscans; «its importance is that the late medieval natural rights theories undoubtedly grew out of it [...]»¹¹¹.

4.1.1 The Franciscan Controversy

St Francis, in the *Regula Prima* (1221), writes:

Let the brothers appropriate nothing to themselves, neither house nor place nor any thing. And like pilgrims and strangers in this present world, serving God in poverty and humility, let them go trustingly forth to beg for alms, nor should they be ashamed, for the Lord for us made himself a pauper in this world¹¹².

Poverty was believed by Francis (c.1181-1226) to be a spiritual way of perfection that imitated the poverty of Christ. In comparison to other mendicant orders such as the Dominicans, it was considered the defining characteristic of the Franciscans¹¹³. But, in the words of Gordon Leff, what began as

¹⁰⁸ Cf. J. COLEMAN, «Property and Poverty», 607-643.

¹⁰⁹ «est enim ius ad pratendam rem ut si promisisti mihi equum habeo ius ad rem petendam sed non habeo ius in re». Cited in R. TUCK, *Natural Rights Theories*, 17.

¹¹⁰ «Ius in re corporali perfecte disponendi, nisi lex prohibeat». Cited in R. TUCK, *Natural Rights Theories*, 17.

¹¹¹ R. TUCK, *Natural Rights Theories*, 20.

¹¹² «Fratres nihil sibi approprient, nec domum nec locum nec aliquam rem. Et tanquam peregrine et advenae in hoc saeculo, vadant pro eleemosyna confidenter, nec oportet eos verecundari, quia dominus pro nobis se fecit pauperem in hoc mundo». Cited in A. BRETT, *Right and Liberty*, 12.

¹¹³ The Franciscans were founded in 1209 and the Dominicans in 1216.

a personal quest by St. Francis and a handful of followers was gradually transformed into an organised way of life, embodied in an institution which, to remain in being, demanded the possessions and organisation St. Francis had shunned. It was from this contradiction that conflict sprang¹¹⁴.

Within the new Franciscan community, there existed a tension in theory and in practice between remaining authentic to the founding ideals and the requirements of being an organised religious order. But it was also a normative issue; it implied a more perfect way of following Christ and therefore a model of life to be followed by all Christians and the institutional Church¹¹⁵. Furthermore, it was also an exegetical and theological issue: were the Franciscans correct in interpreting the life of Christ as one without property at all?¹¹⁶ In order to embody the ideals of their founder in an institution, the early leaders of the Franciscan order attempted to schematise a systematic doctrine of apostolic poverty. Such a doctrine would allow them to use material goods without having ownership or *dominium* of them. As a result, the controversy focused attention on the justification of property, the scope of *dominium*, and the extent of its association with *ius*. Initially, under the terms of Gregory IX's (c.1145-1241) pronouncement *Quo Elongati*, the Franciscans were allowed *usus* of goods but the *dominium* would be held by the Papacy. However, the tension remained and widened further.

Further distinctions, originally outlined by St. Bonaventure (1221-1274), were given papal approval by Nicholas III, in a bull entitled *Exiit qua seminat* (1279)¹¹⁷. Types of *dominium* were distinguished from *simplex usus facti* or simple use. The former was applicable to the Franciscans, the later not. The fundamental difference was marked by fact that in order to have *dominium* the material object or commodity may be disposed of in some manner, i.e. sold or used for further gain. In the latter category, the material object could only be consumed. The Franciscans were claiming that it was possible to step outside the relationships of exchange, by asserting that consuming goods did not count as having property rights. But the conflict radicalised after the death of

¹¹⁴ G. LEFF, *Heresy*, I, 54.

¹¹⁵ R. TUCK, *Natural Rights Theories*, 3.

¹¹⁶ J. COLEMAN, «Property and Poverty», 633.

¹¹⁷ The initial attempt to reconcile the tension was made by St. Bonaventure, Master General of the Franciscan Order. In *Apologia Pauperum* (1269), Bonaventure drew on the sources of scripture, St. Francis and civil law, and defined poverty as living by what was not one's own. He claimed that the Franciscans had voluntarily renounced all ownership, possession and usufruct, leaving only *simplex usus facti*. Simple use was a natural requirement in order to maintain life but did not imply rights of any kind. Cf. J. COLEMAN, «Property and Poverty», 633.

Bonaventure. The Franciscans polarised; one wing known as the Spirituals, made of uncompromising friars, such as Peter John Olivi (d. 1298), insisted on abject poverty as the true imitation of Christ's perfection¹¹⁸. They were forcibly removed from the order and ultimately condemned by John XXII in 1326. Earlier in 1321, the same pope called for a public debate on the issue. In part, his concern may have been due to the dangerous conclusions that could be drawn from the doctrine of apostolic poverty¹¹⁹.

From a theoretical point of view, the controversy turned on the justification of *dominium*: the extent of ownership implied by the term depended on its justification. Up until this point, the theologians of the medieval era viewed ownership of private property (*dominium rerum temporalium* or *potestas approprianda res temporales*) to be justified by a necessity resulting from the consequences of the Fall. On one hand, the Franciscans needed to show that although ownership was a social necessity it was not simply deducible from the *ius naturale*. Furthermore, they had to maintain that it was precluded and upheld by Revelation in the poverty of Christ and the apostles. In this regard, Richard Tuck maintains that a major source of the Franciscan case was Duns Scotus (c.1270-1308)¹²⁰. Duns Scotus argued that that property rights are not strictly speaking *de jure naturali*. He argued that the *ius naturale* ruled it out. It was incompatible with man in a state of innocence because property possession is a human institution with a conventional, legal, positive character¹²¹. On the other hand, opponents to the Franciscan doctrine needed to show that it was more than merely conventional; it was at least compatible with, if not implied by, the natural law¹²².

The final judgement on the issue by John XXII, in *Quia vir reprobus* (1329), claimed that man's *dominium* over the earth and its goods was conceptually the same as God's *dominium* over the earth. Therefore, in the «state of innocence» man did have ownership or *dominium* over

¹¹⁸ For a complete history, cf. G. LEFF, *Heresy*, I.

¹¹⁹ Cf. T. TURLEY, «John XXII and the Franciscans» 74-88.

¹²⁰ R. TUCK, *Natural Rights Theories*, 21.

¹²¹ «Lege naturae vel divina, non sunt rerum distincta dominia pro statu innocentiae, imo tunc omnia sunt communia [...]». J. DUNS SCOTUS, *Quaestiones in librum Sententiarum*, 15.2. Cited in R. TUCK, *Natural Rights Theory*, 21.

¹²² Thomas Aquinas agreed with Scotus that property rights were not strictly speaking of the natural law. However, he considered possessions as necessary, and therefore legitimate, according to the secondary precepts of the natural law resulting from the primary precept of living in a social manner. Cf. *ST* IIa Iae q. 94 a. 5; *ST*, IIa Iae q. 66.

temporal things, including that which was for his own use. Ownership in positive law reflected the natural order. Positive property rights were based on natural right. It was a significant development because property was no longer a mere product of the Fall or a necessary human institution. *Dominium* was an inescapable fact of nature. The Franciscans, therefore, necessarily owned the goods which they used.

In his response, William of Ockham, as quoted in the opening of this section, acknowledged the papal position that Adam and Eve held *dominium* over the material things of the world. But he denied that it was of the type asserted by the Papacy. The difference in position, therefore, depended not on the fact of *dominium* but on its scope. According to Tuck, by trying to place limits, Ockham actually conceded the essential point – *dominium* is a characteristic of the human person. In effect, Tuck inverts the influential position of Michel Villey, which proposes Ockham is the father of subjective rights: «Villey may have got this (in a sense) completely the wrong way round»¹²³. Tuck contends that the remote origin of rights is in the tradition of canonists to which John XXII belonged, and was appropriated by Ockham in course of the polemics. Commenting on the outcome of the debate, he writes:

The end result of this debate was that the conservative theorists had been led to say that men, considered purely as isolated individuals, had a control over their lives which could correctly be described as *dominium* or property. It was not a phenomenon of social intercourse, still less of civil law: it was a basic fact about human beings, on which their social and political relationships had to be posited¹²⁴.

The result of Tuck's analysis is to downplay the role of Ockham in the history of rights. However, the eclipse of Ockham's role is overestimated by him. He too strictly translates *dominium* as property and therefore, as Ockham complained, does not take into full account of all its meanings. As a result, he neglects other historical threads in the development of rights. In this particular case, it leads him to misjudge the role of Ockham. The next sub-section shall give a more in-depth presentation of Ockham's definitions of *ius* in the light of *dominium* as jurisdiction.

¹²³ R. TUCK, *Natural Rights Theories*, 22; cf. M. VILLEY, *La formation*, 251. Villey writes: «Ed, du moins dan l'état présent de mes connaissances, je pense que c'est de Guillaume d'Occam que date le tournant décisif». Villey's case will be outlined in a later subsection, cf. Ch. I., Sec. 4.1.1.

¹²⁴ R. TUCK, *Natural Rights Theories*, 24.

4.2 *Ius, Dominium and Authority*

Inspired in part by the universalist conception of the Roman emperor found in the *Corpus Iuris Civilis*, Frederick Barbarossa considered himself *Dominus Mundi* (Lord of the World)¹²⁵. Such a title brought him in direct conflict with any papal claims of universal authority and continued the struggle between Church and state that defined the medieval era¹²⁶. In particular, the struggle concerned the extent of *dominium* or lordship in the sense of authority and jurisdiction appropriate to either the Church or the state.

The claim of *plenitudo potestatis*, or «fullness of power», essentially held that a duly elected Pope could not be held accountable to another human authority. Drawing on many sources, the so-called Curialists defended the position on the basis of the supremacy of the spiritual over the physical. Anthony Black, in *The Political Thought in Europe*, gives the examples of Aegidius of Rome (1243-1316), who argued that the relation of clerical to lay power is determined by the priority of the soul in relation to the body and of the spiritual in relation to the cosmos generally, and James of Viterbo (1260-1307), who wrote that temporal power pre-exists in the spiritual as to its first and highest authority¹²⁷. Such a hierocratic doctrine held that all secular rulers derived their authority from the Church: they required papal legitimation and could be judged by the pope if deemed to be defective. This era was the climax of medieval papalism as a political theory. Yet, as Black also notes: «these most far-reaching claims ever made for the papacy came at the time when its political power was most in question»¹²⁸.

As outlined previously, early medieval jurisprudence used a language of rights that expressed the «liberties» and «immunities» of individuals or groups against the authority of the King or their Lords¹²⁹. The political struggles of the later Medieval Era promoted a deeper theoretical reflection on the source and limits of such authority and the corresponding «liberty» of individuals or groups or nations. It marks another movement of rights language from jurisprudence to philosophical and theological speculation. It is unsurprising then that those theorists who would advance the reflection on rights are those who sought to limit authority or the notion of *dominium* as *plenitudo potestatis*.

¹²⁵ J.P. CANNING, «Introduction: politics», 341.

¹²⁶ Cf. J.A. WATT, «Spiritual and Temporal Powers», 367-423.

¹²⁷ A. BLACK, *Political Thought in Europe*, 50.

¹²⁸ A. BLACK, *Political Thought in Europe*, 50.

¹²⁹ Cf. Ch. I., Sec. 2.2.

The adoption of the Aristotelian notion of a natural political purpose to the person and the community facilitated a clearer distinction between the Church as an ecclesiastical structure and the state as a political community. The clearer distinction facilitated a systematic comparison of the two institutions by many theorists, and so to the varying possible conclusions regarding the position of the Church¹³⁰. Acknowledging a valid role for ecclesiastical jurisdiction, Aquinas and John of Paris (c.1240-1306) maintained the essentially spiritual nature of the Church. However, emphasis on the spiritual nature of the Church as the mystical body of believers also led to a denial by some, such as Marsilius of Padua (c. 1275-1342), of any need for any government or jurisdiction in the Church¹³¹. Others, such as William of Ockham and Jean Gerson (1363-1429), placed ecclesiastical authority within wider frameworks of the political community. With regard to the origins of rights, the final two writers are the most significant, and the following sub-sections are devoted to their texts.

4.2.1 William of Ockham

Ockham's political theory was primarily motivated by his disenchantment with John XXII¹³². The Pope had placed the Franciscans in a contradictory position. If they renounced all rights to ownership, they must also have renounced rights of use. Any use, therefore, of such things must be unjust and wrong. In response, Ockham rightly points out that the position of John XXII is jurisprudential: «he speaks of lordship which in the legal sciences is called ownership»¹³³. By insisting on meanings beyond jurisprudence, Ockham is appealing to meanings beyond positive law. Ockham refuses to equate lordship with property because ownership implies exclusivity and the consequent ability to alienate or transfer temporal things – primarily to grant or to sell¹³⁴. Instead, he argues that our first parents living in abundance had no need for such division.

¹³⁰ O. O'DONOVAN – J. LOCKWOOD-O'DONOVAN, ed., *From Irenaeus to Grotius*, 390.

¹³¹ On Marsilius cf. L. STRAUSS, «Marsilius of Padua»; cf. A. GERWITH, «Introduction», in *The Defender of the Peace*.

¹³² A.S. MCGRADE – J. KILCULLEN, «Introduction», xiv.

¹³³ OCKHAM, *Opus Nonaginta Dierum*, 35.

¹³⁴ OCKHAM, *Opus Nonaginta Dierum*, 46. «For the appellant does not deny in every sense that our first parents had lordship of temporal things in the state of innocence. He denies that they had the lordship called «ownership» by virtues of which one can say, «This is in such a way mine that it is not yours, and that is in such a way yours that it is not mine»».

Ockham goes on to make a distinction between the right of the forum (*ius fori*) and the right of heaven (*ius poli*) – in effect, between positive law and natural law. It was possible to renounce the former (right of ownership) but not the latter (the right of using). He interprets the *licentia utendi* granted to Franciscans to use material goods as not conferring a legal right, as John XXII maintained, but more importantly as removing an obstacle to exercise a natural right to use such things¹³⁵. Ockham writes, «The permission [...] merely removes the impediment preventing one who has a natural right of using from going on to an act of using, and does not give him any new right»¹³⁶. By acting according to natural right, the Franciscans are acting justly. (By considering the law of ownership to be a limitation or obstacle to the natural right of using, Ockham prefigures the transformation in the relationship between law and rights that took place in early modernity. Thomas Hobbes went far further than Ockham in identifying all rights as freedom and all law as restrictive.)

John XXII, by insisting on the necessity of positive legal rights accruing from permissions or licences to use (*licentia utendi*), had placed an insurmountable obstacle or impediment to the claims of the Franciscans to renounce rights of ownership. This may be seen as the crux of Ockham's disillusionment: John was impeding the evangelical freedom of the Franciscans to follow the way of perfection manifested by a commitment to poverty. It is the assertion of liberty, rather than property, around which Ockham's contentions regarding *ius* and *dominium* (lordship) turn – and underlie his further considerations of papal authority¹³⁷.

Ockham, who had joined Ludwig, the King of Bavaria, desired on the one hand to establish limits of papal power and on the other hand to found the independent rights of secular rulers. The *dominium* over temporal things – ie private property rights – and the *dominium jurisdictionis* of temporal rulers could both be supported by the same philosophical arguments¹³⁸.

Ockham asserts the traditional argument against the curialist defence of papal absolutism: «an unlimited power is at least limited by the realisation of the common good, which again contains respect for the *jura naturalia* of the subjects»¹³⁹. Yet as Arthur McGrade argues,

¹³⁵ A.S. MCGRADÉ, *The Political Thought of William of Ockham*, 176.

¹³⁶ OCKHAM, *Opus Nonaginta Dierum*, 56.

¹³⁷ OCKHAM, *Dialogues*; ID., *Eight Questions on the Power of the Pope*.

¹³⁸ H.A. ROMMEN, «The Genealogy of Natural Rights», 420.

¹³⁹ H.A. ROMMEN, «The Genealogy of Natural Rights», 416.

«Ockham's appeal to the gospel as a law of liberty was his most significant argument against curialist views of *plenitudo potestatis*»¹⁴⁰.

Following the traditional course, Ockham proposes *ius nauturale* as *dictamen rectae rationis*, that is, the dictates of right reason or the natural law. Further to this sense, Ockham also identifies *iura naturalia*, which he defines as *potestates* or *facultates* or subjective rights: «the right of heaven is nothing but a power conforming to right reason»¹⁴¹. A natural right is a *licita potestas* to act because it conforms to the natural law and therefore is licit. Most significantly, the right – *licita potestas* – to act is a *libertas* or an *autoritas*. It is not a permission to act or own granted by a superior. The primary emphasis is placed on the power or the inherent moral faculty of the individual. The font of natural rights is this source and not primarily from the role or position of an individual within society. The duties of others are a response to such rights. To have *iura* is to have *dominion*, in the sense of control (jurisdiction) over one's own moral world which can never be denied or undermined. Ockham accuses John of denying the Franciscans their evangelical liberty or personal jurisdiction over their own moral world to adhere to the ideals of Francis in imitation of Christ.

Liberty as a natural right colours his whole political philosophy. Heinrich Rommen writes that for Ockham «the essential characteristics of the person are independence and self-determination»¹⁴². It is in light of this that Ockham considers papal authority to be specifically spiritual, respecting the rights of others, whether rulers or individuals. He argues against the *plenitudo potestatis* doctrine and insists that the papacy is bound to the authority of the Ecumenical Councils, influencing the conciliarist debates of the following generations. Rommen argues that Ockham's ideas gave the pragmatic rights and liberties of the era a philosophical foundation. «What Occam [sic] discovered was precisely the pragmatic attempts of the citizens in the cities and even of the peasants to limit the jurisdictional authority of their rulers [...]»¹⁴³. After all, as he notes, Ockham grew in England, the land of the *Magna Carta*.

Michel Villey asserts a more direct link between Ockham's philosophy and politics: Ockham's political philosophy (written as an excommunicated refugee in Munich) is a logical outcome of his earlier ethical and philosophical systems (written at Oxford University). Villey argues that

¹⁴⁰ A.S. MCGRADY, *The Political Thought of William of Ockham*, 219.

¹⁴¹ OCKHAM, *Opus nonaginta dierum*, 57.

¹⁴² H.A. ROMMEN, «The Genealogy of Natural Rights», 420. For example, Ockham argues that slavery and servitude cannot be justified by the natural law.

¹⁴³ H.A. ROMMEN, «The Genealogy of Natural Rights», 417.

Ockham is the first to truly define the *ius naturale* as *licit postestas*¹⁴⁴. He attributes to Ockham a foundational and originating role because he provides the philosophical underpinning for the language of rights and therefore supplies a more complete definition¹⁴⁵. His theory of logic and knowledge – nominalism – denies the existence of universal concepts in order to emphasise the particular. When transferred to the political reflection, it leads Ockham, and those who followed, to emphasise the individual over abstract social concepts. It began the process, according to Villey, by which «the individual [...] becomes the centre of interest for legal science, which henceforth strives to describe his legal attributes, the extent of his faculties, and of his individual rights»¹⁴⁶. His moral theology – voluntarism – proposes that moral actions can only be judged according to the will of the individual, playing down the role of reason. When transferred to political reflection, it led those who followed Ockham to emphasise the will of authority as the source of law, eclipsing the role of reason. Villey and others point out that later Ockhamists pushed such theories to their logical conclusions and so provided a philosophy that was radically individual, leading to a social atomism¹⁴⁷. However, A.S. McGrade points to «affinities» between Ockham's nominalism and his political concepts, but denies that one can make the logical inference from the former to the latter¹⁴⁸.

William of Ockham is significant because he prefigures the transformations in modernity that place rights firmly in the foreground. However, I argue that Ockham's *via moderna* is not of the modern tradition. He still works within a medieval framework and not a modern one, which will be outlined in the next chapter.

4.2.2 Jean Gerson

The normative force of rights associated with the two aspects of *dominium* – that people ought to have secure ownership of their material goods

¹⁴⁴ «Il est revenu à Occam, contre les doctes, d'apporter à ces tendances mal définies, autant qu'on en puisse juger, leur achèvement théorique et, sans doute pour la première fois, de concevoir le droit subjectif, de consacrer la jonction des idées de droit et de pouvoir». M. VILLEY, *La formation*, 251 ff

¹⁴⁵ M. VILLEY, *La formation*, 220-263; ID., *Le droit et les droits de l'homme*; ID., *Philosophie du Droit*; ID., *Leçons D'Histoire*.

¹⁴⁶ «l'individu [...] devient le centre d'intérêt de la science du droit ; l'effort de la science juridique va désormais tendre à décrire les qualités juridiques de l'individu, l'entendue de ses facultés, de ses *droits individuels*». M. VILLEY, *La formation*, 228. Translated and cited in J.M. KELLY, *A Short History of Western Legal Theory*, 146.

¹⁴⁷ Cf. S. PINCKAERS, *The Sources*, 241-253, 327-353.

¹⁴⁸ A.S. MCGRADE, «Ockham and the Birth of Individual Rights», 149-65.

and they ought to be free – were slowly taking shape as philosophical truths during the fourteenth century; both trends come together in Jean Gerson (1243-1316)¹⁴⁹.

The end of the property dispute coincided with the death of William of Ockham in 1349. More significantly, it was superseded by a greater dispute. In the near forty years after 1378, the Great Schism divided the Roman Papacy in two and finally three. The exigencies of the new context gave renewed urgency to considerations of *dominium* as jurisdiction. As a response, those involved in the Conciliar Movement sought to justify the authority and primacy of a general council in order to overcome the scandal of a divided papacy, to initiate Church reform and to counter heresy. Jean Gerson, a French theologian, one time chancellor of the Paris University and the primary conciliarist theorist, «pursued these aims throughout his public life. His distinctive doctrine of individual rights grew out of his strivings to achieve them»¹⁵⁰. The movement owed its ideas to collective government or corporation theory already embedded in medieval canon law¹⁵¹. But in this era, conciliarism moved away from its canonical forms and towards a more thorough theological grounding¹⁵². As a reflection on the sources and justifications of authority, it echoed the issues of Ockham outlined in the previous section¹⁵³.

In accordance with the tradition, he asserts that power of *dominium* is a gift freely bestowed by God. It is a state natural to the human person and was not lost, for all people possess some kind of *ius* by the very fact that God created them. In *De vita spirituali animae*, he continues

There is a natural *dominium* as a gift from God, by which every creature has a *ius* directly from God to take inferior things into its own use for its own preservation. Each has this *ius* as a result of a fair and irrevocable justice, maintained in its original purity, or a natural integrity [...] To this *dominium* the *dominium* of liberty can also be assimilated, which is an unrestrained *facultas* given by God¹⁵⁴.

In effect, Gerson brings together *dominium* as ownership and liberty.

¹⁴⁹ J. DUNBABIN, «Government», 477-519, 511.

¹⁵⁰ B. TIERNEY, *The Idea of Natural Rights*, 221.

¹⁵¹ Cf. B. TIERNEY, *Foundations*; ID., *The Crises of Church and State*; ID., *Church law and constitutional thought*.

¹⁵² A. BLACK, *Political Thought in Europe*, 21.

¹⁵³ A. BLACK, «What was conciliarism?», 216.

¹⁵⁴ «Erit igitur naturale dominium donum Dei quo creatura jus habet immediate a Deo assumere res alias inferiores in sui usum et conservationem, pluribus competens ex aequo et inabdicabile servata originali justitia seu integritate naturalie [...] Ad hoc dominium spectare potest dominium libertatis quae est facultas quaedam libere resultans ex dono Dei [...]». Cited in J. DUNBABIN, «Government», 511.

Firstly, *dominium* confers the *ius* or right to take to oneself and own the things required by the need of self-preservation. Ownership and property rights are the result of our natural state and cannot be legally renounced or lost by the removal of grace. This is the same position adopted by John XXII and is used by Gerson in order in order to defend the Church against the heresies associated with John Wyclif (d. 1384)¹⁵⁵.

Secondly, the *dominium* bestowed by God includes the power of liberty. Added to the natural *dominium* quoted above, Gerson also identifies a human and evangelical *dominium*, both of which were constituted after the Fall. Human *dominium* was instituted by the law and therefore could be alienated. This is the position taken by Ockham and is appropriated in order to defend against abuses in the papacy. Human *dominium*, as constituted by law, could be lost in accordance to the law: an unjust ruler could lose «title» to rule after judgement and condemnation by those with the authority to do so. For Gerson, attempting to overcome the scandal of three papal claimants, such competency lay with a general council of the Church. If, for Ockham, rights are asserted in resistance to a perceived over-reaching authority, then for Gerson rights are linked to internal reform.

In another work, *Definitiones Terminorum Theologiae Moralis*, Gerson defines:

Ius is a *facultas* of power to appropriate to someone and in accordance with the dictates of right reason. *Libertas* is a *facultas* of the reason and will towards whatever possibility is selected [...] *Lex* is a practical and right reason according to which the movements and working of things are directed towards their ordained ends¹⁵⁶.

In Richard Tuck's analysis of the source of subjective rights, he argues that this is, in fact, the «first time that an account of *ius* as a *facultas* had been given»¹⁵⁷. Furthermore, Gerson «had converted the claim-right theory of the twelfth century completely into an active right the-

¹⁵⁵ Wyclif had argued that *dominium* is bestowed by grace and therefore any rights are lost by its withdrawal or rejection by falling into mortal sin. Cf. J. COLEMAN, «Property and poverty», 644-647.

¹⁵⁶ «Jus est facultas seu potestas competens alicui secundum dictamen rectae rationis. Libertas est facultas rationis, et voluntatis ad utrumlibet oppositorum [...] Lex est recta ratio practica secundum quam motus et operationes rerum in suos fines ordinatae regulantur». Cited in R. TUCK, *Natural Rights Theories*, 26-27.

¹⁵⁷ R. TUCK, *Natural Rights Theories*, 26.

ory, in which to have any kind of right was to be a *dominus*, to have sovereignty over that bit of one's world»¹⁵⁸.

4.3 *Historical Context*

Writing of this past period, Tierney maintains:

To understand fully the growth of right theories in the late medieval period one has to bear in mind, not only the obvious facts of medieval life – the obsessive concern of many persons and groups to maintain their «rights and liberties» – but also the pervasive influence of Christian attitudes to individual and community at every level of thought and action¹⁵⁹.

The story of rights in this past period is of the movement from jurisprudence towards the polemics of politics. If jurisprudence is ostensibly guided by justice then it is hardly surprising that some elements of its language would be used in the struggles for wider political and social justice. The whole story of rights, therefore, may be told as a struggle of justice.

5. **Renaissance, Reformation and Second Scholasticism: 1450-1600**

In the city of Mainz, around the year 1450, Johannes Gutenberg introduced printing with movable type, making it possible to reproduce identical copies of a single text rapidly and economically. Facilitating an unprecedented dissemination of texts and ideas, printing became a powerful tool of social and political change with «repercussions beyond those previously imagined»¹⁶⁰. On one hand, texts and the ideas they contained became more widespread. On the other, the availability of early and foundational texts allowed for a renewed critical investigation of the originals, thereby enhancing their authority as sources. Three significant «returns» are reflected in three movements of the era: the Renaissance returned to the authorities of classical antiquity; the Reformation returned to the authority of scripture; and the so-called Second Scholasticism returned to the authority of Aquinas. The three movements of return did not merely imitate older ideas. Rather, such ideas were appropriated and adapted in response to the new exigencies of the time; such as, the discovery of the new world, the rise of centralised monarchy, the abuses of power and a new rapid economic development (in some parts of Europe).

¹⁵⁸ R. TUCK, *Natural Rights Theories*, 28.

¹⁵⁹ B. TIERNEY, *The Idea of Natural Rights*, 213.

¹⁶⁰ Cf. E. EISENSTEIN, *The Printing Press*.

The reformers and Renaissance humanists sought the authentic word of God and legal scholars searched for the original intent of Roman law. «Openness to the authority of sources, together with awareness of their distance from the received medieval traditions of thought, was a pervasive and sometimes explosive agent of change»¹⁶¹. A search for the authentic undercut prevailing political models. For example, exegesis confronted Papal claims and a rejuvenated jurisprudence challenged imperial pretensions. In turn, the quest provided a theoretical support for the rising strength and confidence of the nation-state and the national Church.

This section shall only sketch an idea central to the significant contributions offered by both the Renaissance and the Reformation – the centrality of the individual. Although not immediately concerned or framed in a rights-language, they advanced the continuing focus on the individual. Any specific developments in the term *ius* «stayed firmly within a Thomistic framework, and sometimes ran along more voluntarist and individualist lines, inspiring later, more unambiguously «modern» formulations»¹⁶². Therefore, considerations of the Scholastic tradition will continue by way of a textual analysis of two representative theorists.

5.1 Renaissance Humanism

The advent of printing facilitated the diffusion of Renaissance culture throughout Europe from its origins in the city-states of Italy¹⁶³. «No group was quicker to perceive the vast potentialities of the new medium than the humanists»¹⁶⁴. In a more far-reaching manner, this era repeated a dynamic already noted of the twelfth century¹⁶⁵.

Specifically, they returned to and disseminated the sources of classical antiquity such as Cicero and Plutarch. The term *Humanitas*, which had previously developed positive connotations, became a central concern in this era. Theological issues were not eclipsed; God remained as Creator and supreme authority. However, the humanism of this period placed previously unparalleled emphasis on man and his status, importance, powers, achievements, interests or authority. For example, the advances in science associated with this time were a specifically humanist development; it was presupposed by, and with its successes en-

¹⁶¹ O. O'DONOVAN – J. LOCKWOOD-O'DONOVAN, ed., *From Irenaeus to Grotius*, 550.

¹⁶² O. O'DONOVAN – J. LOCKWOOD-O'DONOVAN, ed., *From Irenaeus to Grotius*, 549.

¹⁶³ Cf. A. GRAFTON «Humanism and Political Theory», 9-29.

¹⁶⁴ Q. SKINNER, *The Foundations*, I, 195.

¹⁶⁵ Cf. Ch. 1, Sec. 2.2.

couraged, the ability of man to enquire into the nature of the universe and to control it. In style and method, the humanists were far removed from the scholasticism of previous centuries.

Quentin Skinner, in the first volume of *The Foundations of Modern Political Thought*, concerning the Renaissance, presents the Humanist's inquiries on ethics and politics as a revival of concern for the dramatic interplay between *virtus* and *fortuna* – that is, the struggle between the will of man and the wilfulness of fortune. The essential motif of Renaissance humanism «is the proposition that *virtu vince fortuna* – that *virtu* serves to overcome the power of fortune to control our affairs»¹⁶⁶. Such optimism in the ability to shape the social world according to man's own desires was born of a considerably positive view of the human nature and of man's freedom and powers.

The social world with which they were concerned was primarily the city-states of Northern Italy. The city-states jealously expanded the «liberties» and «rights» afforded to them in the earlier feudal era. Furthermore, they attempted to defend them against enemies from within and without. The defence motivated an ideology inspired by a revival of the notion of republican liberty associated with Rome and Greece. The humanists defended republican liberty and its form of government because only liberty can truly enhance the virtuous person. Despite the fact that the city-states were to fall into the tyranny of powerful families and lords (*signori*), republican values of liberty as a noble and virtuous ideal became central to political thought¹⁶⁷.

5.2 The Reformation

Despite initial similarities and shared concerns between the Humanists and the Reformers – overcoming abuses and returning to a purer era – Skinner notes in the second volume of his study that two books published in rapid succession bear titles that reveal a decisive difference. In 1524, Erasmus (1466-1536) published *On Freedom of the Will*, to which Martin Luther (1466-1536) responded with *The Bondage of the Will*. The former proposed a highly optimistic vision of man's ability to transform himself and society; the latter Reformer contended the very opposite.

The ground of Luther's theology and «of the spiritual crisis, which precipitated it, lay in his vision of the nature of man. (Luther was ob-

¹⁶⁶ Q. SKINNER, *The Foundations*, I, 186.

¹⁶⁷ Q. SKINNER, *The Foundations*, I, 139 ff.

sessed by the idea of man's complete unworthiness)»¹⁶⁸. The heart of the Lutheran project was soteriology – justification by faith alone. The nature of man is such that he is unable to save himself by any action or mediation but must rely on the loving grace of God alone (*sola grazia*). The only response open to man is the way of faith alone (*sola fidae*) in a God revealed in scripture alone (*sola scriptura*). There is no mediation. Ultimately, it may be said that man is alone (*sola humana*) before God.

The implications drawn by Luther were similar yet surpassed other preceding reformers. «The real focus of Luther's attack, however, was not so much on the Church's abuses of its powers, but rather on the Church's rights to claim any such powers in Christian society at all»¹⁶⁹. The heightened awareness of the uniquely spiritual implied a radical distinction from the corrupted worldly. It is a division between two spheres, realms or kingdoms (*Reiche*) and their corresponding authorities (*Regimente*). On one hand, is the temporal (*das weltliche Reich*), or kingdom of the Devil or of the world (*Teufels Reich/Reich der Welt*), and on the other is the spiritual (*das geistliche Reich*), or the kingdom of God or of Christ (*Reich Gottes/Christi*). The individual lives in both simultaneously. In the former, he lives as the Christ-person, in self-sacrifice before God, and in the latter, he lives as the *Welt*-person, caught in the relations of the social world. The twofold division ran through his ecclesiology, ethics and politics, and priority is given to the former to the detriment of the latter. In ecclesiology, the conclusion drawn was the radical separation between the ecclesial and civil worlds. The Church is the uniquely *congregatio fidelium*; thus radically challenging the claims of institutional and judicial necessity and the superiority of the sacerdotal state. All temporal power is passed to the civil authorities, further deepening the separation.

The gulf was never more unbridgeable for him than in the ethical realm: between the gospel ethic of self-sacrificial love contained in the Sermon on the Mount and the civil law of public judgement and punishment, of «natural» rights setting bounds to individual and collective self-seeking¹⁷⁰.

The Lutheran pessimistic vision of human nature – or more precisely his vision of man before God – undermined the role of the natural law. The person is so corrupted by sin that the only means to perceive the

¹⁶⁸ Q. SKINNER, *The Foundations*, II, 3. For further commentators on Martin Luther, cf. P. ALTHAUS, *The Theology of Martin Luther*; ID., *The Ethics of Martin Luther*; W.D.J. CARGILL THOMPSON, *The Political Thought of Martin Luther*.

¹⁶⁹ Q. SKINNER, *The Foundations*, II, 13.

¹⁷⁰ O. O'DONOVAN – J. LOCKWOOD-O'DONOVAN, ed., *From Irenaeus to Grotius*, 555.

good is by way of the grace of God rather than by way of any natural human faculty.

The reforming spirit against authority inspired many to resistance against local governance, most notably the Peasant Uprising in Germany (1525). In Pauline fashion, Luther condemned such acts: ordained by God, civil authority is the only point of temporal power and must be submitted to by the true Christian and a true Church.

The place of the Reformation and the Renaissance in the story of rights offers apparent and real contradictions. On one hand, both initially disregarded the juridical edifice to which the language of rights was bound. On the other, they provided key impulses to its development, if somewhat paradoxically so. For instance, the Lutheran model elevated the role of civil society, thereby providing another justification for the continued centralisation of power towards a state absolutism, against which rights would to define themselves¹⁷¹. But liberty is also, in the words of Steven Ozmant, «its basic legacy»¹⁷². Crucially, both movements emphasised the centrality of the individual, to which the claim of rights would further attach itself. No longer is the individual merely a part of the community but is one who is set apart. The community is further reduced to the background and the individual moves towards an elevated status.

5.3 *Ius and Gens: Second Scholasticism*

The theoretical endeavours of the second scholasticism responded to the extraordinary religio-political developments of the time¹⁷³. The old Christian Roman Empire was giving way to the Protestant polities of Northern Europe and the new Catholic Spanish Empire beyond Europe. There was no longer an overarching Pope and Emperor but a commonwealth of (some) sovereignties in spiritual obedience to the Pope – power not from but under the Vicar of Christ. In the milieu of the counter-reformation, the scholars of this movement challenged the pessimistic Lutheran view of human nature. In response, they asserted the central Thomistic belief in the capacity of reason to supply the moral foundations of political life and reacted against the nominalists who followed Ockham. But their return to the *via antiqua* was never fully completed¹⁷⁴. Indeed, «the very incompleteness of that turning away

¹⁷¹ Q. SKINNER, *The Foundations*, II, 351.

¹⁷² S. OZMANT, *The Age of Reform*, 437

¹⁷³ J.H. BURNS, «Scholasticism», 132.

¹⁷⁴ Q. SKINNER, *The Foundations*, II, 176.

was a source of theoretical originality and power»¹⁷⁵. The Spanish Thomists integrated elements of the Ockham-Gerson tradition in their interpretation of Aquinas, particularly with regard to rights. Brian Tierney writes:

The combination of a professed Thomism with an acceptance of a rights language [transmitted by way of Ockham and Gerson and] derived ultimately from medieval jurisprudence was characteristic of the greatest thinkers of the Spanish «second scholasticism», whose works provide the principal link between medieval and modern rights theories¹⁷⁶.

This following sub-sections shall focus on Francesco de Vitoria and Francisco Suárez and the new conceptual emphasises on *ius* and *gens* – right and nations or people.

5.3.1 Francesco de Vitoria

Prior to the sixteenth century, the basic text of theological study was the *Sentences* of Peter Lombard. In 1509, at the Collège de Saint-Jacques, in Paris, Peter Crockaert replaced it with Thomas Aquinas's *Summa Theologiae*¹⁷⁷. Already a central text in schools of the Dominican Order,

what was new and fertile [...] was the exploitation of the *Secunda pars* and in particular the *Secunda secundae*. For those Dominicans, who were committed to the *via Thomae*, the *Secunda secundae* formed the equivalent of *Sentences* IV [...] it offered it commentators an opportunity to engage with the political side of moral theology¹⁷⁸.

A pupil of Crockaert, Francisco de Vitoria (1483-1546) collaborated in editing the *Prima Secundae* of the *Summa*. Yet during his later career, Vitoria published nothing of his own. Instead, the texts that survive are a series of student dictations or *relectiones* made in Salamanca. Nonetheless, by his new commentaries and applications of the principles of Aquinas to the issues of the day (*De relectiones Indes*) initiated a significant revival of Thomism in Spain and beyond¹⁷⁹.

In his commentary on the *De Iustitia* of Aquinas's *Summa*, Vitoria accepted the original definition of right in the objective sense of the

¹⁷⁵ O. O'DONOVAN – J. LOCKWOOD-O'DONOVAN, ed., *From Irenaeus to Grotius*, 52.

¹⁷⁶ B. TIERNEY, *The Idea of Rights*, 108. Parenthesis added.

¹⁷⁷ Q. SKINNER, *The Foundations*, II, 135.

¹⁷⁸ A. BRETT, *Liberty, Right and Nature*, 125.

¹⁷⁹ B. HAMILTON, *Political Thought in Sixteenth-century Spain*, 175. Thirty of his pupils held professorships in Spanish Universities.

term¹⁸⁰. However, in turning to the applications of justice in a text called *De restitutione*, Vitoria offered a more subjective meaning, while still claiming to be a faithful commentator on Aquinas.

He (Aquinas) says therefore that right is that which is licit in accordance with the laws. And so we use the word when we speak. For we say, «I have not the right of doing this», that is, it is not licit for me; or again, «I use my right», that is, it is licit¹⁸¹.

This is a move to the possessive or active form of right – having or using a right. On one hand, the law indicated what is right, in an objective sense, according to Aquinas. But in applying what is right, Vitoria took this to mean that the law indicated what rights are available (in a subjective sense). But, as we have seen, such a subjective account is not present in the actual text of Aquinas. Instead, the Vitoria turned to a definition influenced by Gerson: «He says then, that *ius* is a power or faculty pertaining to anyone in accordance with the law»¹⁸². He relies on both Aquinas's teaching on justice and Gerson's doctrine of rights¹⁸³.

The extent to which such a combination is possible or desirable divides the commentators. Vitoria may be viewed as a betrayer of the Thomistic ideal¹⁸⁴. For instance, Richard Tuck considers the Second Scholastics to have returned to an objective sense of *ius* and therefore writes them out of the history altogether¹⁸⁵. Others argue that rights are «implicit» in Thomistic assumptions and are open to giving Vitoria an innovative yet faithful role¹⁸⁶. For example, Tierney notes that Aquinas

¹⁸⁰ Cf. Ch. 1, Sec. 3.2.1.

¹⁸¹ Cited in B. TIERNEY, *The Idea of Natural Rights*, 259. cf. F. DE VITORIA, *De Justitia*, 2.2ae 62.1, 64.

¹⁸² «Dicit ergo quod jus est potestas vel facultas conveniens alicui secundum leges» F. DE VITORIA, *De Justitia*, 2.2ae 62.1, 64; Cited in B. TIERNEY, *The Idea of Natural Rights*, 260. The actual definition was provided by Conrad Summenhart (1455-1502), who was associated with Jean Gerson and in the line of Ockham. On Summenhart, cf. B. TIERNEY, *The Idea of Natural Rights*, 242-252.

¹⁸³ Cf. App. C.

¹⁸⁴ «Car là est la ligne de partage entre le droit naturel classique, inséparable du réalisme d'Aristote et de saint Thomas, et le positivisme juridique. La se trouve la clé du problème fondamental (même aujourd'hui, quoi qu'on en dise) de la philosophie du droit». M. VILLEY, *La formation*, 223.

¹⁸⁵ «In place of a Gersonian active rights theory, the Spanish Dominicans in general put the objective sense of *ius* at the centre of their concern». R. TUCK, *Natural Rights Theories*, 47.

¹⁸⁶ «In the course of the last chapter we have also established that objective right in later medieval scholasticism cannot be seen as a direct 'opposite' of subjective right [and] available to Vitoria [...]». A. BRETT, *Liberty, Right and Nature*, 124.

had acknowledged that *ius* may have various meanings and so argues «that he [Vitoria] was carrying further the process of metonymic association used by Aquinas himself when he added various derivative meanings of *ius* to his primary definition»¹⁸⁷. Vitoria was associating an old term – inherited from medieval jurisprudence and transmitted by way of Ockham and Gerson – and connecting it to implications to be drawn from Aquinas.

The language of rights in these centuries is being shaped by the creative reinterpretation of theologians and jurists in response to new contexts¹⁸⁸. In the case of Vitoria, and many other Thomists¹⁸⁹, that context was the treatment of the native population of newly discovered Americas. *Relectio de Indes* is an exploration of the issues arising from the moral outrage at the oppressive and exploitative treatment of the native population by the Spanish¹⁹⁰. Specifically, it investigates the right (*ius*) or titles of *dominium*, and the consequent limitations and responsibilities, by which the Spanish claimed power and «possession of all the lands inhabited by non-Christians they might discover in the Atlantic»¹⁹¹. The investigation is organised into three sections.

The first considers the grounds by which the barbarians may be denied true *dominium*, that is, political jurisdiction and ownership of property. They are: being sinners, infidels, irrational, or insane. Therefore, the argument turns on the qualities that bestow or delimit rights on a person. It is a matter of who are right-holders? He disposes of the first two grounds – being sinners or unbelievers – by asserting that man is made in the image of god which cannot be taken from them. Furthermore, he re-asserts the essential Thomistic thesis that all forms of human *dominium* flow from natural and human law. Natural *dominium* belonged to man by virtue of who he is and not his spiritual state – either as sinner or unbeliever¹⁹². «Natural *dominium* belonged to man as

¹⁸⁷ B. TIERNEY, *The Idea of Natural Rights*, 262. Parenthesis added.

¹⁸⁸ Cf. J. MULDOON, *Popes, Lawyers, and Infidels*; A. PAGDEN, *The Fall of Natural Man*; ID., *The Languages of Political Theory*.

¹⁸⁹ Other significant theorists include Domingo de Soto (1494-1560), Luis de Molina (1535-1600) Gabriel Vázquez (c. 1551-1604) and Francisco Suárez (1548-1617) who will be discussed in the following sub-section. Cf. A. BRETT, *Liberty, Right and Nature*, ch. 4-5; J.A. FERNÁNDEZ SANTAMARÍA, *The State, War, and Peace*; B. HAMILTON, *Political Thought in Sixteenth Century Spain*

¹⁹⁰ Cf. A. PAGDEN – J. LAWRENCE, *Vitoria – Political Writings*, 231-292.

¹⁹¹ The text that legitimised Spanish ownership was Pope Alexander VI's Bulls of Donation of 1493. Cf. A. PAGDEN – J. LAWRENCE, ed., *Vitoria: Political Writings*, xiii-xxx.

¹⁹² Cf. Ch I, Sec. 4.2.2. The position that *dominium* is not solely based on grace was already condemned by John XXII in opposition to the Franciscan Spirituals. By

a creature made in the image of God, Vitoria pointed out, but his likeness to God inhered in man's power of reason and this was not lost by sin»¹⁹³. The final two grounds – being irrational or mad – are denied as obstacles to bearing rights. Humans may never be put on a par with irrational animals. It is only human beings and not all of creation that may possess rightful *dominium* because it is only against other human beings that an injustice can be done. By affirming the primary status of the human being as the one to whom natural *dominium* belongs, Vitoria deduces:

The conclusion of all that has been said is that the barbarians undoubtedly possessed as true dominion, both public and private, as any Christians. That is to say, they could not be robbed of their property, either as private citizens or as princes, on the grounds that they were not true masters (*ueri domini*)¹⁹⁴.

Dominium, therefore, was an active right that belonged to the native population, placing responsibilities on the Spanish Empire – sadly unrealised.

Skipping the second section of *Relectio de Indes*, the third involves a series of arguments concerning Spanish activity considered under the *ius gentium*. The strong association made by Vitoria between rights and people (*gens*) would allow for added advancement in the language of rights by providing a space for further reflection on the *ius gentium*. The developing reflection on the unique and separate place of humanity, and the laws held in common by it, gave new impetus to the status to the hitherto eclipsed category *ius gentium*.

5.3.2 Francesco Suárez

Aquinas's *Summa Theologiae* continued to grow as the seminal text of theological reflection. In the following generations, the revival of Thomism passed from his own Dominican Order to the newly founded Society of Jesus. Thomism was conducive to the mission aims of the Society in the immediate socio-political concerns of religious division and in response to the growth of state power which threatened Church freedoms¹⁹⁵. Fran-

the time of Jean Gerson's attack on Jean Wyclif it was mainstream orthodoxy. The tradition of this stance becomes an important point in the theological appraisal of the final chapter; cf. Ch. VII, Sec. 6.1.1.

¹⁹³ B. TIERNEY, *The Idea of Natural Rights*, 267.

¹⁹⁴ F. DE VITORIA, *De Indes*, in A. PAGDEN – J. LAWRENCE, ed., *Vitoria: Political Writings*, 231-292, 250.

¹⁹⁵ Cf. J. BRODRICK, *The Origin of the Jesuits*; J.W. O'MALLEY, *The First Jesuits*.

cesco Suárez (1548-1617), a Spanish Jesuit and one-time holder of the chair of theology in the Society's distinguished Roman College (1580s), wrote *De Legibus ac Deo Legislatore* as a commentary on the treatise on law of the *Summa Theologiae*; but there were significant innovations¹⁹⁶.

Suárez is self consciously a Thomistic theorist¹⁹⁷. However, he is far more inventive than Vitoria, deepening the combination of Aquinas and the tradition of Ockham-Gerson. He argues for a central ground between the extreme realism of some of the followers of Aquinas and extreme nominalism of the followers of Ockham. With specific regard to the law, he argues that it is both intrinsically reasonable and the will of God, by arguing for the inseparability of the reason (*intellectus*) and the will (*voluntas*). «On one hand, law is conceived as a rational judgement about good and evil (a Thomistic tendency) and, on the other, it is defined as externally imposed commands (a nominalist tendency)»¹⁹⁸. He repeatedly implores that extremes on either side must be avoided and a middle course should be adopted¹⁹⁹.

In the preface of *De legibus ac Deo legislatore* (1612), Suárez defends a theologian's contemplation of the law, for the law is necessary for the way of salvation. The opening chapter, entitled «The Meaning of *Ius*», continues the practice of acknowledging and listing the many meanings of *ius*. In a complex examination of the many senses of the term, Suárez begins from the etymology of the word. Firstly, *ius* can be derived from the term *iustitia* (justice). Citing the *Summa*, and faithful to Aquinas, *ius* is that which is justly due to someone, that which is right, or a sense of objective rightness. But then Suárez follows the lead of Vitoria:

According to the latter and strict signification of *ius*, (that which is due) it is customary to call *ius* properly a certain moral faculty that anyone has either regarding his own thing or something due to him; and so the owner of

¹⁹⁶ Many of the works of Suárez were written and published outside the dates of this subsection. However, he is more in the spirit of the Sixteenth Century than that of the Seventeenth. Cf. B. HAMILTON, *Political Thought in Sixteenth Century Spain*; J.H. FICHTER, *Man of Spain*.

¹⁹⁷ F. COPLESTON, *A History of Philosophy*, III, 202.

¹⁹⁸ They continue: «Most decisively, in regard to the natural law, he insists that God is bound to forbid intrinsically evil acts and to command intrinsically good acts to his rational creature, so that the natural law is *law* both as cohering with rational nature and as expressing a divine command that imposes obligation (bk. 2, ch 6)». O. O'DONOVAN – J. LOCKWOOD-O'DONOVAN, ed., *Irenaeus to Grotius*, 725. Quotations are from the translation provided in this collection unless otherwise stated.

¹⁹⁹ Q. SKINNER, *The Foundations*, II, 150.

a thing is said to have a right in the thing (*ius in re*) and a workman is said to have a right to his wage (*ius in rem ad stipendium*) [...] ²⁰⁰.

Suárez is confirming a practice commonly held since Vitoria²⁰¹. A right, observes Skinner, is «a capacity in effect to justify engaging in certain kinds of normative action»²⁰². Suárez is deepening the significant transition towards the possessive (*ius* possessed as a thing) and to the beneficiary (*ius* as a claim over another to uphold their duty). To use his own examples, the owner of a thing has control over something actually possessed (*ius in re*), and a labourer has a right to claim his wages (*ius ad stipendium*), effecting the duty of the employer.

Secondly, the etymology of the term may be derived from the *iubendo* – commanding. *Ius* therefore is analogous to *lex* (law) because it is a form of commanding. Positive law is defined by Suárez as the «common, rightful (*iustum*) and stable precept which has been sufficiently promulgated»²⁰³. But the law is not an arbitrary force of authority. Authority is limited by the fact that genuine laws must prescribe what is just. And, being just, they must be directed towards, and so be limited by, the common good²⁰⁴.

In a sense, this chapter has come full circle. The typology – objective right, subjective rights and the law – that appears in Grotius may be discerned in the developed Aristotelian-Thomist tradition as interpreted by Francesco Suárez²⁰⁵.

²⁰⁰ F. SUÁREZ, *De legibus ac Deo legislatore*, 1, 2, 5. «Et iuxta posteriorem et strictam iuris significationem solet proprie ius vocari facultas quaedam moralis, quam unusquisque habet vel circa rem suam vel ad rem sibi debitam; sic enim dominus rei dicitur habere ius in re et operarius dicitur habere ius ad stipendum». Cited in B. TIERNEY, *The Idea of Natural Rights*, 303.

²⁰¹ B. TIERNEY, *The Idea of Natural Rights*, 304. O'Donovan and Lockwood-O'Donovan attribute the tradition to Gerson and Quentin Skinner attributes the source to John Mair (1468-1550). «Like Mair, Suárez argues that in speaking of «having a right to something», what we must fundamentally have in mind is the idea of «having a certain power over it». And like Mair, he gives as his main instance the case of 'an owner, who may in this sense be said to have a right over his possession'». Q. SKINNER, *The Foundations*, II, 177. On Mair cf. ID., 43-47, 119-123; B. TIERNEY, *The Idea of Natural Rights*, 239-242.

²⁰² Q. SKINNER, *The Foundations*, II, 176.

²⁰³ F. SUÁREZ, *De legibus ac Deo legislatore*, 1, 12, 5. (II, xvii.2, I.xii, 5). Cited in R. WILENIUS, *The Social and Political Theory*, 15.

²⁰⁴ Cf. H. LLOYD, «Constitutionalism», 254-297.

²⁰⁵ Many historians point to the unacknowledged but obvious inspiration of Suárez on Grotius. Cf. F. COPPLESTON, *A History of Philosophy*, III, 202; P. HAGGENMACHER, *Grotius*, 462ff. B. TIERNEY, *The Idea of Natural Rights*, 319 ff; R. TUCK, *Natural Rights Theories*, 75 ff; M. VILLEY, *Lecons d'histoire*, 249-256.

But the more immediate contribution of Suárez and influential on Grotius is the creation of a conceptual space for the study of international law. Aquinas asserted that the *ius gentium* is associated with the first and therefore collapses the category of the *ius gentium* into that of the *ius naturale*²⁰⁶. However, Suárez maintains that it refers to both, «effectively creating a third class»²⁰⁷. The *ius gentium* is universal custom and is comprised of general conclusions from the natural law which are constituted as positive law by the will of human legislators²⁰⁸. He takes a more postivist approach to the category of the *ius gentium* – effectively tying commonly accepted custom to positive law and the will of legislators. International obligations are not simplistically deduced from the natural law; rather, they are concluded from it by way of universal customary law, enacted and accepted by community of nations. It is «the law which all peoples and diverse nations ought to observe among themselves»²⁰⁹.

The *ius gentium* arises from the bond of fellowship (*corpus mysticum*) between the community of nations. It is made positive by the will of that community and entered into by free consent. The critical point, and in continuity with his tradition, is that man is inclined to live in community. The desire to become a community, rather than a mere multitude, created the volition by which natural and free men came to be bound together by some compact. (The compact as a means of understanding the nature of political relationships was later to take a more significant role.) The power to legislate resides in the power of the community and not in individual members or several members²¹⁰. The move is analogical – the community is seen as a *corpus mysticum* and has power over itself as a person over their own body²¹¹. The transfer

²⁰⁶ Cf. Ch I, Sec. 3.2.1.

²⁰⁷ O. O'DONOVAN – J. LOCKWOOD-O'DONOVAN, ed., *From Irenaeus to Grotius*, 725.

²⁰⁸ F. SUÁREZ, *De legibus ac Deo legislatore*, 2, 19, 3-4. «The conclusion would seem to be that the law of nations is quite strictly human positive law ... [yet] ... the commands of the law of nations differ from those of civil laws in that they are not written but conventional, drawn from practices that are not unique to one state or province, but universal or almost so».

²⁰⁹ «ius quod omnes populi et gentes variae inter se servare debent». F. SUÁREZ, *De legibus ac Deo legislatore*, 2, 19, 8. Cited in J. KELLY, *A Short History of Western Legal Theory*, 202.

²¹⁰ F. SUÁREZ, *De legibus ac Deo legislatore*, 3, 2, 5-6. «For the power has the same source as the community where it resides; but the community is formed by voluntary consent of its individual members; and so that is where the power must spring from».

²¹¹ It represents an interesting shift in interpretation from earlier centuries, cf. Ch. I, 2.1; Ch. I, Sec. 4.2

of power to an authority does not imply blind subjection to the King, for the ruler is bound to the obligations according to the pact. He may therefore be disposed of but only in extreme cases. In this regard, Suárez follows the moderate conciliarist tradition of Jean Gerson.

There are, therefore, many issues that resonate and gain impetus within modernity to be found in the Thomism of the High Middle Ages – rights, the importance of consent in state creation, international law, among others.

5.4 *Historical Context*

The sense of emancipation that motivated the Renaissance and the Reformation led to the breakdown of Medieval Christendom in Europe. The Papacy itself was already seriously weakened by the scandal of the Great Schism. On one hand, it led to the collapse of international political arrangements and the subsequent international wars and civil wars, lasting until the Treaty of Westphalia in 1648. On the other, it led to the crumble of the relatively homogenous world-view of the medieval era. It is in response to both situations that a new political structure which prioritised the nation-state and a new mode of thinking were to arise. Both are in contrast with the previously prevailing Aristotelian-Thomist model. Both are traced in the next chapter.

6. **Conclusion: Some Inferences**

Although many questions cluster around the issue of rights, the question that may be said to guide this thesis as a whole is; what is morally and theologically at stake in the use of human rights?²¹² A number of initial inferences may be drawn from the study thus far that will aid the later response to this question.

Firstly, the course of this chapter mapped a dynamic in which rights were initially developed²¹³. It was defended that a specific rights-language initially grew out of a medieval world that intermingled law, theology and Aristotelian philosophy. Although rights will gain further impetus in contrasting traditions of enquiry, I wish to defend the con-

²¹² Cf. Intro, Sec. 5.

²¹³ The timelines provided in Appendices acknowledge some of the more important historians of ideas with regard to rights, and arrange them according to when they each narrate the moment in which rights come to prominence. I concede that the brevity of this study means that many of the complexities of the textual and contextual issues are not explored in depth.

clusion that rights were, and so may continue to be, consistent with such models of moral reasoning²¹⁴.

Secondly, some characteristics of rights may be inferred by their historical development. Importantly, they arose in response to the increasing complexity and insecurity of society, in which the individual gained in status. They grew in limiting the authority of an ever-strengthening centralised power by protecting property ownership in the developing mercantile system of economics and in defence of freedom against absolutist claims of power. The historical origins and development of rights bear witness to the fact that they are necessarily normative: they prescribe and express the demands of how society ought to be fashioned. Rights, in a phrase, express the demands made in the name of justice. Such a dynamic continued into the following centuries.

Thirdly, the debates and justifications on social and political matters, although appropriating Roman law and Greek and Stoic philosophy, are primarily theological. They are placed within larger Christian narrative such as the creation story, the poverty of Christ, the power of Peter and within the evolving Christian institutional frameworks, such as the power of a Council and Church-state relations. Indeed, rights gain initial momentum from the theological assertions of a rational created order, evangelical liberty and the equal dignity of all. Although later removed from a theological background, I wish to defend the conclusion that theology may continue to inform the development of rights²¹⁵.

Fourthly, a wide «conceptual neighbourhood»²¹⁶ of crucial associations to other terms were identified in this chapter. A partial list of the more important ideas in this era is outlined in the headings and sub-headings of this thesis, including nature, dominium, property, authority, freedom, individual, society and state. For the purposes of this thesis, I wish to focus on four: justice, freedom, law and state-society. These terms are inter-relate and are structured according to an organised mode of reasoning. The natural law model is teleological: terms are identified by their telos, purpose or end to which they orientate themselves. In the so-called human sciences such as ethics and politics, the model holds that it is possible by way of reason to discern the laws and associated virtues that move people towards their natural ends. To hold them in mind, they may be briefly characterised as follows: justice is the objective right-relationship between people measured by their common good; freedom is achieved in the happiness of human person, facilitated

²¹⁴ Cf. Ch. VI, Sec. 7 ff.

²¹⁵ Cf. Ch. VII, Sec. 3 ff.

²¹⁶ W. EDMUNDSON, *An Introduction to Rights*, 87.

by adherence to moral and legal norms; the law is those norms that follow the dictates of reason in pursuit of justice and the common good; the state or structures of authority are an essential aspect of civil society considered to be natural to the human person and necessary for the good of each individual. In short, these terms will help to further unlock what is at stake in the use of rights²¹⁷.

Fifthly, the distinctive marking of this tradition of enquiry I wish to infer may be described as «Order». What is at stake in this model of reasoning utilising rights may be summarised as order. The term may be taken in some of its various nuances – structure, organisation, harmonious condition, or command. For example, society, and consequently the state are conceived as having a natural order, as in «structure», to which it must adhere. It is an objective state of affairs. The purpose of justice and the law therefore is to order, as in «organise», society accordingly. The individual finds fulfilment by way of the correct ordering, as in peaceful or the «harmonious condition» of society and of his own internal well-being. The term also has a regulatory meaning, as in decree or «command», which admits a paternalistic, or indeed potentially oppressive, view of society, justice and the law. These differing characteristics will reoccur through the rest of this thesis.

²¹⁷ Cf. Ch. VI, Sec. 5 ff.

CHAPTER II

Growth of Rights

1. Modernity and Rights

To return to the Prolegomena of *De jure belli ac pacis libri tres*, Hugo Grotius considers: «What we have been saying would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are not of concern to Him»¹.

On the basis of this phrase, Grotius is often portrayed as the founder of modern natural law and associated rights². The modernity of Grotius is claimed on the basis that he reflects some of the characteristics of the early foundations of modernity – belief in new scientific advances and criticism of Aristotelian moral and political philosophy and, most significantly, the rejection of a central theological framework³. On the final point, «Modern natural law», concludes Leo Strauss in *Natural Right and History*, «was partly a reaction to this absorption of natural law by theology»⁴.

In *A Philosophical History of Rights*, Gary Herbert writes that the liberation made by Grotius of natural right and the law of nature «from the classical theological moorings puts him with those seventeenth-

¹ *De Jure Belli*, Prol. 11. «etiamsi daremus, quod sine summo scelere dari nequit, non esse Deum, aut non curare ab eo negotia humana». Cited in J. ST. LEGER, *The "Etiamsi Daremus"*, 25.

² J. ST. LEGER, *The "Etiamsi Daremus"*, 25-27.

³ R. TUCK, *Natural Rights Theories*, 59-81.

⁴ L. STRAUSS, *Natural Right and History*, 164.

century philosophers who are the true authors of the modern, subjective theory of modern rights»⁵. Richard Tuck refers to the passage as making «its untheistic character obvious»⁶. The originality of Grotius, according to Tuck, is further advanced by his rejection of much of the Aristotelian tradition in favour of mathematics as the model for morality⁷. Tuck admits to scholastic influences⁸. However, he maintains the view that Grotius ushers in the beginning of the classical era of the natural rights tradition: in effect, «he promulgated a manifesto for a new science of morality, in which the radical disagreements of the previous generation could be subsumed into a consensus on a minimalist morality and theology»⁹. In light of the laicisation of *ius naturale* in the modern era, A. P. d'Entrèves writes that Grotius's aim

was to construct a system of laws which would carry conviction in an age in which theological controversy was gradually losing the power to do so [...] His successors completed the task. The natural law which they elaborated was entirely «secular». They sharply divided what the Schoolmen had taken great pains to reconcile¹⁰.

To return to the typology: the scholastics in the medieval era envisaged a reconciling and constituting inter-connection between *ius* as objectively right (justice), subjective right and law. «In the language of the law-schools, *ius* could be used in an “objective” as well as in a “subjective” sense; but the latter always presupposes the former. There is a *facultas agenda* in as much as there is a *norma agenda*. There is a “right” in as much as there is a “law”»¹¹. According to d'Entrèves, early modernity distinguished an acute division within the notion of *ius*. Justice and law become separated, only to be bridged and so defined by the central claim of rights. «The modern theory of natural law was not, properly speaking, a theory of law at all. It was a theory of rights. A momentous change has taken place under the cover of some verbal expressions»¹².

The issue of modernity assumes an understanding of the distinguishing features that constitute modern moral and political thought and separate it from its medieval predecessor. O'Donovan and Lockwood-O'Donovan observe:

⁵ G.B. HERBERT, *A Philosophical History of Rights*, 76.

⁶ R. TUCK, *Natural Rights Theories*, 76.

⁷ R. TUCK, «Grotius and Seldon», 518.

⁸ R. TUCK, *Natural Rights Theories*, 176.

⁹ R. TUCK, «Grotius and Seldon», 520.

¹⁰ A.P. D'ENTRÈVES, *Natural Law*, 52.

¹¹ A.P. D'ENTRÈVES, *Natural Law*, 60.

¹² A.P. D'ENTRÈVES, *Natural Law*, 59.

There is a set of political principles and ideas broadly accepted as «modern» that were also influential in the sixteenth and early seventeenth centuries. Most notable are those of social and governmental compacts, natural and political subjective-rights, public utility, majority vote, constitutional structures and constraints on political authority, popular representation, communal will and the rule of law¹³.

The Modern Era may be characterised as the elaboration of these ideas apart from or in opposition to «the traditional Christian theological framework of divine and natural law, providence and salvation, justice towards God and neighbour, Church and commonwealth, public and private righteousness and virtue»¹⁴. Such frameworks may be described as the theoretical structures that contain and define substantive ideas or principles. Grotius, they assert, epitomises modern principles within an older framework.

What, therefore, is the framework that marks modernity from the medieval with regard to *ius naturale* and rights? The previous chapter located the embryonic origins of subjective rights within twelfth century jurisprudence and legal studies, traced its development within the framework of the scholastic tradition indebted to Aristotle, and charted its adaptation in response to the socio-economic challenges. In a study of the natural law in relation to the state, Noberto Bobbio outlines a contrast between an Aristotelian framework and a model that characterises the early modern framework of natural law. He writes that «all the major political philosophers of the modern age employ this model without modifying its structural elements, although they do subsume under them a remarkable wide range of substantive features»¹⁵. The beginnings of the modern period of natural law theory in relation to the state, and therefore law and rights, may be recognised according to the contrast between what he terms as «Conceptual Model of Natural Law Theory» and the Aristotelian «Alternative Model»¹⁶.

The structural elements of the Aristotelian Model – which have various substantive differences throughout the medieval period – that constitute the earlier division in the dichotomy are as follows: first, the initial analysis begins with naturally occurring associations, primarily ac-

¹³ O. O'DONOVAN – J. LOCKWOOD-O'DONOVAN, ed., *From Irenaeus to Grotius*, 550.

¹⁴ O. O'DONOVAN – J. LOCKWOOD-O'DONOVAN, ed., *From Irenaeus to Grotius*, 550.

¹⁵ N. BOBBIO, *Thomas Hobbes*, 1.

¹⁶ N. BOBBIO, *Thomas Hobbes*, 9-10. Equally, all the major theorists of the medieval era – whether of the Thomist or Nominalist tradition – utilise the same structure. Accordingly, they are placed by each other in the genealogy outlined in App. C. It is conceded that some commentators view the two as entirely different branches.

known to be the family; second, such a natural state is progressed and fulfilled in the civil state conceived as a perfect association; third, the structure of the state is seen as an aggregation of organised groups; fourth, the pre-political condition is within an already occurring relationship of superiors and inferiors; fifth, the foundation of the civil state is in an evolution from pre-political through a natural process; sixth, the principle of legitimation of the state is its necessity in facilitating the fulfilment of the person¹⁷.

In contrast, Bobbio outlines the characteristic features of the Conceptual Model of Natural Law Theory: first, the analysis begins with the state of nature, an apolitical or pre-civil condition; second, civil society is held to be in contrast to the state of nature and required to remedy the problems of the state of nature; third, the state of nature is primarily made of individuals who do not live in society; fourth, individuals are free and equal, hence the state of nature is a condition of freedom and equality; fifth, the move towards civil society occurs by convention or contract arising from the willed acts of individuals creating an artificial state; sixth, legitimacy is the result of consent¹⁸.

Six dichotomies emerge. In turn they are: the new modern framework of the natural law in the seventeenth century prioritises the rationalistic rather than the historical-sociological conception of the state; the state is the antithesis rather than the compliment of natural man; there is atomistic or individualistic rather than social or organistic conception of the state; an idealised conception of the state of nature results in natural rights rather than a realistic conception that accepts inequality; the understanding of the foundation of state power is contractual rather than naturalistic; legitimation of political power is by consent rather than by the nature of things¹⁹.

The principles, including rights, named by O'Donovan and Lockwood-O'Donovan, that have roots in the late medieval period, take new impetus in the modern era when placed within this new framework. The present and subsequent sub-sections will trace the evolution of the structural elements of the new framework and the substantial issues that the framework contains, including rights. Leo Strauss implies Grotius when he comments that «None of Hobbes's forerunners attempted that definite break with tradition in its entirety [...]»²⁰. Norberto Bobbio concludes that «Hobbes and only Hobbes is the initiator of modern

¹⁷ N. BOBBIO, *Thomas Hobbes*, 8-9.

¹⁸ N. BOBBIO, *Thomas Hobbes*, 2.

¹⁹ N. BOBBIO, *Thomas Hobbes*, 9.

²⁰ L. STRAUSS, *The Political Philosophy of Hobbes*, 1.

natural law theory»²¹. In response, Tuck argues that «In some ways Hobbes is the true heir of Grotius [...]»²². Perhaps it is better to refer to Hobbes as a founding father of a new line in the genealogy of rights²³.

2. The Seventeenth Century

The seventeenth century is marked at either end by the consequences of religious and political divisions originating in the Reformation²⁴. The Thirty Years War (1618-48), ended by the Peace of Westphalia, carved out the religious geography of Europe. However, the religious wars significantly reduced the authority of papal power in national affairs and ecclesial theology in political and legal thinking. In its place, the state continued to strengthen and took to itself the primary role of arbiter and true guarantor of security and society. As a result, rights-theories became bound to reflections on the state and claims made against the state – not to ecclesiology as before.

2.1 *Historical Context*

Developments occurred in an unprecedented manner in astronomy, physiology, physics, and mathematics²⁵. Progress in the physical sciences due to new empirical methods and the example of certainty portrayed by mathematics provided models for thought in the human sciences of ethics and political philosophy. Francis Bacon (1561-1627) encapsulated the spirit of deductive reasoning, a confidence in reason and the belief that it could facilitate moral and social progress. Certainly, it did lead to improvement of living conditions in some areas of Europe – the last plague in England occurred in 1665. But it also transformed the economic market place. For example,

²¹ N. BOBBIO, *Thomas Hobbes*, 155.

²² R. TUCK, «Grotius and Seldon», 522.

²³ Cf. App. C.

²⁴ For example, in England, the century began with the quelling of foreign aided Catholic resistance in Ireland (1601) and ended with the legal declaration of Protestant succession of the throne (1700). In France, the century opened in the light of the Edict of Nantes (1598) which guaranteed a limited religious toleration but ended with the oppression and mass emigration of the Huguenots under King Louis XIV (1643-1715).

²⁵ For example, the movement of the planets was discovered by Nicolaus Copernicus (1473-1543) and Galileo Galilei (1564-1642); the circulation of blood, by William Harvey (1578-1657); differential and integral calculus and gravity, by Gottfried Leibniz (164-1716), René Descartes (1596-1650) and Blaise Pascal (1623-1662); and gravity by Issac Newton (1643-1727).

new agricultural techniques such as controlled breeding led to the enclosure of common pastures – and so furthered the issue of private property.

Intellectually, major theorists were no longer simply associated with universities, the vernacular replaced Latin, and interest moved from commentaries to writing original treatises. Frederick Copleston observes that it is a transition from predominantly theologians to primarily scientists. Although they differed in their epistemological and metaphysical approaches, philosophers of the early modern era were influenced by the mathematical ideal. Furthermore, they attempted to re-found philosophy according to irrefutable first principles that derive primarily from reflection on the subject or the person as opposed to nature²⁶.

In England, «the seventeenth century was the epoch of a revolution of the most cardinal importance in the history of political and legal theory»²⁷. England moved through three stages: Civil War in the 1640s, republicanism under Oliver Cromwell (1649-69), and finally the restoration of the monarchy by William of Orange in the so-called Glorious Revolution of 1688. This turmoil, which formed the impetus for the theoretical reflections of this era, essentially concerned the nature, scope and origins of authority – in particular, monarchical and parliamentary authority. Each side accused the other of subverting ancient legal rights and liberties of the people and distorting the balance of the English constitution between King, Lords and Commons. England, under the influence of the *Magna Carta*, limited and guided power according to documented principles. In this century two significant documents entered into the canon of the unwritten English Constitution. *The Habeas Corpus Act* (1679) was enacted in order to protect against improper imprisonments²⁸. *The English Bill of Rights* (1689) concluded the century-long conflict by making the monarchy conditional on the parliament and protecting the English people from the abuses of arbitrary power²⁹. Religious and political conflicts in the continual power struggle between the English monarch and parliament provided the milieu for the theorists of the seventeenth century outlined in this sub-section.

²⁶ F. COPLESTON, *History of Philosophy*, IV, 13-45.

²⁷ J. KELLY, *A Short History of Western Legal Theory*, 206.

²⁸ Cf. M.R. ISHAY, ed, *The Human Rights Reader*, 89-91.

²⁹ Cf. M.R. ISHAY, ed, *The Human Rights Reader*, 91-93.

2.2 *Thomas Hobbes*

As Hugo Grotius was forced to leave his homeland of Holland due to strife, Thomas Hobbes (1588-1679), some short years later, also fled from turmoil in his native England – coincidentally, both settled for a period in Paris. Hobbes claimed to be the first of all who fled in fear at the outbreak of the English civil war in 1640³⁰. Fear lies at the heart of the *Leviathan*, in which he wrote: «The Passions that encline men to Peace, are Feare of Death; Desire of such things are necessary to commodious living; and a Hope by their Industry to obtain them»³¹.

However, his writings are far from apprehensive. Hobbes condemned the tradition as a failure because it based principles on the highest of aspirations and goals: «For there is not such *Finis ultimus*, (utmost ayme,) nor *Summum Bonum*, (greatest Good,) as spoken of in the Books of the old Morall Philosophers»³². Instead, Hobbes attempted to deduce his principles, «from what is most powerful in most men most of the time: not reason, but passion»³³.

2.2.1 Rights and Freedom

Hobbes wrote extensively on matters of physics³⁴. In *A Philosophical History of Human Rights*, Gary Herbert argues that Hobbes's account of the sources of the human behaviour was inspired and guided by the contemporaneous scientific revolution³⁵. According to the scientific claims of Hobbes, nature is in continuous and necessary motion. All animate beings are driven by continual motion; humans experience this as endless desire, «because Life it selfe is but Motion, and can never be without Desire, nor without Feare, no more than without Sense»³⁶. Hobbes's peculiar understanding of physics and nature made possible «or at least plausible, a revolutionary new account of natural right»³⁷. Lawrence Berns asserts that such

³⁰ C.A.J. COADY, «Hobbes», 75.

³¹ T. HOBBS, *Leviathan*, 90.

³² T. HOBBS, *Leviathan*, 70.

³³ L. BERNS, «Thomas Hobbes», 397.

³⁴ Cf. T. HOBBS, *De Corpore*.

³⁵ G.B. HERBERT, *A Philosophical History of Rights*, 87. He writes: «To ignore the disputes and subtle disagreements in seventeenth-century philosophy of science is to risk failing to comprehend, or, worse yet, trivialising the seventeenth-century rights revolution either by extracting it, in some analogical fashion, from modern mechanics or by misconceiving it as a new «moral» theory in the tradition of Grotius».

³⁶ T. HOBBS, *Leviathan*, 46.

³⁷ G.B. HERBERT, *A Philosophical History of Rights*, 94.

a materialist philosophy allows Hobbes to base his moral code on a mechanistic psychology³⁸.

In comparison, Leo Strauss maintains that Hobbes's political philosophy is independent of his natural science because its principles «are provided by experience which every one has of himself, or to put it more accurately, are discovered by the efforts of self-knowledge and self examination by every one»³⁹. The basis therefore is human nature rather than nature itself⁴⁰. C.B Macpherson offers a third source. He discerns aspects of Hobbes's principles in the strengthening model of the competitive and property-orientated market economy society in England: the description of the natural condition at the centre of Hobbes's theory is «got primarily from observation of contemporary society, and incidentally confirmed by examining definitions»⁴¹.

The natural condition, or state of nature, is proposed by Hobbes near the end of the first part of the *Leviathan* entitled «Of Man», in which he presents an account of the psychology of the person. In contradistinction to the preceding Aristotelian-Thomistic tradition, the passions are «those forces in man, which so to speak, push him from behind; it is not to be understood in terms of those things which could be thought of as attracting man from in front, the ends of man [...]»⁴². Man is characterised as driven by desire⁴³. The primary desire of natural man is self-preservation, hence fear. Power enables the individual to fulfil that desire and alleviate their fears through establishing security. In the natural condition, Hobbes posits the fundamental equality and freedom of each to fulfil their desires. But, as each strive for the same thing, some must lose out. In a natural state of freedom and equality, people become enemies: «the condition of man [...] is the condition of Warre of every one against every one»⁴⁴.

As a result, Hobbes is at odds with the previous tradition, including Grotius, which asserted that man by nature is social⁴⁵. Man is alienated from the other, incapable of trust and therefore radically individuated. The growth of individualism traced in the previous chapter becomes

³⁸ L. BERNS «Thomas Hobbes», 398.

³⁹ L. STRAUSS, *The Political Philosophy of Thomas Hobbes*, 7.

⁴⁰ L. STRAUSS, *The Political Philosophy of Thomas Hobbes*, 170.

⁴¹ C.B. MCPHERSON, *Theory of Possessive Individualism*, 27.

⁴² L. BERNS, «Thomas Hobbes», 398; cf. N. MALCOLM, «Hobbes and Spinoza», 33-534.

⁴³ T. HOBBS, *Leviathan*, 70.

⁴⁴ T. HOBBS, *Leviathan*, 88.

⁴⁵ The conflict between equal claims for material goods and security is exasperated by three great natural causes of argument – competition, distrust, and glory. T. HOBBS, *Leviathan*, 88.

central to the theoretical foundation of the moral and political order. In such a natural state, the laws of nature are those which incline men towards peace – allowing for the partial fulfilment of desire. Hobbes defines the *ius naturale* as

The RIGHT OF NATURE, which Writers commonly call *Jus Naturale*, is the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing which in his own judgement, and Reason, he shall conceive to be the aptest means thereunto⁴⁶.

What is critical is the assertion that each is free to judge for themselves what is required for self-preservation. There is no law or arbiter to judge between rival claims. The conflict not only arises from the pessimistic view of human nature; it is «a necessary jural conflict between people whose rights overlap or conflict in the some sense with one another until they have been renounced»⁴⁷. Immediately after proposing the right of nature, Hobbes defines freedom: «By LIBERTY, is understood according to the proper signification of the word, the absence of externall Impediments [...]»⁴⁸. The freedom of each individual therefore is a negative one – freedom from external restraints. The fundamental right and the basic characteristic of all rights is the free fulfilment of a self-discerned need.

It results in Hobbes defining liberty and its associated rights in contradistinction to the laws or demands and obligations required of nature. He defines «A LAW OF NATURE, (*lex naturalis*) is a Precept, or generall Rule, found out by Reason, by which a man is forbidden to do, that, which is destructive to his life [...]»⁴⁹. The precepts of the law of nature are no longer conceived as paths to freedom but restrictions of freedom. Hobbes therefore concludes:

For though they that speak of this subject, use to confound *Jus*, and *Lex*, *Right* and *Law*, yet they ought to be distinguished; because RIGHT, consisteth in liberty to do, or to forbear; Whereas LAW, determineth, and bindeth to on of them: so Law, and Right, differ as much, as Obligation, and Liberty; which in one and the same matter are inconsistent⁵⁰.

The previous tradition had conceived of natural rights and natural laws as mutual. Hobbes, however, defined them as detached and mutually exclusive. The basis of right is not derived from an obligation to do

⁴⁶ T. HOBBS, *Leviathan*, 91.

⁴⁷ M. MALCOLM, «Hobbes and Spinoza», 535.

⁴⁸ T. HOBBS, *Leviathan*, 91.

⁴⁹ T. HOBBS, *Leviathan*, 91.

⁵⁰ T. HOBBS, *Leviathan*, 91.

the right thing but the freedom or power that each individual has to claim whatever is judged by them to be necessary for them. The subjective element of *ius*, traced in the previous chapter, comes to the fore and is given primacy over and against the other elements of justice and law. Furthermore, the central characteristic of early modern natural rights theories is that they are based on freedom, conceived as a lack of impediment to what is judged for one's own self-preservation.

The central right, according to Hobbes, is self-preservation. Three laws of nature and the obligations or duties dictated by it are derived and subordinate to this right and associated rights⁵¹. In order to advance self-preservation, the first and fundamental requirement is to create peaceful conditions. In order to attain peace, the second law is to agree to the same freedoms for each, requiring the laying down of some rights or freedoms. The mutual laying down of rights creates a contract. The third law, therefore, requires that all commit to their contracts. This social contract is the commitment to constituting civil society in order to escape the natural condition. Again, in contrast to the previous tradition, civil society is not a natural evolution but «radically conventional»⁵². Civil society is required in order to overcome the natural condition: natural forces drive us from nature. It is the task of reason and civic virtue to redirect and manipulate these natural desires in order that they do not become self-destructive. The contract or the transferral of right or liberty is the basis of justice.

For where no Covenant hath preceded, there hath no Right been transferred, and every man has right to every thing; and consequently, no action can be Unjust. But when a Covenant is made, then to break it is *Unjust*: And the definition of INJUSTICE, is no other than *the not Performance of Covenant*⁵³.

The primary purpose of the contract is to provide a means for judging between different claims. It transfers powers, particularly the capacity to judge what is right for oneself. But, as noted, trust is not a feature of natural man. Therefore, a greater power than all or any is required to maintain the contract – a sovereign, «the Leviathan» or «the Artificiall Man»⁵⁴.

⁵¹ T. HOBBS, *Leviathan*, 92-100. The fundamental right to self-preservation cannot be transferred, for it is the very reason why rights are surrendered and therefore is the basis of the contract.

⁵² L. BERNIS, «Thomas Hobbes», 400.

⁵³ T. HOBBS, *Leviathan*, 100.

⁵⁴ The Leviathan refers to the mythical monster in the Old Testament who was King of the Proud (Job 41: 33-34).

The sovereign reserves the right to punish and to police, the right to adjudicate justice and the right to legislate law in his duty to maintain the peace desired by all who have entered the contract. The power of the sovereign, therefore, becomes absolute. The rights of the subject, on the other hand, are transformed into positive actual rights defensible in law under the power of the sovereign. Law results from the will of the sovereign but because the sovereign is constituted by the will of the people, the law enacted by the sovereign is in fact self-imposed by the people. In this regard, Hobbes breaks with the Aristotelian-Thomistic tradition by dissociating law from reason and creating the deeply modern association of the law to the will⁵⁵. Of the three models of commonwealth – monarchy, democracy and aristocracy – Hobbes argues for the appropriateness of the rule of a single person⁵⁶. But in any form, Hobbes emphasises the absolute duty and obedience of all to the sovereign. Hobbes's commitment to absolute authority to provide peace is a salient reminder of the conservative or totalitarian tendency of many natural rights theories⁵⁷.

Leo Strauss observes: «Modern and classical political philosophy are fundamentally distinguished in that modern political philosophy takes “right” as its starting point, whereas classical political philosophy has law»⁵⁸. Modern natural law is a natural rights theory. Furthermore, «To the extent that modern liberalism teaches that all social and political obligations are derived from and are in the service of the individual rights of man, Hobbes may be regarded as the founder of modern liberalism»⁵⁹. But, according to Ian Shapiro in *The Evolution of Liberal Rights Theory*, Hobbes represents a transitional moment. Although lacking some elements, Hobbes's work «contains many elements of what was to become the classical variant of the liberal ideology of individual rights [...]»⁶⁰. Early modern natural law and seventeenth century liberalism are co-original; if the former represents the structural elements, the latter represents the subsequent political ideas. The full expression of this theory was to be worked through in the following generations.

⁵⁵ L. BERNES, «Thomas Hobbes», 412.

⁵⁶ T. HOBBS, *Leviathan*, 131-132.

⁵⁷ R. TUCK, *Natural Right Theories*, 119 ff.

⁵⁸ L. STRAUSS, *The Political Philosophy of Thomas Hobbes*, 156.

⁵⁹ L. BERNES, «Thomas Hobbes», 401.

⁶⁰ I. SHAPIRO, *The Evolution of Liberal Rights Theory*, 23.

2.3 *The Levellers*

Hobbes fled England before civil war finally broke out in March 1642. The power struggle between the assertions of parliamentary rights and the privileges of royal prerogative spilled over into armed conflict between the Puritan Parliament of Oliver Cromwell and the royalist supporters of Charles I. But further divisions developed within the Parliamentarians between the officers and many from the ranks of the disaffected Puritan New Model Army, named The Levellers. In October 1647, the two sides came together to debate constitutional proposals – *The Agreement of the People* – at Putney Heath in Surrey, Southern England. Against the divine right of kings the Agreement stipulated:

That the power of this and all future representatives of this nation is inferior only to theirs who choose them, and doth extend, without the consent or concurrence of any other person or persons, to the enacting, altering, and repealing of laws[...]⁶¹.

It was the extent of the franchise that divided the Parliamentarians.

2.3.1 Rights and Participation

On one side of the debate was Cromwell himself, who, as Lieutenant-General of the New Model Army, chaired the debate. In the often heated discussions, Henry Ireton spoke for a limited franchise based on property.

All the main thing that I speak for is because I would have an eye to property [...] For here is the case of the most fundamental part of the constitution of the kingdom, which if you take away, you take away all by that. Here men of this and this quality [...] do comprehend the whole permanent, local interest of the kingdom⁶².

They insisted that the election of representatives must remain only with the landed gentry and owners of property, fearing a constitution of universal manhood suffrage on the basis that the rich would become governed by the poor, leading to the destruction of private property – and therefore the propertied classes – and ultimately to a collapse into anarchy and immorality. Voting should be limited to those of property because they have a permanent and vested interest in the country and so know what is best for all.

⁶¹ THE LEVELLERS, «An Agreement of the People», 92-101, 94.

⁶² H. IRETON, «The Putney Debates», 107-108.

The other side was led by John Lilburne, Richard Overton and other elected representatives of the Leveller movement from within the rank-and-file of the army. They were a short lived and extreme element of the Puritan movement, inspired by a radical Christian equality. They pressured for constitutional reform and in particular universal manhood suffrage. In *A Short History of Ethics*, Alasdair MacIntyre writes that the Levellers were the first to assert the doctrine of rights in its revolutionary form⁶³. Their claims were given theoretical expression in earlier pamphleteering. For instance, Richard Overton, in *An arrow against all tyrants*, proclaims:

No man has power over my rights and liberties, and I over no man's. I may be but an individual, enjoy my self and my self-propriety and may right myself no more than my self, or presume any further; if I do, I am an encroacher and an invader upon another man's right – to which I have no right. For by natural birth all men are equally and alike born to like propriety, liberty and freedom [...]⁶⁴.

Overton is asserting the domain and mastery that each individual has over his own life; those who encroach on such a natural condition are automatically tyrants. He is maintaining many of traditional English rights of the *Magna Carta*; but they gain revolutionary momentum by being associated with new conceptions of the individual. The claims of equality and freedom presupposed in rights are motivating claims for participation in authority and government. Rights therefore cut across the social hierarchy. At the debate, Thomas Rainborough argued that every man «born in England cannot, ought not, neither by the Law of God nor the law of nature, to be exempted from the choice of those who are to make laws for him to live under – and for him, for aught I know, to lose his life under»⁶⁵. As MacIntyre writes:

This doctrine [all men are equal in the sight of God] in secular form, as a demand for minimum equal rights for all men and hence for a minimum of freedom, is Christianity's chief seventeenth-century achievement, [...] The left-wing movements in the parliamentary army in the English civil war express for the first time secular concepts of freedom and equality which break with all traditional forms of social hierarchy⁶⁶.

The Levellers were a rather momentary movement within the wider power struggles of the time. A further second agreement watered down

⁶³ A. MACINTYRE, *A Short History of Ethics*, 147-151.

⁶⁴ R. OVERTON, *An arrow against all tyrants*, 55.

⁶⁵ T. RAINBOROUGH, «The Putney Debates», 106.

⁶⁶ A. MACINTYRE, *A Short History of Ethics*, 144.

their claims of universal manhood suffrage; but by this time, political events had left them marginalised⁶⁷. Furthermore, within a short time religious Puritanism was transformed, according to MacIntyre, from a critique of the social order to a justification of the new economic order⁶⁸. However, the seventeenth century made significant gains in progressing the idea of the necessity of popular consent to law by way of a representative body.

2.4 John Locke

The so-called Glorious Revolution (1688), which crowned William of Orange, finally secured the triumph of the Parliamentarians and the establishment of constitutional arrangements in England. Although John Locke's (1632-1704) *Two Treatises of Government* was published anonymously the following year, it was written before the Revolution. Whether it was Locke's purpose or not, «It did in actual fact justify the Revolution to posterity, as well as to contemporaries»⁶⁹.

It was written to refute a defence of absolute monarchy and the divine right of kings made by Sir Robert Filmer. Locke summarises Filmer's model as follows: «His system lies in a little compass, 'tis no more but this, *That all Government is absolute Monarchy*. And the Ground he builds on is this, *That no Man is Born free*»⁷⁰. The first treatise attacked such a system; the second presented his own model, in which, according to Robert A. Goldwin,

Locke's own political teaching may be stated in opposite terms but with similar brevity, in this way: *All government is limited in its powers and exists only by the consent of the governed*. And the ground Locke builds on is this: *All men are born free*⁷¹.

2.4.1 Rights, Property and Limits of Authority

According to Locke, Filmer's argument that power is linked to the divine ordering of superiority of some over others means that «Government in the World is the product of only Force and Violence»⁷². In order to reveal the true source of political power Locke begins

⁶⁷ Cf. D. WOTTON, «Leveller Democracy», 412-442.

⁶⁸ A. MACINTYRE, *A Short History of Ethics*, 145. Cf. C.B. MACPHERSON, *The Political Theory of Possessive Individualism*, 107-159.

⁶⁹ P. LASLETT, «Introduction», in ID., ed., *Locke: Two Treatises of Government*, 46.

⁷⁰ J. LOCKE, *Two Treatises of Government*, 142.

⁷¹ R. A. GODWIN, «John Locke», 476.

⁷² J. LOCKE, *Two Treatises of Government*, 268.

with an account of the state of nature. Similarly to Hobbes, he presents it as a state of perfect freedom and equality. However, Locke's account of freedom is not of unbound self-interested desire or «a state of licence»⁷³. The law of nature, discernable by reason, firstly «teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty or Possessions»⁷⁴. Secondly, it requires that each must do as much as possible for the preservation of mankind. The state of nature, therefore, is a more benign place for Locke than posited by Hobbes.

Equality and freedom assert, according to Locke, that everyone in the state of nature is self-governing. Each person has an executive and judicial power to interpret and enforce the laws of nature. Political power inheres in each individual. Locke admits this to be a «Strange Doctrine»⁷⁵. James Tully comments: «His premise of political individualism *is* strange: it is one of the major conceptual innovations of early modern thought»⁷⁶. As self-governing, everyone has the natural right to punish those who act against the law of nature in order to secure that law for the benefit and preservation of each. It is not simply an historical pre-civil description: any condition or human relationship in which there is no shared arbiter or appeal is to live in the state of nature.

In contrast to the state of nature, in civil or political society the right to judge the requirements of the natural law are entrusted voluntarily and conditionally into the hands of an appropriately constructed government. People must move towards a political society because of the confusion and difficulties that arise from each individual claiming to interpret the requirements of the natural law, that is, self-preservation and the preservation of all. In this regard, Locke is breaking with the Aristotelian-Thomist tradition that linked the natural law to the virtues. Godwin observes that they are simply disregarded.

For that matter, he barely uses or does not use at all, in the Second Treatise, such words as charity, soul, ethics, morality, virtue, noble or love. They are not essential to his explanation of the foundation of civil society. For that

⁷³ J. LOCKE, *Two Treatises of Government*, 270-271.

⁷⁴ J. LOCKE, *Two Treatises of Government*, 271.

⁷⁵ J. LOCKE, *Two Treatises of Government*, 272-273.

⁷⁶ J. TULLY, «Locke», 620.

task he names other, more powerful and universal forces in human nature – and, above all, the strongest [...]»⁷⁷.

The strongest principle is that of self-preservation, further echoing Hobbes. They both consider civil government to be the proper remedy for the burdens of the state of nature. However, for Locke, the main threat against a person is not other people; instead, it is nature itself or the condition of poverty and hardship.

It is at this point, Locke makes an innovative turn, «which few had considered in the context of political origins, and none had given much prominence. He abruptly injects into the discussion the concept of property»⁷⁸. The traditional view, shared by Locke, was that all material goods were originally held in common. However, he admits of one exception; each person has ownership of themselves and the fruits of their labour. The produce of man helps him to fulfil the need for self-preservation. As a result, the natural right associated with self-preservation attaches itself, by way of labour, to what a person produces or appropriates. As Locke writes, «For this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough and as good left in common for others»⁷⁹. Ownership of land is appropriated in the same way. Material goods have value conferred on them by people and the labour which they invest in their goods. Originally property was limited to what could be feasibly used. According to Locke, the invention of money allowed for the freedom to accumulate and secure further conditions of self-preservation. It preceded the establishment of government and was created by mutual consent and tacit agreement by the community⁸⁰. But in time, and in order to protect the resources of self-preservation, people needed to leave the state of nature in order to set up a source of power: «the great and chief end [...] of Men's uniting into Commonwealths, and putting of themselves under Government, is the Preservation of their Property»⁸¹. For Locke, property is meant in its broadest sense: «Lives, Liberties and Estates, which I call by the general name, *Property*»⁸².

The innovative turn to the concept of property provides three interesting consequences. First, in connecting the origins of government

⁷⁷ R.A. GODWIN, «John Locke», 484.

⁷⁸ P. LASLETT, «Introduction», 101.

⁷⁹ J. LOCKE, *Two Treatises of Government*, 288.

⁸⁰ J. LOCKE, *Two Treatises of Government*, 300.

⁸¹ J. LOCKE, *Two Treatises of Government*, 350.

⁸² J. LOCKE, *Two Treatises of Government*, 350.

with economics, Locke was to prefigure later models in which politics serves economics⁸³. Secondly, although positing the basic equality and freedom of all, Locke ends up justifying inequality: «it is plain that men have agreed to a disproportionate and unequal possession of the earth [...]»⁸⁴. Thirdly, Locke deepens the notion of natural man being an owner well beyond elements of older Aristotelian-Thomist tradition.

The actual move towards civil society is the transfer of the powers and associated rights of each individual in the state of nature to a sovereign. As Hobbes, political power is enacted by way of a social compact. In contrast to Hobbes, rights are not alienated but entrusted to those who govern. Absolute power is not created; people are not «so foolish that they care to avoid what mischiefs may be done them by polecats or foxes, but are content, nay, think it safety, to be devoured by lions»⁸⁵. Correct political power requires limitations because the government can only act according to the rights of nature entrusted to it. The obligations under the law of nature not to harm the lives, liberty or property of others also apply to government. Rights, except the right to self-preservation, are transferred through the explicit consent of the people. The resulting community expresses the three forms of power that inhere in each individual – legislature, judiciary and executive⁸⁶. That they inhere in each individual allows for the people's right to take back power in a tyrannical situation and re-establish a new compact. Politically, his theory justified the new contractual relationship with William III, the new monarch of England, and would provide the ideology for the American Revolution a century later.

2.4.2 Excursus: Liberalism and Rights

As noted previously, Richard Tuck asserts that Locke is the culmination of the classical period of rights theory⁸⁷. Ian Shapiro categorises Locke as the «classical moment» of the associated liberal tradition. I wish to propose five central tenets that may be discerned of the theories of Hobbes and Locke and shape «so powerfully both the vocabulary and the grammar of the [liberal] tradition»⁸⁸.

⁸³ For example, *laissez-faire* economics of Adam Smith (1723-1790) or historical materialism of Karl Marx (1818-1883).

⁸⁴ J. LOCKE, *Two Treatises of Government*, 302.

⁸⁵ J. LOCKE, *Two Treatises of Government*, 328.

⁸⁶ Locke accepts the possibility that all three powers may be held in one set of hands.

⁸⁷ R. TUCK, *Natural Rights Theories*, 58.

⁸⁸ I. SHAPIRO, *The Evolution of Rights in Liberal Theory*, 59; 59-79, 278-305. Parenthesis added. The five consequences outlined here differ somewhat from those

First: the central conceptual place of the individual. It is the private individual, separate from others, who is the subject of all legitimate rights. Being predicated to the individual, they are truly subjective rights. The individual remains private, even on entering civil society. By way of the social contract, both Hobbes and Locke conceived the state to be the result of a conscious transferral of some or all of an individual's rights. Hobbes's pessimism regarding human nature required a strong state initially taking away all rights in order to maintain peace. However, Locke's more benign vision of human nature added an essential element to the liberal tradition – the capacity of the individual to be a right-holder independent of the government.

Second: rights are conceived separate from obligations. In the older tradition, rights were within the wider context of just social relationships. But in the liberal tradition that followed Hobbes and Locke, rights are expressions of the human capacity for autonomous action, independent, in the first place, from consideration of others. In the state of nature, rights concern what individuals can do: in civil society, that capacity or power is regulated by the law to allow for equal space for each. This implies three corollaries for the law: the law then must carry most of the burden of obligation; the law is separated from morality; and the law is conceived as the limitation of freedom.

Third: the substance of rights is defined in terms of negative freedom. Negative freedom is freedom to pursue one's own goals without the interference of others. A conception of negative freedom is the basis of the central marking of liberal theory – the principle of non-interference. This principle underpins two political consequences. Firstly, it grounded the liberal value of toleration of a diversity of religious commitments independent of political interference, particularly advanced by Locke; albeit in a limited manner.

Fourth and connected to the above is a second political consequence: rights are linked to the justification and legitimate pursuit of individual property. The theory provided the conceptual tools for the growing capitalist social framework. For instance, negative freedom required limited political interference in economic practices. Again, an image of the individual as property-owner and as naturally fulfilled by way of possessions is fostered. The liberal tradition, therefore, is intimately interconnected with market economics. But at its heart is a profound ambiguity. As more fully explained by C.B.

given in greater detail by Shapiro. Furthermore, they parallel five tenets of a later tradition of modernity; cf. Ch. II, Sec. 3.3.2.

Macpherson in *The Political Theory of Possessive Individualism*, it posits the equality of all yet supports a system of inequality⁸⁹.

Fifth: the primary purpose of the state is based on the previous four tenets. The concept of the state reflects the dichotomy identified by Noberto Bobbio between the Conceptual Natural Law and the earlier Aristotelian Model⁹⁰. Conceptual Natural Law or early modern natural law theory, I wish to claim, is the root of Liberal Law Theory. The civil sphere is based on the relationship between private individuals and conceptually conceived as a contract. The resulting state structures regulate and facilitate private interaction and, in order to do so, the state enforces obligation by law. But, because rights are defined apart from obligations, rights are conceived to be held against the state. The state's legitimacy then is based on the extent to which it allows individuals to pursue their own goals, whether religious, economic or moral; hence, the common association of the liberal tradition with minimal government and resistance to overarching authority.

Based on the posited ideals of freedom and equality, these characteristics define much of the liberal tradition and re-appear as critical issues in contemporary liberal theorists; namely, for the purposes of this dissertation, Ronald Dworkin.

Locke's theory not only came to justify a revolution already undertaken in England but would motivate further calls for resistance against arbitrary power. In particular, Locke would be very influential on the revolutionaries in the British North-American colonies (1776). However, as Shapiro argues, Locke's theory is socially conservative⁹¹. Although emphasising the limitations of authority, it lacks a fuller commitment to the rights of participation in authority. Such an emphasis – pre-figured in the Leveller debates – would create a further division in the branches of the family tree of rights in the following century⁹².

3. The Eighteenth Century

William Edmundson, in *An Introduction to Rights*, suggests that a time-line charting the prevalence of rights rhetoric would show two expansionary periods⁹³. He writes of «the peculiarity that rights-rhetoric, as a historical fact, has had its ups and downs and, looked at in sche-

⁸⁹ C.B. MACPHERSON, *The Political Theory of Possessive Individualism*, 247.

⁹⁰ Cf. Ch II, Sec 1.

⁹¹ I. SHAPIRO, *The Evolution of Rights in Liberal Theory*, 143.

⁹² Cf. App. C.

⁹³ Cf. App. B. Edmundson does not actually provide a timeline.

matic profile, resembles a Bactrian camel – it has two humps»⁹⁴. The first expansionary period approximately coincides with the *American Declaration of Independence* (1776) until the French Reign of Terror (1794). The two political revolutions may be viewed as a culmination of a period of modern intellectual history known as the Enlightenment.

3.1 *Historical Context*

The Enlightenment is best described as a mood or temper that dominated Europe during this period⁹⁵. Initiated in the transformations of the early seventeenth century, noted at the beginning of this chapter, it is characterised by a faith in the power of reason to advance humanity beyond the perceived limitations and oppressions of traditional authority or religious and metaphysical orthodoxy⁹⁶. Immanuel Kant (1724-1804), in *What is Enlightenment?* (*Was ist Aufklärung?*), proclaims an age of independent reason.

*Enlightenment is man's emergence from his self-incurred immaturity. Immaturity is the inability to use one's own understanding without the guidance of another. This immaturity is self-incurred if its cause is not lack of understanding, but lack of resolution and courage to use it without the guidance of another. The motto of enlightenment is therefore: Sapere aude! Have courage to use your own understanding*⁹⁷.

As testified by the previous chapter, confidence in reason reoccurs throughout the history of ideas, but the Enlightenment period is marked by unbounded optimism and belief that intellectual progress, and therefore moral and political progress, was being achieved and could be maintained for the betterment of all. Everything was open to rational scrutiny and could be reconstructed according to rational principles – including religion. The process of secularisation cut off analysis of human experience from religion. Reflection proceeded from man as he is, rather than man as he is in relation to God, which may be said to characterise earlier turns to the individual. The point of departure was more truly anthropocentric.

Capturing the spirit of the age is *The Encyclopaedic Dictionary* (1749), edited by Denis Diderot (1713-1784) and Jean-le-Rond d'Alembert (1717-1783). They gathered together a wide range of con-

⁹⁴ W. A. EDMUNDSON, *An Introduction to Rights*, 12.

⁹⁵ F. COPLESTON, *History of Philosophy*, IV, 45.

⁹⁶ Cf. N. HAMPSON, *The Enlightenment*; E. CASSIRER, *The Philosophy of the Enlightenment*; P. HAZARD, *European Thought in the Eighteenth Century*.

⁹⁷ I. KANT, «An Answer to the Question: What is Enlightenment?», 54.

tributors to a project attempting to coordinate and systematise knowledge. The drive to systematisation was influenced by the successes of the physical sciences in deducting universal laws from collected empirical evidence. Such spirit also motivated, in part, the initial codifications of the law – exemplified by the Napoleonic Code⁹⁸.

Writing early in the following century, Alexis de Tocqueville observed,

Thus, though their ways diverged in the course of their researches, their starting point was the same in all cases; and this was the belief that what was wanted was to replace the complex of traditional customs governing the social order of the day by simple, elementary rules deriving from the exercise of the human reason and natural law⁹⁹.

In Europe, such an intellectual mood clashed with the political and social structures. Turmoil in England had concluded in the establishment of political representation within a constitutional monarchy. But the lack of such a system on continental Europe, particularly in France, frustrated and radicalised political thinking, creating conditions in which rights became the widespread rallying cry for justice. The desire for change was also driven by socio-economic transformations. Political stability, colonisation, a protestant work ethic and scientific advances facilitated the industrial revolution in Britain in the latter half of this century. Across much of Europe, a new self-confident middle class grew and desired to assert its political will, clashing with the monarchical social order.

This section is not organised in a strict chronological manner. Firstly, it briefly explores *The American Declaration of Independence* (1776) as it is philosophically closer to the theorists of the previous section. Secondly, it will move to the two dominant theorists of the eighteenth century with regard to rights – Jean-Jacques Rousseau and Immanuel Kant.

3.2 *The American Declaration of Independence*

As a prerequisite to the overthrow of authority and the subsequent recovery of the natural right to form a new government, Locke prescribed the requirement to clearly list alleged abuses. If the list is compelling, «'tis not to be wonder'd, that they should then rouse themselves, and endeavour to put the rule into such hands, which

⁹⁸ J. KELLY, *A Short History of Legal Theory*, 262-265.

⁹⁹ A. DE TOCQUEVILLE, *The Ancient Regime*, 139.

may secure to them the ends for which Government was first erected [...]»¹⁰⁰.

In 1776, *The United States Declaration of Independence* announced the secession of thirteen North American colonies from Great Britain. They followed Locke's direction and listed abuses under the sovereignty of King George III, and concluded that after «repeated injuries and usurpations, all having, in direct object, the establishment of an absolute tyranny over these States»¹⁰¹. It then proceeded to list twenty-seven dissensions. At first, the resistance to perceived and real abuses was as Englishmen asserting their traditional rights. The declaration itself records: «In every stage of these oppressions, we have petitioned for redress in the most humble terms; our repeated petitions have been answered only by repeated injury»¹⁰².

Thomas Jefferson (1743-1826), the chief architect of the document, was greatly influenced by Locke. The contractual aspect of government and the commitment to natural rights of all are present in the document.

We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that, whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundation on such principles, and organising its powers in such form, as to them shall seem most likely to effect their safety and happiness¹⁰³.

The American Declaration employs Locke's conception of man as a bearer of natural rights bestowed by his Creator. Locke's central rights of life, liberty and property are modified to life, liberty and the pursuit of happiness. But even the pursuit of happiness is considered along Lockean lines: within the boundaries of non-interference by government, particularly in matters of property, people are tolerated to pursue their own goals. Similarly, it holds a Lockean view on the construction of government: it is viewed as a contract with the people in whom sovereignty remains. It can be abolished if it impedes man's natural rights. This model was further expressed in the enactment of the Constitution and a Bill of Rights. The latter, «consisting of the first ten amendments

¹⁰⁰ J. LOCKE, *Two Treatises of Government*, 415.

¹⁰¹ *The American Declaration of Independence*, 128-129. All quotations from M.R. ISHAY, ed., *The Human Rights Reader*, 127-130.

¹⁰² *The American Declaration of Independence*, 129.

¹⁰³ *The American Declaration of Independence*, 127.

annexed in 1791 to the United States Constitution of 1787, although using as its practical model the English Bill of Rights in 1689, clearly belongs in the doctrinal tradition shaped by Locke»¹⁰⁴.

3.3 *Jean-Jacques Rousseau*

For the previously mentioned *Encyclopaedic Dictionary*, Diderot invited Jean-Jacques Rousseau (1712-1778) to contribute a number of articles – Book V included Rousseau’s *Discourse on the Political Economy*. It was Diderot, ironically as it turned out, who encouraged Rousseau to first write an essay in response to a prize offered by the Dijon Academy: Has the progress of the sciences and arts done more to corrupt morals or improve them?¹⁰⁵. Rousseau proposed, in *Discourse on the Arts and Sciences*, that far from ennobling man, civilisation corrupted man’s original innocence. The theme underlies all his work and guides Rousseau’s efforts to give a true account of man’s state of nature in order that it may be regained. By doing so he directly opposed the belief in progress held by Diderot and the *philosophes* of the Enlightenment. According to Leo Strauss, Rousseau was the first critic of modernity¹⁰⁶.

3.3.1 Rights and Popular Sovereignty

Rousseau turned to moral and political inequalities in *The Discourse on the Origin of Inequality*. Critical of Hobbes and Locke for incorrectly describing natural man, he observes: «Every one of them, in short, constantly dwelling on wants, avidity, oppression, desires, and pride, has transferred to the state of nature ideas which were acquired in society; so that, in speaking of the savage, they described the social man»¹⁰⁷. It is civil man that is alienated from others; a distortion that is projected unto natural man. Corruptions that belong to civilisation are justified by the claim that they are natural.

Rousseau does agree with Hobbes and Locke on the normative importance of natural man and proceeds to give his own account. He radi-

¹⁰⁴ J. KELLY, *A Short History of Western Legal Theory*, 270.

¹⁰⁵ In his *Confessions*, Rousseau later recalls: «I told him [Diderot] my cause [...] He encouraged me to give my ideas wings and compete for the prize. I did so, and from that moment I was lost. All the rest of my life and of my misfortunes followed inevitably as a result of that moment’s madness». J. J. ROUSSEAU, *The Confessions*, 327-328.

¹⁰⁶ L. STRAUSS, *History of Natural Right*, 252 ff.

¹⁰⁷ J.J. ROUSSEAU, *Discourse on Inequality*, 197.

cally sheds man of all attributes associated with civil living, including language. Natural man is at peace with his surroundings: he is not radically alienated from each other by the aggressiveness or competition, as conceived by Hobbes¹⁰⁸. He lives guided by nature, with a sense of immediacy, following his instinct, desires and passions. But like Hobbes and Locke, natural man is still an individual, living freely and equally without any authority. However, he has the capacity to be moved by others, motivated by only the simplest of desires – self-preservation or self-love (*amour de soi*) and compassion or pity (*pitié*) for others¹⁰⁹. According to Gary Herbert, Rousseau is asserting the sociability of man and it is this that marks him from the early modern tradition¹¹⁰. However, unlike the Aristotelian-Thomist tradition, the sociability of man does not necessarily require that man be a political animal.

Initially, man develops social skills of speech, reason and familial ties and continues to live a peaceful life. As with Locke, property is an essential element to the foundations of civil society. However, due to private property, *amour de soi* develops into *amour propre* – true self-love mutates into vanity and selfishness. He concludes: «The first man, who, having enclosed a piece of ground bethought himself of saying “This is mine”, and found people simple enough to believe him, was the real founder of civil society»¹¹¹. War ensues, requiring the need for peace. Unlike Hobbes or Locke, who view the origins of civil society as the product of rational self-interest of all, Rousseau sees civil society as a means of reinforcing and legitimising the interests of the powerful and the propertied. At base it is a deception – a trick. They propose peace under the guise of a wise sovereign power. As a result, «All ran headlong to their chains in hopes of securing their liberty»¹¹². Society is founded on vanity and selfishness; hence, the inequalities present in society. It contrasts with the view of society as necessary for the fulfilment of man as proposed by the Aristotelian-Thomist tradition or as a means of security of self or protection of property as proposed by the early modern liberal tradition.

¹⁰⁸ Natural man does not fear death. Rather, «the knowledge of death and its terrors being one of the first acquisitions made by man in departing from the animal state». J.J. ROUSSEAU, *Discourse on Inequality*, 202.

¹⁰⁹ J.J. ROUSSEAU, *Discourse on Inequality*, 224.

¹¹⁰ Cf. G.B. HERBERT, *A Philosophical History of Rights*, 132 ff.

¹¹¹ J.J. ROUSSEAU, *Discourse on Inequality*, 234.

¹¹² J.J. ROUSSEAU, *Discourse on Inequality*, 235.

David Muschamp argues that Rousseau's account of the essential goodness of man challenges the Christian account of man's fall from grace, which was emphasised in his native Calvinist Geneva.

It was not disobedience, rebellion and ungodliness which caused the misery of mankind, as the theologians proposed, but unnatural and vicious social arrangements which produced the inequality, the injustice, the loss of freedom and the consequent degradation of civilised mankind¹¹³.

Redemption is possible according to Rousseau. By way of education towards civic virtue, people may refocus their passions. In this, he was very influential on the Romantic Movement, which responded to the rationality of the Enlightenment¹¹⁴.

The division between freedom and bondage, nature and society, man and citizen organises all of his work¹¹⁵. It gives rise to a problem, addressed in *Of the Social Contract* (1762):

The problem is to find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before¹¹⁶.

As «born free and everywhere in chains»¹¹⁷, the dual nature of man creates a problem of legitimacy. On one hand, freedom and equality is man's natural condition, but on the other, social order is the «right which provides a basis for all others. Yet this right does not come from nature; it is therefore founded on conventions. The problem is to know what these conventions are»¹¹⁸. In other words, how can society be non-coercive in order that all may legitimately claim to be truly free and equal?

Civil society is not grounded on natural right for there are no moral commitments in the natural condition. An act of commitment is required in order to establish civil society and morality. Society and morality, therefore, are conventional. That act is the social contract, in which each individual person hands over their power. The contract, «rightly understood, all come down to just one, namely the total alien-

¹¹³ D. MUSCHAMP, «Rousseau:», 129.

¹¹⁴ N. HAMPSON, *The Enlightenment*, 196. Works such as the novel *Julie* or *The New Heloise* (1761) and the educational tract *Emile* (1762) all attempt to show ways beyond tainted humanity.

¹¹⁵ V. GOUERVITCH, «Introduction», in V. GOUERVITCH, ed., *Rousseau*, x.

¹¹⁶ J.J. ROUSSEAU, *Of the Social Contract*, 49-50.

¹¹⁷ J.J. ROUSSEAU, *Of the Social Contract*, 48.

¹¹⁸ J.J. ROUSSEAU, *Of the Social Contract*, 41.

ation of each associate with all his rights to the whole community»¹¹⁹. Such an act of association is an act of unity that creates a body politic, an artificial person who encapsulates the individual will of all.

The contract constitutes a regime in which the free will of each coincides with the will of all. Rights are neither transferred to one individual (Hobbes) nor to many representatives (Locke). It is the people as a whole who become sovereign. Popular sovereignty becomes the defining feature of «political right» or civil rights and therefore the legitimacy of a civil regime. The tacit agreement underlying Locke's social contract becomes the continual and active consent of all. The participation and agreement of all means that the will of one is not enforced on another. The social contract, popular sovereignty and therefore political right are sustained by what he calls the General Will. In obedience to the sovereign, each is obeying what is truly themselves; by disobedience, one is following one's own instincts of selfishness and vanity and is therefore unfree. «What man loses by the social contract is his natural freedom [...] what he gains is civil liberty [...] the obedience to a law which we prescribe to ourselves»¹²⁰.

Rousseau distinguishes between sovereignty inhering in the people and the government which applies the law. Allan Bloom writes, «This distinction is new in Rousseau and works a fundamental break with his predecessors, especially those of classical antiquity. It prefigures the distinction between state and society so important today»¹²¹. The primary focus of study becomes society and government a derivative examination.

Rousseau is ambiguous on determining the General Will and particularly on the nature of the Sovereign who encapsulates it. The General Will allows for no individual will; society must be homogeneous. According to Herbert, «The title of Rousseau's most famous book, *The Social Contract*, is somewhat ironic. The "immovable keystone" and real constitution of the state is to be found, not in self-representation, but in the common origins of its citizens»¹²². All factions within society must be repressed and education in citizenship is required to help serve the general will. The individual will is transformed by civil virtue – by true love (and patriotism) of our common life together. According to Gourevitch, the title refers not so much to the actual functioning of the social contract as to its purpose – that legitimate rule must be based on

¹¹⁹ J.J. ROUSSEAU, *Of the Social Contract*, 50.

¹²⁰ J.J. ROUSSEAU, *Of the Social Contract*, 53-54.

¹²¹ A. BLOOM, «Jean Jacques Rousseau», 574.

¹²² G.B. HERBERT, *A Philosophical History of Rights*, 141.

the authorised consent of the people. It is an ambiguity which lies at the heart of Rousseau and divides his commentators. On one hand, he may be read as a republican asserting the role of popular sovereignty. On the other, he may be read as ushering in an unlimited powerful sovereign and the totalitarian state. Such ambiguity that linked tyranny with utopian republican ideals of liberty, equality and fraternity were to express themselves politically in the French Revolution and its aftermath.

3.3.2 Excursus: Critique and Rights

In the history of ideas, Leo Strauss writes, «The first crisis of modernity occurred in the thought of Jean-Jacques Rousseau. [...] But Rousseau was not a “reactionary”. He abandoned himself to modernity»¹²³. Alan Bloom observes, he «undertook to clarify the meaning of modern theory and practice, and in so doing he brought to light radical consequences of modernity of which men were not previously aware»¹²⁴. Certain characteristics, beginning in Rousseau, may be highlighted of a tradition that includes Karl Marx, The Frankfurt School and Jürgen Habermas¹²⁵. The primary element of this tradition is critique: it is critical of modernity and the associated liberal tradition. Importantly however, its criticisms are by way of the very structures of thought central to modernity. As such, important features may be outlined in parallel to the excursus concerning liberalism¹²⁶.

First: the individual is considered as social¹²⁷. It is only in the social context that rights come to have meaning. In time, the social sciences were to become an important resource in the development of the Critical tradition. However, unlike the Aristotelian-Thomist tradition, and similarly to modernity, it views society as conventional.

Second: rights are re-conceived to be connected to social obligations. It is only by way of society that man can be free again. His rights therefore are defined by his commitment to society. It is this characteristic that has facilitated the many totalitarian impulses that have accompanied elements of this tradition.

Third: rights primarily concern participation. Commitment to society requires participation in the authority that orders that society. To be

¹²³ L. STRAUSS, *History of Natural Right*, 252.

¹²⁴ A. BLOOM, «Jean-Jacques Rousseau», 559.

¹²⁵ Cf. App. C.

¹²⁶ Cf. Ch. II, Sec. 2.2.4.

¹²⁷ Many of its roots are to be found in the civic republicanism of the Renaissance period and its appropriation of Roman and Greek humanist philosophy. Cf. Q. SKINNER, *The Foundations*, I.

free is to be politically free, that is, to determine the structures of society. This element echoes through the democratic movements associated with this tradition such as the Levellers and the Chartists (a nineteenth century British movement).

Fourth: the existing structures of a society are perceived to favour existing power and vested interests. In particular, it is often critical of private property and the capitalist economics. Reformation of society and the state is required if people can claim to be truly free. It is this element that inspired the political vanguard ideologies of the communist movements and the more incremental assertions of socio-economic rights by labour or trade-union movements.

Fifth: as with the liberal tradition, the primary purpose of the state is based on the previous four tenets. The focus being on society makes for a derivative conception of the state – loyalty is primarily offered to the former rather than the latter. Suspicions of the structures of power in society make for a willingness to change government or even to bring about its eventual demise. It contrasts to the earlier Aristotelian-Thomist and the liberal tradition, which considered the establishment of government necessary for society; therefore, to destroy government was to destroy society. State and government in the Critical tradition primarily find legitimacy to the extent that it facilitates the participation of all in the many aspects of society.

3.4 *Immanuel Kant*

In contrast to many of the theorists previously discussed, Immanuel Kant (1724-1804) was not directly active in political or religious affairs; neither did he travel far from his native Königsberg in East Prussia, and the university in which he studied and lectured. However, Kant was not a recluse. He keenly engaged with the intellectual currents of his time. In particular, David Hume (1711-1776) and Jean Jacques Rousseau provided the points of departure and motivation for his philosophy. Of his metaphysical writings, he confessed that it was after reading the scepticism of Hume that he was «first interrupted from my dogmatic slumber many years ago and gave my investigation in speculative philosophy an entire altered direction»¹²⁸. Concerning morality he wrote, «Rousseau has set me right [...] I learned to honour mankind and I would be less worthy than the average worker if I did not believe that [philosophy] could contribute to what really matters, restoring the rights of mankind»¹²⁹.

¹²⁸ Cited in P. HASSNER, «Immanuel Kant», 585.

¹²⁹ Cited in P. HASSNER, «Immanuel Kant», 585.

3.4.1 Right and Duty

Kant responded to Hume in the first of three Critiques, entitled *Critique of Pure Reason* (1781)¹³⁰. Hume, a radical sceptic, had rejected the empirical reality of causality¹³¹. Observation, he argued, merely perceives certain events regularly occurring immediately after certain other events. Causality is simply a means employed to make sense of these events and is uncritically accepted as certain by metaphysics. Kant agreed but drew a different conclusion. He argued that experience involves both the impressions of the senses (*a posteriori*) and the element provided by the mind (*a priori*). The certainty of causality is revealed through reason reflecting on itself; for causality is a notion that cannot but be employed. Along with other categories, such as time and space, it creates a framework by which we understand nature. They are necessary preconditions or elements or tools supplied by the mind, by which we understand the sense information of our experiences.

The basic division rests on the distinction of the phenomenal and noumenal world or that of appearance and the thing in itself (*Ding an sich*). Howard Williams, in *Kant's Political Philosophy*, argues that it is of central importance because «it provides Kant with his conception of man»¹³². It is a dualistic conception: man is both subject to nature and autonomous of it. Attached to the former are our needs and our desires and associated with the latter is reason and freedom. In *Kant's System of Rights*, Leslie Arthur Mulholland admits that Kant's response to moral questions (partly) parallels his approach to metaphysics – reason analyses itself in order to reveal the universal principles of its own working¹³³.

In the dual character of the human person, the moral act may be divided between felt experiences (*phenomena*), and the freedom to will a particular outcome (*noumena*). As previously with metaphysics, the universal laws of morality may be discerned by way of analytic judgments on the process of practical reasoning because they are independent of experience. The moral domain is demarcated apart from the experience of sense perceptions, emotions or desires. To make moral choices implies freedom and true freedom requires that man be capable of being independent of the forces of nature or the mere calculation of

¹³⁰ The three texts are the *Critique of Pure Reason* (1781; 1787), the *Critique of Practical Reason* (1788) and the *Critique of Judgement* (1790).

¹³¹ Cf. D. HUME, *An Enquiry Concerning Human Understanding*.

¹³² H. WILLIAMS, *Kant's Political Philosophy*, 153.

¹³³ L.A. MULHOLLAND, *Kant's System of Rights*, 270-272. Cf. S. SHELL, *The Rights of Reason*, 132.

consequences¹³⁴. Kant begins *Groundwork for the Metaphysics of Morals*: «it is impossible to think of anything at all in the world, or indeed even beyond it, that could be considered good without limitation except a *good will*»¹³⁵. The will is affected by desire but, unlike Hobbes, it is not determined by desire. In fact, it is identifiable by its capacity or power to make choices independently from our desires and act instead according to the imperatives demanded by practical reasoning. This approach and the resulting consequences were to have a lasting influence on the development of moral philosophy. Not knowing the things in themselves, objective nature no longer has a primary normative role. Morality turns to the subject's self-understanding of his moral acts – creating a Copernican Revolution.

Morality, therefore, implies a pure will independent of any intentions except what the will itself intends. In willing particular behaviour, one can choose a particular way of behaving that reflects one's imperatives or rules or, in Kant's term, maxims. Maxims become evident in the self reflection on reasons of behaviour to which one is committed. But not all maxims are truly moral. Only maxims that can be universally applied to everyone may be called moral laws¹³⁶. The demand of reason that moral law be universal is asserted as the categorical imperative: «*act only in accordance with that maxim through which you can at the same time will that it become a universal law*»¹³⁷. The formulation is based on the unconditioned and autonomous will. The criterion of moral judgement, therefore, is universalisation. It requires that an individual should ask himself if an intended action could become a universal law of action for all. If it contradicts itself, it is not appropriate to a rational being. The recognition of the freedom and dignity of all produces a second formulation of the categorical imperative: «*So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means*»¹³⁸. If the former principle refers to the reasoning of what to do, the second

¹³⁴ Kant categorised the difference as autonomy and heteronomy. Autonomy, from the Greek for «self and «law», understands morality as freely chosen and rationally self-imposed. Heteronomy, the law of another, is the acceptance of moral commands from without.

¹³⁵ I. KANT, *Groundwork for the Metaphysics of Morals*, 7.

¹³⁶ Any other motivation is related to a hypothetical imperative. The latter refers to reasoning – if x then y. The categorical imperative refers to a demand that is independent on any hypothetical outcome or motivated by with certain circumstances, needs, or ends in mind.

¹³⁷ I. KANT, *Groundwork for the Metaphysics of Morals*, 31.

¹³⁸ I. KANT, *Groundwork for the Metaphysics of Morals*, 37.

guides action itself. The duty that is demanded by this maxim corresponds to a profound respect for others. To violate the duty to respect others – abuses of liberty or property, or in other words, rights – is to treat others as a means or an instrument rather than free beings of inherent dignity. It is this formulation that «provides the moral basis of the political doctrine of the rights of man»¹³⁹. This is reinforced by Kant's third formulation: «every rational being must act as if he were by his maxims at all times a lawgiving member of the universal kingdom of ends»¹⁴⁰. Each person willing a universal maxim appropriate to all and respecting the freedom and dignity of others creates a self-legislating environment. This formula refers to communal living and the required social order. Similarly to Rousseau, each person is a participant in the rule over themselves: the limitations of freedom in duty to the self-applied legislation are placed on themselves and so are not coercive.

Three characteristics may be discerned of Kant's moral system. Firstly, it is strongly deontological, and, as a result, formal. Kant is not making substantive claims – but providing the means by which we may judge the rationality of substantive claims. In contrast to teleological approaches, it rejects any calculative judgement of consequential ends as proposed by utilitarians or conceptions of specific good lives as proposed by the Aristotelian-Thomist tradition. The distinction of just principles of morality independent of the good is a hallmark of modern moral philosophy – particularly of the liberal tradition in which Kant becomes very influential. Secondly, individuals who live morally are placing themselves under maxims or laws they would will for all, for free people are self-legislating. Unlike Hobbes and the liberal position, freedom is not lawless but the ability to live according to self-given laws. This second characteristic places Kant in a tradition from Rousseau to Critical Theory¹⁴¹. Thirdly, the deontological principles are bound to duty – for it is duty which motivates the actor to be moral. Duty is a basis for the foundations of rights but is a duty toward principle – perhaps better described as a conviction – rather than duty arising from a social role.

In the introduction to *Metaphysics of Morals*, Kant proposes the universal principle associated with right. The book is divided into two sections: namely, «The Doctrine of Rights» and the «The Doctrine of Vir-

¹³⁹ P. HASSNER, «Immanuel Kant», 591.

¹⁴⁰ I. KANT, *Groundwork for the Metaphysics of Morals*, 45.

¹⁴¹ Cf. App. C.

tue». In his introduction to the «Doctrine of Rights» (*Rechtslehre*) he writes,

Why is moral (Moral) philosophy usually (for example by Cicero) titled the doctrine of duties and not also of rights? Since duties and rights are related to each other. The ground is this: we know our own freedom (from which all rights as well as duties are derived) only through the *moral imperative*, which is a proposition commanding duties; [...] the concept of a right can be derived from this imperative¹⁴².

The maxim or universal principle of right is: «Every action which by itself or by its maxim enables the freedom of each individual's will to co-exist with the freedom of everyone else in accordance with a universal law is *right*»¹⁴³. Right, according to Kant, is only concerned with external actions «for each individual can be free so long as I do not interfere with his freedom by my external actions [...]»¹⁴⁴. In its strict sense, it is sharply distinguished from virtue. Rights, therefore, are purely a matter of the regulation of society according to justice and should not be associated with any concept of the good life.

The universal principle of right, as pointed out by Mary Gregor is the application of the universal maxim – the categorical imperative – to the sphere of law¹⁴⁵. It is the law that externally coordinates and facilitates the co-existing freedom of all. If it is to be just, it must cohere to the universal principle of right. Not to do so, that is, not respect the equal freedom of all in accordance to a universal imperative, is to undermine the law itself and therefore the freedom of all. The German legal tradition of the *Rechtstaat*, or the state governed according to the rule of law can, in part, be attributed to Kant.

Rights specifically concern the extent to which people can be free together. As a means to regulate external relationships, they presuppose and help constitute a social harmony. In contrast to Hobbes and Locke, freedom is not characterised by the lack of law. On the contrary, freedom is exercised according to self-applied laws. Rights result from affirmative mutual recognition of each other's freedom. The external freedom of each is sustained in the relationship with other free people – that is, the acknowledgement of obligations on oneself and on others of moral imperatives such as treating others as ends and not means. It is the third formulation of the categorical imperative in action. Applied to

¹⁴² I. KANT, *The Metaphysics of Morals*, 132.

¹⁴³ I. KANT, *The Metaphysics of Morals*, 133.

¹⁴⁴ I. KANT, *The Metaphysics of Morals*, 133.

¹⁴⁵ M. GREGOR, *Laws of Freedom*, 13.

politics, the universal principle requires «A constitution allowing the *greatest possible human freedom* in accordance with laws which ensure *that the freedom of each can coexist with the freedom of all the others*»¹⁴⁶.

Kant presents rights as the necessary preconditions or presuppositions inherent to being free in the context of social existence. He denies the Hobbesian conclusion that rights are prior to social living and lead to social strife. He also avoids the apparent denial of individual freedom in the reduction of rights to the social, as concluded by Rousseau. In the intellectual development of rights, Gary Herbert claims that:

One could say, with some justification, that Kant's theory of rights represented an attempt to mediate the dispute between Rousseau and Hobbes, that is to restore the Hobbesian natural right of the individual without the burdens created by the brutality of natural behaviour, but also without dissolving the individual into the collective consciousness as Rousseau appears to have done¹⁴⁷.

The section concerning right in *Metaphysics of Morals* concludes that «moral-practical reason within us pronounces the following irresistible veto: *There shall be no war* [...] For war is not the way in which anyone should pursue his rights»¹⁴⁸. It is only in peaceful conditions (which even include cessation from preparations for war) that a co-existing freedom under law may be achieved. However, he concedes that a perpetual peace may be beyond reach¹⁴⁹.

Kant responded enthusiastically to the French Revolution (in spite of his own conservative tendencies). But it proved to be the zenith of

¹⁴⁶ Cited in H. REISS, «Introduction», in ID, ed., *Kant: Political Writings*, 23.

¹⁴⁷ G.B. HERBERT, *A Philosophical History of Rights*, 145.

¹⁴⁸ I. KANT, *The Metaphysics of Morals*, 174.

¹⁴⁹ A small work, entitled *The Perpetual Peace*, opens with a rare moment of humour: «THE PERPETUAL PEACE: A Dutch innkeeper once put this satirical inscription on his signboard, along with the picture of a graveyard». In it he offers prescriptive proposals for the principles by which an international peaceful order could be sustained by cooperation in a federation of states. States are best organised as representative republics under the rule of law. Freedom guaranteed by a just social order is only possible under law. The states in recognising each other would in turn place themselves under a minimal law capable of deciding between disputes without recourse to war. He distinguishes between three levels – the civil right internal to nations (*ius civitatis*), international right that regulates relationships between nations (*ius gentium*), and a cosmopolitan right associated with being citizens of a universal state of mankind (*ius cosmopolitanum*). I. KANT, *The Perpetual Peace*, 98-99. The last category is innovative. Yet, it is perhaps prophetic in the light transnational organisations, such as the European Union, that have grown initially motivated by the goal of perpetual peace.

the Enlightenment; both it and the rights that it espoused were to come under attack in the following century.

3.5 *The French Declaration of the Rights of Man and the Citizen*

The struggle for American independence effected events in Europe and, in particular, its ally, France. Military support of the American cause contributed to an overwhelming national debt. It directly caused the calling of the Estates-General, comprising of representatives of the nobility, clergy and propertied classes, in 1789 for the first time since 1614 and the rise of absolute nation-states epitomised by the Bourbon kings of France. More significantly, the American experience also inspired political aspirations among the propertied classes represented by the Third Estate.

In opposition to voting procedures, the Third Estate proclaimed itself the National Assembly and committed itself to the establishment of a new constitution and challenging the abuses of the *ancien régime*. Marquis de Lafayette (1757-1834), who had fought in the American War of Independence, and in part consultation with Thomas Jefferson who was Ambassador to Paris, proposed a number of drafts. The final document was accepted and published due to quickening political events and disorder. The subsequent revolution, symbolised in the storming of the Bastille, overturned the social order and promised new beginnings.

The preamble asserts that it is «ignorance, forgetfulness or contempt of the rights of man» that causes the abuse of authority. In response, the declaration of rights is to act as a «constant reminder», a means to hold legislative and executive authority accountable and to guide the citizens in «support of the constitution and the common good»¹⁵⁰. It continues

In respect of their rights men are born and remain free and equal. The only permissible basis for social distinctions is public utility

The final end of every political institution is the preservation of the natural and imprescriptible rights of man. The rights are those of liberty, property, security and resistance to oppression.

The basis of all sovereignty lies, essentially in the Nation. No corporation nor individual may exercise any authority that is not expressly derived there from¹⁵¹.

The rest of the document includes articles stating that freedom is «the capacity to do anything that does no harm to others»; that legis-

¹⁵⁰ *The French Declaration*, 138. All quotations from M.R. ISHAY, ed., *The Human Rights Reader*, 138-139.

¹⁵¹ *The French Declaration*, 139.

lation is «the expression of the general will» and «All citizens have a right to participate in shaping it either in person, or through their representatives»; that arrests are according to due process and punishments appropriate; the freedom of conscience and that «free communication of thoughts and opinions is one of the most precious rights of man»; the presumption of innocence and that the purpose of a police force, funded by taxation «according to means» is for «the public weal»; and that «property is an inviolable and sacred right[...]»¹⁵².

After the publication of the document, the revolutionaries fractured and, in the ensuing power struggles, France descended into the Reign of Terror in which many thousands were killed and the pillars of the *ancien régime* and Catholic Church were destroyed, leading finally to the rule of Napoleon Bonaparte (1769-1821) and European-wide wars.

At the end of the eighteenth century, rights proved themselves to be a revolutionary force in society. «If the American and French Revolutions were to be considered as experiments in the practical value of making the concept of rights central to our understanding of our political arrangements, the results were decidedly mixed»¹⁵³. The French Declaration is an expression of the broad natural rights tradition but, according to John Kelly, it «was not a pure expression of natural rights ideology nor a mere imitation of admired English and American precedents»¹⁵⁴. Certainly the social conditions and the exercise of state power were considerably different. Jeremy Waldron, in *Nonsense Upon Stilts*, writes that the French Declaration is the product of a different intellectual climate than the United States (originating in Great Britain): the former resulting from a Lockean legacy and the latter associated with Rousseau¹⁵⁵. Of the French Declaration, he writes:

It is easy to exaggerate his [Rousseau] influence: the Declaration was modelled mainly on the manifestos set out by the Americans some years earlier. But to the extent that it incorporates democratic ideas and ideas about popular sovereignty in law-making and in government, it is certainly Rousseauesque in inspiration or at least inspired by a theoretical milieu in which the influence of Rousseau's ideas and Rousseauesque language was consid-

¹⁵² *The French Declaration*, 139.

¹⁵³ W.A. EDMUNDSON, *An Introduction to Rights*, 41.

¹⁵⁴ J. KELLY, *A Short History of Western Legal Theory*, 270.

¹⁵⁵ Cf. App. C.

erable. Certainly there is precious little in the Lockean heritage on which this particular strand of revolutionary thought could be based¹⁵⁶.

The French Revolution received mixed reaction. Many responded enthusiastically to the initial stages but became despondent; others were radically critical of the rights-rhetoric it espoused. Following the structure of Jeremy Waldron's study, the critical response to the French Declaration provides the organising structure to the next section. By outlining the ideas which motivated a critique of rights, the next section attempts to clarify the conceptual terrain by highlighting the ideas to which rights appear to contradict.

4. The Nineteenth Century

The pace of socio-economic and political change quickened in the nineteenth century. The industrial revolution initiated in Britain, underpinned by an ideology of *laissez-faire* economics and championed by theorists such as John Adams (1723-1790), quickly spread to continental Europe and the United States. Related transformations, such as urbanisation and population growth, and technological advancements in agriculture, transport and communications, ruptured older social ties in an unprecedented manner.

As the social structures broke down, new forms of social identity were created. At a political level, this expressed itself in the rise of national pride and the creation of class consciousness. The former led to the unification of Germany and Italy and the renaissance of cultural identities among many peoples. Furthermore, it helped solidify the self-confidence of the state. Nationalism, allied to the drive for economic expansion, fuelled colonising ambitions throughout the world – the overseas possessions of Britain were formally declared an Empire in 1877¹⁵⁷. The latter responded to the creation and exploitation of large industrial working populations and led to a variety of ideologies which may be broadly categorised as socialism. At times, the two came together as in the Europe-wide attempted revolutions of 1848.

The push for better working conditions and participation in authority occurred incrementally through the development of trade unions and a politically capable labour movement. For instance, in Britain, the electoral franchise, although still tied to property and only to men, was widened in 1832, 1867, and 1884. Often, such developments were justified according to political pragmatism, rather than the granting of

¹⁵⁶ J. WALDRON, *Nonsense upon Stilts*, 21.

¹⁵⁷ Cf. E.J. HOBSBAWM, *The Age of Empire*.

rights. The underlying moral theory, which came to dominate the era, was utilitarianism, exemplified by John Stuart Mill (1806-73). Mill advocated a strong liberal notion of liberty as non-interference supported by a principle of utility which proposed the greatest happiness for the greatest number of people¹⁵⁸. (The current theoretical interest in rights-language exemplified in the central part of this thesis may be viewed as a reaction against this model.)

In the United States, the issue of slavery finally resulted in civil war¹⁵⁹. The preamble of the Constitution asserted that all were endowed with inalienable rights. Cases brought before the Supreme Court, therefore, relating to the slavery turned on the question: who are properly conceived as right-holders?¹⁶⁰ Some cases excluded; others granted rights based on a common humanity. The answer, perhaps, was only truly worked through in the U.S. civil rights protests of the 1960s.

At other times, the desire for better conditions took an aggressive form which pitched and defined social classes against one another. The more radical forms of socialism were driven by the utopian ideal of the classless society, in which power resided in the proletariat. Its most influential theorist, Karl Marx, believed in the inevitability of capitalism's downfall. Others, however, desired to hasten the process led by a vanguard.

By 1891, the fear of social convulsion resulting from revolution was echoed in the title of the encyclical *Rerum Novarum* of Pope Leo XIII¹⁶¹. Considered the first explicit Roman Catholic teaching on socio-economic matters, it called for social reconciliation by both reaffirming the rights to property which underpinned the capitalism system and asserting the basic just claims of the working classes. It encourages,

Some opportune remedy must be found for the misery and wretchedness pressing so unjustly on the working class [...] a small number of rich men have been able to lay upon the teeming masses of the poor, a yoke little better than slavery itself¹⁶².

It marks the origins of a tradition of Church teaching that would later incorporate a rights language. However, it is a point of considerable

¹⁵⁸ Cf. J.S. MILL, *Utilitarianism*; ID., *On Liberty*.

¹⁵⁹ Slavery had already been banned in other regions such as the Spanish and British Empires.

¹⁶⁰ It bears similarities to the debate concerning the native Latin American population in Spain at the end of the sixteenth century; cf. Ch. I, Sec. 5.3.2.

¹⁶¹ Cf. D. DORR, *Social Teaching*; R. CHARLES, *Christian Social Witness*, II; P. HENRIOT – E. DEBERRI – M. SCHULTHEIS, ed., *Catholic Social Teaching*.

¹⁶² *Rerum Novarum*, 3.

note that Church authorities, theologians or jurists made little contribution to its development since the early seventeenth century. Although juridical rights-claims may have developed within a scholastic and theological framework, rights-rhetoric since that period was intertwined with Enlightenment rationality. As a result, at a theoretical level, theological consideration of justice or law was not framed in terms of rights. At a social level, anti-clericalism and the enforced separation of Church and state in some countries, such as revolutionary France, along with the growing Church anti-modernist stance, created further entrenchment¹⁶³.

Edmundson characterises the nineteenth century as one of consolidation and retrenchment after the first expansionary period. An expansionary period may be identified as those times in «which “rights-talk” was so prevalent that its very prevalence became a matter of comment and criticism»¹⁶⁴. This section turns to three main critiques of the nineteenth century resulting from the first expansionary period.

4.1 *Rights and Scepticism*

Jeremy Waldron, in book entitled *Nonsense Upon Stilts* writes: «Misgivings about rights are not a new phenomenon [...] many of the issues have remained remarkably constant»¹⁶⁵. He gathers together three texts – *Reflections on the Revolution in France* (1790), *Anarchical Fallacies* (c. 1791) and «On the Jewish Question» (1884) – all of which directly respond to *the French Declaration of the Rights of Man*. They offer critical assessments of natural rights proposed by the dominant liberal tradition and offer alternative model of rights – as traditional liberties (Burke), as legal fictions (Bentham) or as participation in authority (Marx). Jeremy Waldron summarises the common dissent.

¹⁶³ For instance, Pius VI (1717-1799) wrote of the 1789 *Declaration of the Rights of Man*: «This absolute freedom is established as a right of man in society. It not only guarantees him the right not to be disturbed because of his religious opinions, but it also gives him licence to think, speak, write, and even print with impunity everything which the most unbridled imagination can suggest about religion. It is a monstrous right which seems nonetheless to the Assembly to result from the innate quality and freedom of all men [...] a chimerical right [...] contrary to the rights of the supreme Creator [...]» Cited in R. MCINERNEY, «Natural Law and Human Rights», 12. In light of this chapter, it should be noted that the Catholic Church was not alone in its scepticism of rights.

¹⁶⁴ W. EDMUNDSON, *An Introduction to Rights*, 12.

¹⁶⁵ J. WALDRON, *Nonsense Upon Stilts*, 3. All quotations from these three texts are taken from this collection.

Each of them offered a wider vision – the altruism of Bentham’s principle of utility, the intergenerational wisdom of Burke’s traditions, and the cooperative fulfilment of Marxian species-being. For all of them, human life, to be bearable, involved a substantial commitment to living together in community that is belied by the abstract egoism of a theory of human rights¹⁶⁶.

Thus far, the term right has been paired with other significant terms. In this section, the term may be viewed as being placed in a negative correlation: it is being defined by what it is perceived to contradict.

4.1.1 Edmund Burke: Rights and Tradition

Edmund Burke (1729-1797) responded to the French Revolution by lauding liberty but immediately asserted that it must always be placed within a real context or «circumstances»¹⁶⁷. His central critique turns on the fact that rights as declared in France are abstracted out of context, history and tradition. He writes,

I think I envy liberty as little as they do, to any other nation. But I cannot stand forward, and give praise or blame to any thing which relates to human actions, and human concerns, on a simple view of the object as it stands stripped of every relation, in all the nakedness and solitude of metaphysical abstraction. Circumstances [...] give in reality to every political principle it distinguishing colour, and discriminating effect¹⁶⁸.

The distinction between «metaphysical abstraction» and «circumstances» constitute his critique of the French Constitution and praise of the English Constitution. The Reflections are as much a celebration of the English Constitution as it is a critique of its French counterpart. He defends rights based on traditional liberties using the analogy of inheritance by which society remains secure and orderly; thereby, facilitating true freedom and rights. In comparison, he considers the abstracted rights of metaphysicians contained in the French declaration as dangerous because they lack context in the political and social reality. They become constructs that destroy hard-earned real rights and liberty.

¹⁶⁶ J. WALDRON, *Nonsense Upon Stilts*, 44-45.

¹⁶⁷ Burke foresaw much of the degeneration of the Revolution. Conor Cruise-O’Brien argues that Burke’s «insight is so acute as to endow him with prophetic power [...] not from any mystical intuition, but from penetrating powers of observation [...] Burke had immense respect for *circumstances*, and observed them with proportionate attentiveness». C. CRUISE-O’BRIEN, *The Great Melody*, 402.

¹⁶⁸ E. BURKE, «Reflections», 97.

They despise experience as the wisdom of unlettered men; and as for the rest, they have wrought under-ground a mine that will blow up at one grand explosion all examples of antiquity, all precedents, charters, and acts of parliament. They have «the rights of men». Against these there can be no prescription; against these no agreement is binding: these admit no temperament, and no compromise: anything withheld from their full demand is so much of fraud and injustice¹⁶⁹.

Natural rights are destructive; what they destroy are the necessary social and historical bonds that hold a society together. Above all, they destroy tradition – whether transmitted or expressed in the norms of political rules compromises and practicalities, the experience or wisdom of the ruling classes or the symbols and awe associated with the rituals that surround governance. Real rights are hard-won through the give-and-take of politics. Abstracted rights, on the other hand, admit no negotiation. Everything may be sacrificed in light of their demands – including the inherited principles, wisdom and symbols of a tradition.

The critique of Enlightenment reason is that it refuses to take account – and in fact destroys – the wisdom of a tradition within a society. It is an «arithmetic reason» that denies the intricacies of practical political thinking. Claiming metaphysical perfection, they foster selfishness and arrogance: «By having a right to every thing they want every thing»¹⁷⁰. In contrast, tradition cultivates political duty and virtue. Ultimately abstracted rights will undermine real rights because they undermine the social order on which real rights may be based.

4.1.2 Jeremy Bentham: Rights and Utility

In comparison, Jeremy Bentham (1748-1832) was confident in Enlightenment reason and its ability to emancipate and provide a more sound social order¹⁷¹. He represents currents in the intellectual development of the Enlightenment that are hostile to natural rights: «natural rights is simple nonsense [sic]: natural and imprescriptible rights, rhetorical nonsense – nonsense upon stilts»¹⁷². He condemns natural rights as fallacious in theory and anarchical in practice: «in the first place, the errors it contains in theory; and then, in the second place, the mischiefs

¹⁶⁹ E. BURKE, «Reflections», 104.

¹⁷⁰ E. BURKE, «Reflections», 105.

¹⁷¹ As with the *Philosophes* of the Enlightenment Era, Bentham sought to clarify meaning of terms and the intent to which they ought to be used. In his contrast to Burke, Timothy Fuller writes, «Burke found beauty where Bentham saw ugliness». T. FULLER, «Jeremy Bentham and James Mill», 713.

¹⁷² J. BENTHAM, «Anarchical Fallacies», 53.

it is pregnant with in practice»¹⁷³. They are nonsense because they are meaningless and contradictory; they are anarchical because they undermine what is truly necessary for good government.

Firstly, natural rights are nonsense. Bentham maintains that terms cannot be understood in abstract from their general use. In the case of jurisprudence, this means that terms such as right, duty or justice are required to be translated into the practical workings of the law. They can only make sense in the light of empirical observations such as the power of the sovereign, positive enactment of commands and the fear of sanction. Accordingly, rights may only be conceived as legal rights – there is no such thing as natural rights.

That there are no such things as natural rights – no such things as rights anterior to the establishment of government – no such things as natural rights opposed to, in contradistinction to, legal: that the expression is merely figurative; that when uses in the moment you attempt to give it a literal meaning it leads to error, and to that sort of error that leads to mischief – to the extremity of mischief¹⁷⁴.

Furthermore, they make no sense because they are riddled with contradictions. They make absolute claims yet are always in need of some constraints. They claim to be independent of the government yet it requires government to legislate for their meaning. Secondly, rights are anarchical. The errors lead to mischief because they undermine the role of law in social order. In making no sense, they will lead to violence for there is no other means by which one can adjudicate between rights or judge on the application of rights. Therefore, rights imply that people are bound to revolution, rather than disobedience, in the pursuit of what they assert.

The claims that rights are fallacious and anarchical reflect the influential categorical division initiated by Bentham for the proper exposition of the law. He distinguishes between descriptive or «expository jurisprudence» that accounts for the law as actually existing and observable, and «censorial jurisprudence» that analyses the law from a moral point of view, that is, it identifies weaknesses and proposes reform. In his *Introduction to the Principles of Moral and Legislation*, Bentham proposes the principle of utility for evaluating the law. Based on the premise that «Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*»¹⁷⁵, the principle proposes that

¹⁷³ J. BENTHAM, «Anarchical Fallacies», 49.

¹⁷⁴ J. BENTHAM, «Anarchical Fallacies», 52.

¹⁷⁵ J. BENTHAM, *Introduction to the Principles of Moral and Legislation*, 1.

calculative judgements may be made about what will increase general and individual happiness. Legislation therefore may be reduced to the interests of individuals.

The categorical distinction is critical in the historical development of rights. According to the typology outlined at the beginning of this thesis, the development may be traced as follows. In the pre-modern era, *ius* developed into a tripartite and mutually interrelated connection of objective right (*iustum*), subjective or natural rights (*iura*) and law (*lex*). At the turn of the modern era, Thomas Hobbes reduced objective right to the demands of natural rights and placed them in contradistinction, rather than in relation, to the law – three became two. In denying natural rights all together, Bentham effectively isolated the law. Two became one. Rights became defined solely according to the functions of the law, independent of the requirements of justice and morality. It was the birth of legal positivism.

According to Bentham, rights are legal fictions arising from the central observable facts of law. The only real entities in law are people (sovereigns and governed), commands and sanctions. Legal duty is be subject to a command or prohibition of a sovereign or his representative.

A law commanding or forbidding an act thereby creates a duty or obligation. A right is another fictitious entity, a kind of secondary fictitious entity, resulting out of a duty. Let any given duty be proposed, either somebody is the better for it or nobody [...] If it be any other party then it is a duty owing to someone other party: and then that other party has at any rate a right: a right to have this duty performed: perhaps also a power: a *power* to compel the performance of such duty¹⁷⁶.

To have a legal right is to be the beneficiary of a legal duty. Following Bentham, jurisprudence limited itself to the level the conceptual analysis of rights. Although it could reveal interesting and influential classifications, a positivist account sidelined moral considerations. Much of contemporary discussion, exemplified by the three central theorists of this dissertation, has reacted strongly to the reductionism of rights and justice to positive law.

4.1.3 Karl Marx: Rights and Class

From German philosophy, French politics and English economics, Karl Marx (1818-1883) drew together the basis for a powerful critique of the basis of the emerging industrial society. Yet despite an

¹⁷⁶ J. BENTHAM, *Of Laws in General*, 239-294.

extensive output, Karl Marx paid very little attention to rights as such.

The primary text considering the issue is an early essay called «On the Jewish Question» in 1844¹⁷⁷. Of the American and French Declarations, Marx writes, «none of the of the so-called rights of man goes beyond egoistic man, man as he is in civil society, namely an individual withdrawn behind his private interests and whims and separated from the community»¹⁷⁸. Such rights represent an alienation of man from his true self and his true place in society. The rights of man are not merely symptomatic expressions of the current organisation of society; rather, they are a factor in the very constitution of the capitalist state. Rights only make sense in the capitalist phase of history. Reminiscent of Rousseau, Marx argues that rights create, justify and safeguard the conditions in which the powerful and propertied classes can flourish, to the detriment and exploitation of the masses. They are sustained by the mystifying ideology that declares them to be natural and universal. They are presented as beyond the sectional interests that they actually serve but in fact are fictions defending bourgeois class power. Vulgar or orthodox Marxism continued to view rights in such a manner.

He insists that the right to liberty is illusory, appearing to offer emancipation but in reality it debases the person. The Rights of man conceive of man as alienated from others and himself, egotistical and individualistic. The ensuing society based on such rights will necessarily be in conflict. Tom Campbell observes, «Marx's emphasis on the role of conflict in social relationships is reminiscent of Hobbes, but Marx sees social conflict as between groups or classes rather than between individuals [...]»¹⁷⁹. But as Gary Herbert comments, «Marx was, in a sense, returning to Rousseau's famous critique of Thomas Hobbes that Hobbes illegitimately transferred to human nature characteristics acquired by men only in civil society»¹⁸⁰.

¹⁷⁷ The paper is a response to Bruno Bauer on the question of Jewish emancipation. Human emancipation according to Marx is far more comprehensive than political emancipation and ought to be the true solution to the Jewish Question. True freedom will only occur when all can control the material conditions of their lives. He writes, «Therefore we do not, with Bauer, say to the Jews: you cannot be politically emancipated without radically emancipating yourselves from Judaism. Rather we tell them: because you can be politically emancipated without fully and definitively withdrawing from Judaism, *political emancipation* itself is not *human* emancipation». K. MARX, «On the Jewish Question», 42.

¹⁷⁸ K. MARX, «On the Jewish Question», 147.

¹⁷⁹ T. CAMPBELL, *Seven Theories of Human Society*, 113.

¹⁸⁰ G.B. HERBERT, *A Philosophical History of Rights*, 275.

Marx makes a distinction, albeit left undeveloped in his later work. In the text, Marx asserts two categories of rights: «the *rights of man* in so far as they differ from the rights of the citizen»¹⁸¹. On one hand, there are rights of the citizen: «rights which are exercised only in community with others. *Participation* in the community and specifically in the *political* community, in the state, constitutes their content. They fall under the category of political freedom [...]»¹⁸². Such rights need not isolate but are conducive to participation in a community and enable true control over the material conditions of life by all. Marx condemns the illusionary priority of the former over the latter. He argues that the French *Declaration of the Rights of Man* creates a situation in which «citizenship, the political community, is degraded by the political emancipators to a mere means for the preservation of these so-called rights of man [...] it is not man as citizen but man as a bourgeois who is called the real and true man»¹⁸³.

The second category – rights that facilitate participation – is in substance still limited according to Marx because it is part of the capitalist phase of history. But in a formal manner they do coincide with Marx's communal vision. Jeremy Waldron writes: «Full-blooded emancipation, therefore, requires not just the existence of a political community, but the involvement of that community in the democratic organisation and running of productive economic life»¹⁸⁴. In *Marxism and Morality*, Steven Lukes observes that of the Rights of the Citizen, Marx

failed to consider their positive, world-historical significance, their applicability to non-egoistic, non-bourgeois forms of social life, and their consequent relevance to the struggle for socialism, because his mind was so exclusively fixed upon the critique of the egoism of bourgeois society and the mystifying ideology that pervaded it, from the perspective of a future he imagined as emancipated from both¹⁸⁵.

However, contemporary neo-Marxists, such as Jürgen Habermas, considered in the central part of this dissertation, have moved beyond many Marxian categories. This has allowed them to draw upon a wider tradition based on the insight that democratic participation is necessary for true communal living and emancipation¹⁸⁶.

¹⁸¹ K. MARX, «On the Jewish Question», 43.

¹⁸² K. MARX, «On the Jewish Question», 43. For example, the right to participate in the general will, the free communication of thoughts and opinions, the demand of accountability of public officials and democratic rights in general.

¹⁸³ K. MARX, «On the Jewish Question», 147.

¹⁸⁴ J. WALDRON, *Nonsense Upon Stilts*, 131.

¹⁸⁵ S. LUKES, *Marxism and Morality*, 65.

¹⁸⁶ Cf. App. C.

5. The Twentieth Century

In the history of rights, the twentieth century is starkly divided. In the first half of the century, theoretical reflection on rights narrowed to become a functional analysis of the legal discourse. But the horrors of Second World War (1939-1945) and the subsequent publication of the *United Nations Declaration of Human Rights* (1948) marked a watershed, followed by a resurgence of rights claims in both populist emancipatory movements and in the political agenda¹⁸⁷. However, it took a further generation before theoretical reflection paid serious attention of the justification of rights¹⁸⁸.

5.1 *The Historical Context*

The contextual sub-sections that situate the textual analysis in this thesis can only give impressionistic picture. It is even more so of the twentieth century as the pace of events hasten and the historical forces multiply – leaving open the accepted charge of obscuring some movements or misconstruing others.

The first half of the century is dominated by the two world wars. The rise of the nation-state since the beginnings of modernity (made explicit in the Treaty of Westphalia) was strengthened by the rise of nationalism, which in turn justified militarism and imperialism. Democracy in Europe was unable to successfully replace the old monarchical order after the First World War, particularly in the face of extreme inflation (1923) and economic hardship (1929). Dictatorships became widespread, bound to ideologies of the state and nationalism. The religious wars of Europe gave way to national wars, descending into world-wide conflicts. The horrors of the two wars provided the motivation for two attempts in institutionalising human rights. The first, the International League of Nations (1919), proved to be very ineffectual in the face of national demands. The second, the United Nations (1945), has of course lasted, despite limitations. In particular, the *Shoah* and widespread genocide during wars and dictatorships provided the moral outrage to stimulate a reassertion of rights. But the first half of the century did see significant transformations. In particular, the suffragette movement successfully widened the franchise to include women in most democracies. The labour and trade union movement also won recognition of significant rights for workers, aided by the extension of the state into

¹⁸⁷ Cf. M. ISHAY, *History of Human Rights*, 173-314.

¹⁸⁸ W. EDMUNDSON, *An Introduction to Rights*, 107.

the economic sphere. These rights protected them against the worst exploitations of *laissez-faire* capitalism and were to help lay the foundation for the welfare-state.

If the first half of the century was dominated by actual war, the second half was overshadowed by the threat of a final war and nuclear holocaust. The political scene moved to a global level, subject to two superpowers of opposing ideologies. The rhetoric of rights surged due to the success of emancipatory movements, particularly in the 1960s. Many nations asserted their rights to self-determination in independence movements from colonial control. The civil-rights movements challenged racist structures in the United States and other parts of the world. The women's movement challenged implicit patriarchal power structures that discriminated against the rights of women. Rights language was extended to include all claims for freedom from perceived coercive and exploitative authority – sexual reproduction rights, gay rights, environmental rights, language rights, etc. The extension of rights is often categorised as three generations: the first are the traditional liberal rights, the second are socio-economic rights and the third concern cultural and environmental rights¹⁸⁹. They became the vocabulary of a burgeoning international law; the European Charter on Human Rights and the corresponding European Court of Justice being the most sophisticated. By the end of the century, globalisation and global nature of events continues to deepen – perhaps in part due to the end of the cold war and the apparent triumph of a capitalist economic and social ordering of society. But, if history is ideological struggle, as asserted by Marx, history has not ended, for there are still forces, such as religious fundamentalism, which are challenging its hegemony¹⁹⁰.

5.2 Wesley Hohfeld

Similarly to Bentham, Wesley Newcomb Hohfeld (1879-1918) was motivated to the desire to counter legal confusions and equivocations.

¹⁸⁹ They may also be categorised as blue, red and green rights, cf. C. DOUZINAS, *The End of Human Rights*, 115. Polarisation occurred after the initial drafting of the UNDHR on the proper weight to be afforded to differing categories of rights. As a result, two covenants were ratified: the ICCPR stresses civil and political rights held against the state, such as freedom of speech, association and travel and the protection of due process, and the ICESCR emphasises social and economic rights, such as the right to work, social welfare, health and education. The third generation are more controversial and concern rights to peace, humanitarian assistance, language and culture, cf. G.J. WALTERS, *Human Rights*, 15 ff. Rights have since further expanded to include a further categories such as medicine and animals; cf. C. WELLMAN, *The Proliferation of Rights*.

¹⁹⁰ Cf. F. FUKUYAMA, *The End of History*.

Concerned with the usage of rights only within legal reasoning, he provides a positivist account, shying away from metaphysical or ethical considerations. His analysis, published posthumously in *Fundamental Legal Conceptions* (1919), argued that the terminology of rights in legal use is not adequately accounted for by the simple duty-right correlation, as outlined by Bentham.

5.2.1 Rights: A Taxonomy

Hohfeld agrees with Bentham that a right in the strictest sense is the claim-right: rights are claims recognisable in law and are strictly correlated to the duty or obligation legally bound on another¹⁹¹. However, legal reasoning which uses rights terminology may be used in a manner other than right-claims: «the term “rights” tend to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense»¹⁹². Accordingly, he classifies four different categories of rights, as used in actual legal reasoning, and their corresponding legal relationships made of jural correlations and jural opposites¹⁹³. The four categories are claims, powers, liberties, and immunities.

Firstly, a *claim* is that legal assertion made by one party against another party in order that the first party may perform a specific duty-bound action. An example of a claim right is the right to have a loan repaid to a creditor resulting from the corresponding duty on the part of the debtor to make the repayment. The correlation to a right then is duty. For instance, a student's claim to confidentiality is directly related to the counsellor's legal duty not to reveal any confidential information without her permission. The opposite of a right is a no-right, that is, no claim on the duty of another.

Secondly, a *liberty* is that freedom whereby one party is legally protected against another party to perform a particular action in situations where the former party has no duty to perform that action. An example may be the protection in court afforded a spouse not to give evidence against her partner. A professor's academic freedom to express unpopular ideas in a classroom without fear of upsetting benefactors is directly related to the absence of any legal duty to the president by the professor in this regard. The correlation to a liberty-right is a no-right or the recognition of a duty not to. The opposite then is a legal duty.

¹⁹¹ W.H. HOHFELD, *Fundamental Legal Conceptions*, 38.

¹⁹² W.H. HOHFELD, *Fundamental Legal Conceptions*, 36.

¹⁹³ W.H. HOHFELD, *Fundamental Legal Conceptions*, 36 ff.

Thirdly, a *power*, if recognised by the law, is the legal prerogative of one party over a second party to bring about a legal situation. For example, the right to distribute property by will allocates further rights to the beneficiaries. Or, a student may waive her right to confidentiality because the action of giving consent extinguishes the counsellor's related legal duty not to do so. The correlation to a power-right, Hohfeld calls a liability; and the opposite is a disability.

Fourthly, an *immunity* is the legal recognition and protection of one party against a second party to bring about a legal situation. For example, the right to join a union may be seen as a guarantee of immunity from the action of an employer who might seek to forbid this¹⁹⁴. Or a student is immune from parents waiving her right to confidentiality. The correlation is a disability; and the opposite is a liability.

The taxonomy and conceptual framework proposed by Hohfeld became very influential in the course of the twentieth century. Although Hohfeld was primarily concerned with legal rights, scholars such as Carl Wellman have applied his distinctions to moral rights¹⁹⁵. Others, including Margaret MacDonald, H.J. McKloskey and Joel Feinberg, have considered rights to be «an argument over linguistic usages, and have adopted Hohfeld's analysis of legal rights as the appropriate paradigm for understanding non-legal, moral rights. The concept of "rights" has been replaced almost exclusively by the concept of "rights-talk"»¹⁹⁶.

5.3 United Nations Declaration of Human Rights

Founded in 1945, in order to facilitate international security in response to the Second World War, the United Nations unanimously adopted the *Universal Declaration of Human Rights (UNDHR)* three years later¹⁹⁷. The document was the product of many contributors from diverse cultures, chaired by Eleanor Roosevelt¹⁹⁸. The document begins

¹⁹⁴ The first set of examples is taken from B. ALMOND, «Rights», 262. The second set of examples is taken from C. WELLMAN, *The Proliferation of Rights*, 7-8.

¹⁹⁵ Carl Wellman argues that moral rights may be best conceived as a complex structure of Hohfeldian distinctions. Cf. C. WELLMAN, *Real Rights*. ID. «A New Conception»; ID., «Rights».

¹⁹⁶ G.B. HERBERT, *The Philosophical History of Rights*, 303; cf. M. MACDONALD, «Natural Right»; H.J. MACCLOSKEY, «Rights»; J. FEINBERG, «Duties, Rights and Claims».

¹⁹⁷ The Soviet bloc, Saudi Arabia, and South Africa abstained.

¹⁹⁸ On the history of the framing of the declaration, cf. M.A. GLENDON, *A World Made New*; J. MORSINK, *The Universal Declaration of Human Rights*.

with a simple statement recognising «the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world» in response to «barbarous acts» before listing human rights «as the common standard of achievement for all peoples and nations [...]»¹⁹⁹.

One framer, René Cassin, describes the subsequent articles contained in the document under the manifesto headings of dignity, liberty, equality and brotherhood²⁰⁰. The first two articles refer to the common value of all individuals regardless of creed, race or gender. For example, Article One states «All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience [...]». Articles Three to Nineteen relate to the basic rights of liberty, life and security. For instance, they forbid slavery, torture, arbitrary arrest and defend due process, freedom of movement and political asylum. Articles Twenty to Twenty-Six concern equality and concentrate on equality and political participation and, as Article Twenty-Two states, the «economic, social and cultural rights indispensable for his dignity and free development of his personality». Articles Twenty-Six and Twenty-Seven refer to education and creative achievement. The final articles concern the responsibilities of individuals and states to foster conditions in which the rights may be realised.

The Declaration deliberately uses the term human rights in order «to avoid any insinuation that only males are qualified to possess them [as implied by “rights of man”] and to eliminate the dubious presuppositions of traditional theories of natural rights»²⁰¹. But many consider human rights to be natural rights under a new guise. As Peter Jones observes: «Historically, the idea of human rights descended from that of natural rights. Indeed some theorists recognise no difference between them; they regard “natural” and “human” as merely different labels for the same kind of right»²⁰². However, Gary Herbert disagrees. The concept of human rights gained force precisely because it is necessarily cut from its moorings in a metaphysical human nature. He argues that human rights in modern political discourse are best seen as amplified civil rights that hold governments and societies to account. He writes, «The concept of *human* rights is *not* only not descended from the concept of natural rights; it is a repudiation of the concept of natural rights, both

¹⁹⁹ Cf. I. BROWNIE – G. GOODWIN-GILL, ed., *Basic Documents*, 17-23.

²⁰⁰ Cf. M. ISHAY, *The History of Human Rights*, 222; J. NICKEL, *Making Sense of Human Rights*.

²⁰¹ C. WELLMAN, *The Proliferation of Rights*, 15.

²⁰² P. JONES, *Rights*, 72.

ancient and modern [For] neither required nor recognised human dignity as its foundation»²⁰³.

Dignity is not defined in the UNDHR or any of the subsequent declarations or instruments of international law. Oscar Schachter notes, «Its intrinsic meaning has been left to intuitive understanding, conditioned in large measure by cultural measures»²⁰⁴. Capturing the idea of worth (*dignitas*), it attempts to appeal to all religious and philosophical traditions that acknowledge the importance of respect for or value of the person. The extent to which each tradition can do so has become a matter of continued debate. Other cultures may see rights as intimately bound to the Western experience and therefore incompatible with their chosen goals and common identity²⁰⁵.

However, the ability to cut across traditions allowed for human rights to become a central part of political discourse in the second half of the twentieth century. At an international level, the UNDHR is now supplemented by a host of further declarations and instruments and a deepening international law. The United Nations, although still submitted to the primacy of the sovereign state, has proved more effective than the preceding League of Nations. At a national level, rights-language came to dominate the political discourse, particularly after the civil-rights movements of the 1960s and associated movements for discriminated ethnic minorities, women's rights and the anti-nuclear movement.

5.4 *Pacem in Terris*

In 1963, Pope John XXIII issued the encyclical letter *Pacem in Terris* (Peace on Earth). According to John Langan, it represented, along with the experience and documents of the Second Vatican Council, a resolution of Catholicism's «long struggle with modernising and secularising culture of the West»²⁰⁶.

Against the cold war backdrop, the encyclical asserts the necessary interconnection between justice and peace. In an unprecedented exten-

²⁰³ G.B. HERBERT, *A Philosophical History of Rights*, 293-294.

²⁰⁴ O. SCHACHTER, «Human Dignity», 401 ff.

²⁰⁵ R. PANIKKAR, «Is the Notion of Human Rights a Western Concept?», 383 ff.

²⁰⁶ J. LANGAN, «Human Rights in Roman Catholicism», 110. *Pacem in Terris* and Vatican II represent a third phase. The first is marked by *Rerum Novarum* and the beginnings of official social doctrine; the second traverses the experience of two wars and growth of Christian Democratic Parties in Europe. On the transition, cf. D. HOLLENBACH, *Claims in Conflict*, 66 ff; C. CURRAN, «Churches and Human Rights», 38-41; E. MARTINEZ-FERNANDEZ, «Los Derechos humano y la doctrina social de la Iglesia», 149-182.

sive manner, rights language is appropriated within a wider context that informs much of the Catholic tradition²⁰⁷. As a point of departure, John XXIII writes,

Any human society, if it is to be well-ordered and productive, must lay down as a foundation this principle, namely, that every human being is a person, that is, his nature is endowed with intelligence and free will. By virtue of this, he has rights and duties, flowing directly and simultaneously from his very nature. And as these rights are universal and inviolable so they cannot in any way be surrendered²⁰⁸.

The central axle is the relationship between the human person, understood as a moral being orientated towards truth (that is, with intelligence and free will) and a successful social order based upon and capable of facilitating this vision. At one end of the axle, both rights and duties are considered to flow from a holistic account of human nature, that is, the human being as a unitary person. Resulting from an account of human nature the foundation of rights and duties is presented as universal and therefore open to all. The theological doctrines that inform the vision are the Incarnation and creation of human beings «in the image and likeness of God» (Gen 1:26). Revelation then is, «essentially confirmatory»²⁰⁹. On the other, the human person is necessarily orientated towards society.

Since men are social by nature they are meant to live with others and work for one another's welfare. A well-ordered society requires that men recognise and observe their mutual rights and duties. It also demands that each contribute generously to the establishment of a civic order in which rights and duties are more sincerely and effectively acknowledged and secured²¹⁰.

The social order is based on a social interdependence that mutually requires both right and duties. It has two aspects. Firstly, rights may be viewed as corresponding to the obligations bound on moral and successful living. Rights protect and duties strive toward the common good and individual goods which are essential to human flourishing and therefore part of human nature. It states: «The right of every man to life is correlative with the duty to preserve it; his

²⁰⁷ On the core principles informing the Catholic teaching on social issues, cf. THE PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, *The Compendium of the Social Doctrine of the Church*; R. CHARLES, *Christian Social Witness*, II; P. HENRIOT – E. DEBERRI – M. SCHULTHEIS, ed., *Catholic Social Teaching*.

²⁰⁸ *Pacem in Terris*, 9.

²⁰⁹ J. LANGAN, «Human Rights in Roman Catholicism», 111. The relationship between assertions of faith and reason, in relation to rights, will be returned to in the final chapter.

²¹⁰ *Pacem in Terris*, 34.

right to a decent standard of living, with the duty of living it becoming; and his right to investigate the truth freely, with the duty of pursuing it every more completely and profoundly»²¹¹. Secondly, rights and duties are bound the mutual recognition of the interpersonal dependence – another’s rights require acknowledgement of one’s duties. The comprehensive list of rights and duties are further presented with the social institutions natural and necessary to the social order, all of which are necessary for the common good²¹². These three characteristics – a comprehensive account of the human nature, the necessary sociability of the human person, and the natural necessity of the social institutions – place the language of rights back within the older Aristotelian-Thomist tradition²¹³. From a historical perspective, Brian Tierney writes,

The popes of our age, who have embraced so enthusiastically the idea of natural rights, after their predecessors condemned it for many years as an irreligious, Enlightenment aberration, have been returning, unwittingly perhaps, to a tradition rooted in the Christian jurisprudence and philosophy of the Middle Ages²¹⁴.

Allied to *Pacem in Terris* is the critical place of *Dignitatis Humanae*, promulgated at Vatican II. It asserts the religious freedom of all as a necessary aspect of recognising the dignity of each person. To each is the God-given obligation to search for truth, «in a manner proper to the dignity of the human person and his social nature»²¹⁵. As a result, coercion of religion or for religion is inappropriate. Indeed, religious freedom a necessary precondition of a just order. It places limits on the extent to which the state may interfere with religious affairs; and the extent to which religion may use the means of state to impose belief. Together the two documents provide the founding principles and initial manifesto of much of the contribution of the Roman Catholic Church as an advocate of human rights worldwide²¹⁶.

²¹¹ *Pacem in Terris*, 29.

²¹² For example, the social institutions of the family, rule of law and governance. *Pacem in Terris*, 16, 21, 48, 55, 92, 100.

²¹³ Cf. Ch. I; Ch. II, Sec. 1.

²¹⁴ B. TIERNEY, *The Idea of Natural Rights*, 343.

²¹⁵ *Dignitatis Humanae*, 2.

²¹⁶ For an internal Church document designed to foster reflection on rights and advocacy for rights cf. PONTIFICAL COMMISSION JUSTICE AND PEACE, *The Church and Human Rights*. For a collection of Church Documents and Papal addresses directly concerned with rights, cf. G. FILLIBECK, *Human Rights in the Teaching of the Church*.

A fuller account of scripture, tradition and the teaching of the Magisterium on rights will be provided when the thesis turns to consider the theological horizon.

6. Conclusion: Some Inferences

A number of relevant points, which parallel the final observations of the previous chapter, may be drawn from the second part of the historical study. They are proposed in order to respond to the central question guiding this question – what is morally and theologically at stake in the use of human rights?²¹⁷

Firstly, Chapter II charts the rise, fall and rise of rights in the modern era, focusing on two traditions – the Liberal and Critical tradition – both of which are bound to the characteristics and categories of thought associated with modernity. The liberal tradition arises from the origins of modernity and a new version of natural law. The critical tradition may be described as a critique of modernity using categories provided by modernity²¹⁸. As a result, evaluation of rights is often connected to an appraisal of western society. On one hand, they may be viewed as moral progress; on the other, they may be associated with moral decline. Either way, a thorough reflection on what is at stake in rights must take account of their contributions.

Secondly, recent history confirms an inference drawn in the last chapter – they express the demands made in the name of justice. In fact, they take on a motivational force in the modern era. Most commonly, they justified revolutionary or social reform, such as change in authority structures. They became slogans in the name of justice, particularly in defence of the discriminated or in advocacy of the marginalised. However, they were also used to justify socially conservative concerns, such as defence of private property and so protecting the economically powerful.

Thirdly, one of the distinguishing features of the modern era was the growth of a secular world view and the corresponding eclipse of a Christian theological framework. The Enlightenment optimism in the power of human reason, inspired by advances in science, excluded justifications according to divine revelation. However in recent generations, rights-rhetoric has been re-appropriated and has found new sources of justification in theology, facilitated in part by a renewal in

²¹⁷ Cf. Intro, Sec. 5.

²¹⁸ Cf. Ch. VI, Sec. 8 ff. On the dynamic of traditions of enquiry, cf. Ch VI, Sec. 2; Ch. VI, Sec. 7.

the Aristotelian-Thomist tradition of natural law. A number of important questions may be inferred. Can older models of moral reasoning take account of modernity's achievements?²¹⁹ Furthermore, is it possible for a Christian rapprochement with modernity, with regards to human rights?²²⁰

Fourthly, the central typology of a rights theory (justice, rights and law) and the associated lattice work of ideas undergo a significant change in this era. Significantly, rights are sceptically undermined leading to a breakdown of the typology, isolating justice and law from one another. The liberal and critical traditions propose differing frameworks, presenting the associated terms in a different manner, thereby prioritising and delineating rights in different ways. In contrast to the teleological model of the Aristotelian-Thomist tradition of natural law, they may be described as deontological: terms are defined according to principles independent of considerations of ends, purposes or goals. Such goals are left for the individual to choose. The principles then are bound to the conditions that provide for freedom, that is, the equal freedom of each to pursue a chosen good. Matching the previous chapter, four terms of the lattice work – state-society, justice, law and freedom – may be characterised as follows. Liberal theory presents the state as an artificial construct based on the consent of individuals and in service of the needs of individuals; justice is primarily accounted for in the protection of negative rights, which protect the equal freedom of all; the law is the command of the will of the sovereign and so characterised as positive enactment and coercive; and freedom concerns the ability to make personal choices without restraint. Critical theory shares similar characterisations but the terms are viewed through the lens of perceived oppressions. For instance, the state is an artificial construct that is capable of being manipulated into being a tool of domination or emancipation; justice is primarily viewed in terms of positive rights, which provide for socio-economic and political needs; the law is a means of social integration; and, finally, freedom may be described as empowerment²²¹.

Fifthly, the distinctive markings of the liberal and critical traditions may be described respectively as «Tolerance» and «Participation». They capture the central values that move each tradition. They act as both core principles that organise the enquiry and the virtues by which an individual or society may be gauged. From this inference, I wish to

²¹⁹ Cf. Ch. VI, Sec. 8 ff.

²²⁰ Cf. Ch. VII, Sec. 3 ff.

²²¹ Cf. Ch. VI, Sec. 5.

propose that these terms represent the core of what the respective models of reasoning assert to be crucially at stake in defending the individual in the name of justice. It is these aspects, therefore, that a dialogue about rights between traditions must turn²²².

I now turn to the central theorists of this thesis, each of whom stand as a contemporary representative of each tradition, in order to give an exposition of the complexity of their ideas.

²²² Cf. Ch. VI, Sec. 8 ff.

PART TWO
INTERPRETATION

CHAPTER III

John Finnis: A Natural Law Theory of Rights

1. Introduction

John Mitchel Finnis (1940-) is recognised by many, including critics, as a leading theorist in contemporary moral philosophy and jurisprudence. Writing of his central text, *Natural Law and Natural Rights*, Neil MacCormick comments that it makes «a radical impression by a careful restatement of an old idea, bringing old themes back to new life by the vigour and vividness with which they are translated into a contemporary idiom»¹. Such a translation, according to Terence Kennedy, is to expound «the Rule of Law in society in terms of human rights as the modern idiom for Natural Law»². Henry Veatch may be critical but he acknowledges that Finnis's central text is «a book that bids fair to being the one really definitive treatment of natural law in the present day»³.

Although born in Australia, John Finnis currently teaches jurisprudence, law and ethics on both sides of the Atlantic. He graduated in law from Adelaide University in Australia (1961) and, as a Rhodes Scholar, completed his doctoral studies from Oxford University in the United Kingdom (1965). He is joined the English Bar; but his career primarily has continued at Oxford in which he has held positions of Lecturer, Reader and Professor of Law and Legal Philoso-

¹ N. MACCORMICK, «Natural Law», 105.

² T. KENNEDY, «The Originality of John Finnis», 125.

³ H. VEATCH, «Review of Natural Law and Natural Rights», 259.

phy⁴. In addition, he became a member of the Philosophy sub-faculty in 1984. Since 1995, he has divided his commitments and holds professorial appointments at Oxford and at Notre Dame University in the United States.

His writings have explored the morality of many social issues including abortion,⁵ sexuality,⁶ and the strategy of deterrence that perpetuates the threat of nuclear holocaust⁷. In promoting public ethical reflection, he acted as governor to the Linacre Centre for Health Care Ethics in London (1981-1996), and as a leading Catholic intellectual, he served on the International Theological Commission (1986-1992) and the Pontifical Council *De Iustitia et Pace* (1990-1995). Currently, he assists at the Pontifical Academy *Pro Vita* (2001-)⁸. In 1990, he became a Fellow of the British Academy.

In this chapter, I will analytically examine Finnis's framework by which he understands human rights in moral reasoning. I refer to Finnis's analysis of particular right-claims only where it clarifies the general discussion. This main section is followed by an outline of his reflections on Christianity before concluding with a presentation of significant points that link back to previous chapters and look forward to pending chapters.

2. Situating Finnis

In *Natural Law and Natural Rights*, Finnis presents his primary aim as the «re-presentation and development of the main elements of the “classical” or “mainstream” theories of natural law»⁹. This is the common purpose of all his significant works. While his primary influence and explicit point of departure is the canon of natural law

⁴ Other appointments included Associate-in-law at the University of California at Berkeley (1965-1966), lecturer at the University of Adelaide, professor of law at the University of Malawi (1976-1978) and Boston College (1993-1994).

⁵ Cf. J. FINNIS, «The Rights and Wrongs of Abortion», 129-152; ID., «The Laws of God», 59-98.

⁶ Cf. J. FINNIS, «Personal Integrity», 173-191.

⁷ Cf. J. FINNIS – J. BOYLE – G. GRISEZ, *Nuclear Deterrence*.

⁸ He has also been an advisor to the Catholic Bishops of England and Wales. He has advised a number of Australian governments on federal-State and UK-Australia constitutional relations. He was one of the first two laypersons appointed to the International Theological Commission.

⁹ J. FINNIS, *Natural Law and Natural Rights*, vi. Finnis refers to his own specialised field as «analytical jurisprudence». By this, it is taken to mean the mode thought prevalent in the English speaking world in which close attention is paid to the analysis of concepts and language-use in law.

writings¹⁰, he argues «in detail for his revisionist view of Aquinas's theory of natural law»¹¹.

Finnis self-consciously stands within the classical tradition, drawing upon much of its systematic framework, exemplified by Thomas Aquinas, Aristotle and Plato. He has never attempted a systematic history of natural law but prefers to engage with the fundamental structure of classical natural law thinking as presented by the canon. In particular, Aquinas plays a pivotal role, having a «uniquely strategic place in the history of natural law theorising»¹². Drawing upon the systematic framework of the tradition, Finnis maintains the necessary inter-connection between justice as the right thing, the rights of individuals and the law, in the light of a deep understanding of the human person. Accordingly, he «insisted that the justification of the modern rule of law [and associated rights] required the exposition of a substantive theory of human nature and the moral goods and values necessary to its perfection»¹³.

In an early article, entitled «Blackstone's Theoretical Intentions», Finnis argues that a fundamental break occurred between the classical and the modern traditions of legal reflection¹⁴. He rejects the models of the law represented by Bentham (legal positivism) and Blackstone (Lockean liberal rights) for within these frameworks the person is abstracted from their actual political and legal relationships, marginalising the concept of the common good as a means of justification for positive law. The good is posited by these theories as individual and pre-social and the law is considered as nothing more than the protection of rights – whether natural (Blackstone) or merely positive (Bentham). Ultimately, these two modern approaches to law must base legal obligation on superior will rather than on reason, which characterised the earlier tradition. Finnis contends that a return to pre-modern accounts of law is best able to counter such a voluntarist approach.

The re-integration of the theoretical concerns of classical natural law with the justification of rights language was influentially under-

¹⁰ Cf. Ch. I, Sec. 3.2.1 ff; App. C.

¹¹ A. LISSKA, *Aquinas's Theory of Natural Law*, 39.

¹² J. FINNIS, *Natural Law and Natural Rights*, vi.

¹³ C. COVELL, *The Defence of the Natural Law*, 196.

¹⁴ J. FINNIS, «Blackstone's Theoretical Intentions», 163-83. Other early articles include ID., «Reason, Authority and Friendship», 101-124; ID., «Scepticism, Self-Refutation, and the Good of Truth», 247-267. For my presentation of this break, cf. Ch. II, Sec. 1; Ch. II, Sec. 2.4.2; Ch. II, Sec. 4.1.2.

taken by Jacques Maritain (1882-1973)¹⁵. He argued that individual human rights are directly derivative from the natural law. In *Man and the State*, published in 1951, he asserted that each person's «right to existence, to personal freedom, and the pursuit of the perfection of moral life, belongs, strictly speaking, to natural law»¹⁶. However, according to Finnis, the neo-scholasticism exemplified by Maritain tended to be inaccurate in its exposition of Aquinas and muddled in its philosophical reflections¹⁷.

Such a two-fold criticism may be seen as points of departure in the re-appraisal of the natural law of Thomas Aquinas¹⁸. In order to supersede neo-scholasticism, Finnis has collaborated with Germain Grisez and Joseph Boyle in a re-articulation of the natural law capable of responding to contemporary philosophical objections and modern social concerns in a manner that they claim is true to Aquinas¹⁹. This project he calls the New Classical Theory²⁰. Firstly, it rejects the previously standard interpretation of Aquinas's theory of natural law as «unsound». Initially articulated in an article entitled «The First Principle of Practical Reason» (1965), Germain Grisez denied the prevalent interpretation of the natural law tradition. In order to deduce moral imperatives according to this model, a person

¹⁵ Cf. J. MARITAIN, *Man and State*; ID., *The Rights of Man and Natural Law*; ID., *The Person and the Common Good*. On the life and work of Maritain, cf. J. DI JOSEPH, *Jacques Maritain*.

¹⁶ J. MARITAIN, *Man and State*, 100.

¹⁷ J. FINNIS, «Introduction», in ID., ed., *Natural Law*, I, xvi. He observes: «These writings intended to participate in philosophical discourse, but tended to commingle properly philosophical inquiry with two other intentions: to expound the thought of Aquinas, considered as an unsurpassed authority, and to accept what support might be given to certain premises and conclusions by the authority of theology (or, more precisely, of the Catholic faith). The commingling of diverse intentions tended to impair not only the philosophical arguments of the neo-scholastics, but also the accuracy of their expositions of Aquinas, whose work came to be seen through the spectacles of one or another school or tradition of philosophical doctrine».

¹⁸ Cf. R. BLACK, «Introduction», 1-5. Black identifies three criticisms of traditional scholastic thought by the New Natural Law School: firstly, scholasticism failed to link morality to issues of meaning; secondly, scholasticism provides a static understanding of human nature; thirdly, lacking an enquiry into meaning and being static, scholasticism succumbs to legalism.

¹⁹ Cf. R. MCINERNEY, «Grisez and Thomsim», 53-72; T. CHAPPELL, «Natural Law Revived», 29-52.

²⁰ J. FINNIS, «Introduction» in *Natural Law*, I, xix. He also accepts the more common title of New Natural Law Theory. Todd Salzman refers to it as the «Basic Goods theory»; cf. T.A. SALZMAN, *What Are They Saying About Catholic Moral Method?*, 1. This thesis shall use the more common phrase of New Natural Law Theory.

«examines an action in comparison with his essence to see whether the action fits human nature or does not fit it. If the action fits, it is seen to be good; if it does not fit, it is seen to be bad»²¹. Instead, Grisez gives an account in which the specific commandments of the natural law are self-evident principles of practical reasoning orientated towards the good. As a result, and secondly, Grisez responds in an astute manner to the primary modern philosophical criticism of the natural law – the fallacy by which an *ought* can be logically deduced from *is*. He does so by actually accepting the principle but denies that it undermines a correct reading of the natural law proposed by Aquinas. Instead, Grisez argues that practical reasoning requires no direct referral to theoretical truth. In the same article he writes,

The theory of law is permanently in danger of falling into the illusion that practical knowledge is merely theoretical knowledge plus the force of will [...] The way to avoid these difficulties is to understand that practical reason really does not know in the same way that theoretical reason knows. For practical reason, to know is to prescribe. This is why I insisted so strongly that the first practical principle [Good is to be done and pursued, and evil is to be avoided] is not a theoretical truth [...] This point is precisely what Hume saw when he denied the possibility of deriving *ought* from *is*²².

The moral life lived according to the natural law is ordered in harmony with the principles of practical reasoning and the goods towards which they aim. The project of New Natural Law – which includes the primary works of John Finnis – is to unpack and deepen this insight attributed to Aquinas²³. Their approach has been restated and refined in many collaborative and individual works and articles of the *American Journal of Jurisprudence*, formerly known as *The Natural Law Forum*. Although they claim to be faithful to the exposition and spirit of Aquinas, they do admit that their project advances his theory:

it uses some language common in the (broadly-speaking, Thomistic) natural-law tradition from which we developed the theory. But what we say

²¹ G. GRISEZ, «The First Principle of Practical Reason», 168.

²² G. GRISEZ, «The First Principle of Practical Reason», 216-217.

²³ There are many collaborators and sources of this school. They include: J. BOYLE – G. GRISEZ, *Life and Death*; G. GRISEZ, *The Way of Lord Jesus*; J. FINNIS – J. BOYLE – G. GRISEZ, *Nuclear Deterrence*; G. GRISEZ – J. BOYLE – J. FINNIS, «Practical Principles, Moral Truth, and Ultimate Ends», 237. Defenders of the school include R. GEORGE, ed., *Natural Law and Moral Inquiry*, among others. For brief overviews, cf. J. PORTER, «Basic Goods and the Human Good»; ID., «The Natural Law and the Specificity of Christian Morality».

here differs in various ways from the theories articulated by Aristotle, Thomas Aquinas, and others²⁴.

Within the Thomist tradition, the project – most frequently referred to as the New Natural Law Theory – has been critiqued by many for failure to be true to Aquinas²⁵. In common, negative commentators wish to reassert the necessary role of metaphysics in revealing a human nature that can provide facts from which norms or values may be deduced. For example, the previously mentioned Henry Veatch argues:

For it really isn't necessary, [Finnis] seems to say, that so-called natural laws in law and ethics should be laws of nature at all, or in any sense discoverable in nature. No, and as if to puzzle and perplex his readers even more, Finnis apparently wants to claim no less a one than St. Thomas Aquinas as being on his side in this regard. For St. Thomas, Finnis suggests, was one who was never taken in by any such notion as that one might be able to derive ethical principles from nature, or that one would ever need to suppose that ethics had to be based on metaphysics²⁶.

Veatch maintains that the Grisez-Finnis re-interpretation is characterised by modernity. In particular, the central assertion that ethics may be pursued in an autonomous manner independently of metaphysics and nature is the result of Kantian philosophy and therefore unfaithful to the Aristotelian-Thomist tradition of natural law. In *Human Rights: Fact or Fancy*, he writes,

Was it not Kant, after all, who decisively turned his back on Aristotle and on the entire tradition of natural-law ethics, in his unequivocal repudiation of nature as being able to provide a foundation for morals or ethics? Accordingly, just as Kant in his ethical deontology sternly refused to make

²⁴ G. GRISEZ – J. BOYLE – J. FINNIS, «Practical Principles», 237.

²⁵ Cf. R. MCINERNEY *Aquinas on Human Action*; R. HITTINGER, *A Critique*; L. WEINREB, *Natural Law and Justice*; A. LISSKA, *Aquinas's Theory of Natural Law*; J. PORTER, *Divine Law and Human Law*; P. WESTERMAN, *The Disintegration of the Natural Law*.

²⁶ H. VEATCH, «Natural Law and the 'Is-Ought' Question», 293. The debates have flowered into a series of articles and responses, cf. R. MCINERNEY, «The Principles of Natural Law», 1-15; to which a response was made, cf. J. FINNIS – G. GRISEZ, «The Basic Principles of Natural Law», 21-31. For other critical articles, cf. B. JOHNSTONE, «The Structures of Practical Reason», 417-446; J. SCHULTZ, «Is-Ought», 1-23; P. SIMPSON, «St. Thomas and the Naturalistic Fallacy», 51-69; to which Grisez responded, cf. G. GRISEZ, «The Structures of Practical Reason», 269-291; for further critical comment, cf. D. FLIPPEN, «Natural Law and Natural Inclinations», 284-316; to which Grisez responded, cf. G. GRISEZ, «Natural Law and Natural Inclinations», 307-320.

even the slightest concessions to natural teleology, may we say that Grisez [and Finnis] would appear to be following Kant's suit²⁷?

Finnis rejects Veatch's description of his position because it creates gulfs between logical distinctions and therefore does not take account of the explicitly asserted relationship between ethics and human nature²⁸. This chapter further explains Finnis's position.

Teresa Iglesias-Rozas maintains that «he is to be counted as a *sui-generis* Aristotelian-Thomist»²⁹. In the history of the Aristotelian-Thomist model of natural law, the mark of modernity in the return to Aquinas by Finnis (inspired by Grisez and in collaboration with others) parallels the previous great return to Aquinas of the Second Scholasticism. As Vitoria and Suárez returned to the *via antiqua* in the light of nominalism³⁰, so also Finnis and Grisez turn towards Aquinas in the light of post-Kantian modernity. Perhaps what has been observed of the former can be applied to the latter: «the very incompleteness of that turning away was a source of theoretical originality and power»³¹. I will later contend that this is particularly true with respect to the particular issue of providing a theoretical support for rights³².

Like Vitoria and Suárez, Finnis claims to be true to the Aristotelian-Thomist tradition. Out of such fidelity, he condemns elements of contemporary moral theology and

their characteristic moral principle and method: Pursue the course which promises, in itself and its consequences, a net greater proportion of good states of affairs, or (again, too casually supposed to be a coapplicable criterion) a net lesser proportion of bad, overall, in the long run. For the sake of a label, let us call this «proportionalism»³³.

He criticises the proponents of such an approach on the grounds that it is philosophically unsound and unfaithful to the Christian and Thomist tradition³⁴. In summary, he writes, «the tradition, both of phi-

²⁷ H. VEATCH, *Human Rights: Fact or Fancy*, 98.

²⁸ Cf. J. FINNIS, «Natural Law and the “is” – “ought” Question», 226-277.

²⁹ T. IGLESIAS-ROZAS, «Reasons for Action», 240.

³⁰ Cf. Ch. I, Sec. 5.3.

³¹ O. O'DONOVAN – J. LOCKWOOD-O'DONOVAN, ed., *Irenaeus to Grotius*, 552.

³² Cf. Ch. II, Sec. 7 ff.

³³ J. FINNIS, *Moral Absolutes*, 14.

³⁴ Cf. J. FUCHS, *Christian Morality*; T.E. O'CONNELL, *Principles for a Catholic Morality*; B. HOOSE, *Proportionalism*. For an overview of the debate, cf. T.A. SALZMAN, *What are They Saying about Catholic Moral Method?*; R. GAILLARDETZ, «John Finnis and the Proportionalism Debate», 125-142. Nigel Biggar and Rufus Black contend that «this heated conflict» and the «ecclesial-political environment»

osophy and of faith, treated as obviously untenable what proportionalists today profess to be self-evident»³⁵. This critique is part of a wider analysis of moral methodology that excludes as untenable the possibility of any final measurement or prediction of consequences³⁶. The reasons for his critical assessment are further outlined in the course of this chapter.

The central proponents of the New Natural Law Theory may be taken as a group³⁷. However, John Finnis is considered separately for the purposes of this dissertation because, as a legal philosopher, he provides the explication and application of the theory in the light of jurisprudence. As a result, he presents a greater delineation of the issues surrounding justice, rights and law – thereby making for a clearer subsequent comparative study. His published works include *Natural Law and Natural Rights* (1980), *Fundamentals of Ethics* (1983), *Moral Absolutes: Tradition, Revision and Truth* (1991) and *Aquinas: Moral, Political, and Legal Theory* (1998). References to collaborative works, such as *Nuclear Deterrence, Morality, and Realism* (1987), will be made to the extent that it expands and deepens the discussion.

Of *Natural Law and Natural Rights*, Finnis writes, «Almost everything in this book is about human rights (“human rights” being a contemporary idiom for “natural rights”: I use the terms synonymously)»³⁸. His ethical and jurisprudential reflections regarding rights are the result of the application of a general conceptual framework. This chapter proceeds accordingly: first, it outlines the elements of his framework; secondly, it focuses on the resulting reasoning about rights. It is supported by reference to his other ethical works.

3. General Theoretical Framework

Natural Law and Natural Rights begins

There are human goods that can be secured only through the institutions of human law, and requirements of practical reasonableness that only those institutions can satisfy. It is the object of this book to identify those goods, and those requirements of practical reasonableness, and thus to show how

has «resulted in a significant hindrance of the advancement of ethical understanding [that New Natural Law may represent]». N. BIGGAR – R. BLACK, «Preface» in *The Revival of the Natural Law*, xv. Parenthesis added.

³⁵ J. FINNIS, *Moral Absolutes*, 20.

³⁶ Cf. J. FINNIS, *Fundamentals of Ethics*, 80-86.

³⁷ Cf. R. GAHL, *Practical Reason in the Foundation of Natural Law*, ii.

³⁸ J. FINNIS, *Natural Law and Natural Rights*, 198.

and on what conditions such institutions are justified and the ways in which they can be (and often are) defective³⁹.

In other words, the purpose of this particular work is to justify the rule of law and its associated institutions and to outline the criteria by which it may be evaluated by way of a substantive account of the elements that constitute human good and the practical demands of being reasonable. Accordingly, Finnis's primary concern is to propose a normative account of the law or a consistent theory which supports the moral authority of law to guide human action.

His reflections rest primarily on reasons for actions. In pursuing a particular course of action, a person (or community) invokes reasons by which that action is justified to oneself and others, that is, she engages in practical reasoning: «Practical thought is thinking about what (one ought) to do»⁴⁰. Reflection on the reasons for particular acts exposes values inherent in that for which we strive.

Human affairs are properly understood in the light of their purpose or significance to those who participate in them. Social practices in which people participate and which guide human affairs, such as law, can be fully understood «only by understanding their point, that is to say their objective, their value, their significance or importance, as conceived by the people who performed them, engaged in them, etc»⁴¹. To describe law, therefore, is to implicitly evaluate it. Finnis explicitly rejects those legal philosophies that claim to be merely describing law, and so are value-neutral, for being methodologically blind or naïve⁴². An explanation of the law is never merely its description. Such descriptive theories claim to be neutral on the matter of what ought to be done, yet it is the normative claim – what is to be done? what purpose is being pursued? – that inheres in the social practice of law. The normative element is necessarily a part of any descriptive theory of law: ethics and legal theory are inextricably bound. He maintains therefore that there is a mutual necessity between the two elements. There is a to-and-fro movement leading to a reflective equilibrium between the values held to be important and the descriptions of the human and cultural context.

A methodologically-aware jurisprudence allows for the priority of the practical viewpoint – that is, for value, purpose, significance, or the

³⁹ J. FINNIS, *Natural Law and Natural Rights*, 1.

⁴⁰ J. FINNIS, *Natural Law and Natural Rights*, 12.

⁴¹ J. FINNIS, *Natural Law and Natural Rights*, 1.

⁴² He names J. Bentham, J. Austin, and H.L.A Hart. The position is commonly categorised as legal positivism. The rejection of such a position will be a recurring theme of this thesis.

human good. Therefore, a sound legal theory must be one that provides a coherent account of practical reasoning. Such is the claim that Finnis makes for a theory of natural law.

A sound theory of natural law is one that explicitly, with full awareness of the methodological situation just described, undertakes a critique of practical viewpoints, in order to distinguish the practically unreasonable from the practically reasonable, and thus to differentiate the really important from that which is unimportant or in important only by its opposition to or unreasonable exploitation of the really important. A theory of natural law claims to be able to identify conditions and principles of practical right-mindedness, of good and proper order among men and in individual conduct⁴³.

3.1 *The First Principles of Practical Reasoning and Natural Law*

The conception of practical reasoning proposed by Finnis is of the Aristotelian-Thomist tradition. In *Central Issues in Jurisprudence*, N.E. Simmonds contrasts Finnis's approach with the «Humean conception of reason», that is, the model commonly associated with David Hume and the Enlightenment⁴⁴. According to Finnis, the second model originated in Thomas Hobbes and is founded on «the Hobbesian and Humean claim that practical reason is founded on pre-rational desires of which all we can say is 'we happen to have them'»⁴⁵. Chapter II outlined the role of Hobbes in the development of this assertion⁴⁶. The model holds that reasons for actions are simply justifications for desire. Reason is instrumental to attaining the object of our desires but cannot discern what ought to be desired – one desire is as good as another and may not be deemed to be reasonable or unreasonable. Finnis rejects such a model: a correct model of practical reasoning begins not from desires but from the basic human goods which are perceived to be desirable. The former gives precedence to desire: the latter, prioritises the human good.

According to Finnis, in coming to understand our actions,

the revealing question is the question «Why», not interpreted blankly as if one were investigating iron filings jumping to a magnet or the ricochet of billiard balls, but humanly and intelligently as «What for?» Only thus will one be able to describe one's actions as they really are, and oneself as the agent one really is. And only thus will the relations between desire and un-

⁴³ J. FINNIS, *Natural Law and Natural Rights*, 18.

⁴⁴ Cf. N.E. SIMMONDS, *Central Issues in Jurisprudence*, 97-113.

⁴⁵ J. FINNIS, *Fundamentals of Ethics*, 29.

⁴⁶ Cf. Ch. II, Sec. 2.2.

derstanding in the identification and pursuit of human good be accurately known⁴⁷.

Such a question is the primary concern of practical reason. Practical reasoning reveals itself by way of reflection on the basic motivations for doing the things a person does in the actual lived human experience in the every-day world. Importantly, practical reasoning presumes the free choice of individuals to shape their own destiny according to intelligible purposes or goals, that is, it pre-supposes that an individual has the capacity to know what they are doing and to act accordingly⁴⁸. Actions initiated by free choice «are done for the sake of something; they are rationally guided (whether or not they are morally good and entirely reasonable in other respects)»⁴⁹. As rationally guided, the principles of action may be discerned by practical reason reflecting upon itself. Reflection on the lived-experience of pursuing some purpose reveals the reasons why one is interested in that outcome. Distinct from a purpose itself, the reasons provided, which explain why a particular goal is desirable and an action is motivated by it, reveal in turn a good.

For example, among goods are winning and being healthy, considered insofar as they can be realised – protected, promoted, and so on – not only by one action but by many possible actions. In entering a contest or going to the doctor, one's purpose of winning or regaining health only participates in the goods of winning and health, in which one is interested more generally⁵⁰.

In other words, to achieve a purpose is to instantiate the good in which a person is interested. «Good in the widest sense in which it is applied to human actions and their principles, refers to anything a person can in any way desire»⁵¹. The good that is desired directs human action: in order to instantiate a good, a person must act in certain ways. Therefore, the dynamic of moral action, that is, the willed act initiated by free choice, is moved according to goods rather than desires. It stands in contrast with the model of Hobbes and Hume. Defending this mode of reasoning, Robert George writes that the goods

far from being reducible to desires, (they) give people reasons to desire things – reasons which hold whether they happen to desire them or not and

⁴⁷ J. FINNIS, *Fundamentals of Ethics*, 51-52, 136-142.

⁴⁸ This characteristic will become an important point in a later chapter; cf. Ch. I, Sec 7.1 ff.

⁴⁹ G. GRISEZ – J. BOYLE – J. FINNIS, «Practical Principles:», 240.

⁵⁰ G. GRISEZ – J. BOYLE – J. FINNIS, «Practical Principles», 241.

⁵¹ J. FINNIS – J. BOYLE – G. GRISEZ, *Nuclear Deterrence*, 227.

even in the fact of powerful emotional motives which run contrary to what reason identifies as human good and morally right⁵².

Deliberation or the persistent purposive questioning – why are you doing that? and Why should we do that? – will uncover a small number of basic goods. They are irreducible to any prior motive and need no further explanation except that they are rationally judged to be for the benefit of the person: «The basic goods are basic reasons for acting because they are aspects of the fulfilment of persons, whose action is rationally motivated by these reasons»⁵³. Such goods have motivating power because they are perceived to have intelligible value and are worth following. In the last analysis, they are experienced as aspects of our well-being, full-being, or human flourishing. They are not abstract entities but real elements that actually constitute people as persons. Through acted-out choices, people achieve their purposes. But it is only by the same means that people also form their own characters: it is «by a free choice I willy-nilly constitute myself a certain sort of person»⁵⁴. It is by choosing to instantiate the basic goods, a person participates in human flourishing; by choosing otherwise is to limit or hinder human flourishing.

Such basic goods «concern the evaluative substratum of all moral judgements [...] in which we grasp the basic values of human existence and thus, too, the basic principles of all practical reasoning»⁵⁵. The basic values or basic goods are the first principles of practical reasonableness to be pursued as an opportunity for human flourishing. They are the first principles of the natural law.

An account of practical reasonableness can be called a theory of «natural law» because practical reasoning's very first principles are these basic reasons which identify the basic human good as ultimate reasons for choice and action – reasons for actions which will instantiate and express human nature precisely because participating in those good, i.e. instantiating (actualising, realising) those ultimate aspects of human flourishing⁵⁶.

3.2 *The Basic Goods*

Practical reasoning reveals those goods or basic principles that are pursued as opportunities of human flourishing. Initially, they arise from

⁵² R. GEORGE, *In Defence of Natural Law*, 282.

⁵³ G. GRISEZ – J. BOYLE – J. FINNIS, «Practical Principles», 252.

⁵⁴ J. FINNIS, *Fundamentals of Ethics*, 139.

⁵⁵ J. FINNIS, *Natural Law and Natural Rights*, 59.

⁵⁶ J. FINNIS, «Natural Law and Legal Reasoning», 135-136.

a reflection on the motives or intentions in action: «At this point in our discourse (or private meditation), inference and proof are left behind (or left until later), and the proper form of discourse is ‘... is a good, in itself, don’t you think?’»⁵⁷.

By means of such discourse, basic goods are recognised as those that remain irreducible to any other. They cannot be logically deduced from something else nor are they instrumental in bringing about another good. Rather, they are basic or intrinsic and are made plain and evident in the commitment, action and decisions of all human beings. «Goods like these are intrinsic aspects – that is, real parts – of the integral fulfilment of persons. We call these intrinsic aspects of person full-being, «basic human goods»: basic not to survival but to human full-being»⁵⁸. They facilitate self-realisation, self-actualisation or self-fulfilment. They are universal modes of interest and commitment that underlie all practical pursuits at an individual and communal level (such as morality, politics and law and their respective codes)⁵⁹. As a result, they are the indemonstrable but self-evident principles of practical reason. Coinciding with the recognition of each basic inclination in the human person is a basic good or value for which a person strives and together they constitute human flourishing.

While there is a limitless diversity of pursuits and commitments, there are only a small number of basic goods. In *Natural Law and Natural Rights*, Finnis lists seven such basic goods. They are life, knowledge, play, aesthetic experience, sociability, practical reasonableness, religion⁶⁰. They correspond to the fundamental inclinations of the human person as follows: life, in all its aspects including self-preservation, health, shelter and procreation of life; knowledge, that is, an inclination to know the truth for its own sake and not as an instrumental towards another good; play, or that which has no point beyond its own enjoyment and therefore its own value – later to be supplemented by the good of excellence achieved through work; aesthetic experience, or the appreciation and creation of beauty; sociability, or the natural inclination to live together with a minimum of peace and harmony or, at most, a real friendship; practical reasonableness, which brings to bear effectively one’s own intelligence in order to shape one’s own life, character and future – that is, the other basic goods – in order

⁵⁷ J. FINNIS, *Natural Law and Natural Rights*, 85-86.

⁵⁸ J. FINNIS – J. BOYLE – G. GRIEZ, *Nuclear Deterrence*, 277.

⁵⁹ J. FINNIS, *Moral Absolutes*, 42.

⁶⁰ Cf. J. FINNIS, *Natural Law and Natural Rights*, 81-92; ID, *Fundamentals of Ethics*, 51, 124.

to bring about inner peace, authenticity and self-determination⁶¹; and finally religion, or the inclination beyond ourselves to meaning itself and the corresponding value of engaging with the ultimate order of things⁶².

The list of the basic goods has evolved since it was first compiled by Grisez in the founding article of New Natural Law Theory⁶³. James Bernard Murphy questions the extent to which the basic goods may be called self-evident if they are open to continual modification. In particular, Murphy argues for the place of work as an intrinsic good that facilitates self-realisation and fulfilment and which was initially overlooked by Finnis and Grisez⁶⁴. The recent addition of the basic good of marriage – linked to the human inclination of sexuality – has produced a good deal of response⁶⁵. In an article entitled «The Basic Dimensions of Human Flourishing: A Comparison of Accounts», Sabina Alkire

⁶¹ It relates to Aristotle's *phronesis* and Aquinas' *prudencia*. By ordering the other goods and the means by which to achieve them, Finnis describes it as «architectonic». J. FINNIS, *Fundamentals of Ethics*, 70.

⁶² The seven categories are divided into two groupings. The first three goods are called *substantive goods* for they concern our animal (life) and rational selves (knowledge and beauty), and simultaneously animal and rational (play and work). The following four are called *reflexive goods* because they concern harmony with others (friendship), within oneself (Practical Reasonableness), within ones judgements and with the transcendent. G. GRISEZ – J. BOYLE – J. FINNIS, «Practical Principles», 106-108.

⁶³ Cf. G. GRISEZ «The First Principles of Practical Reason», 168-196. Grisez categorised eight forms of human good which are latter reaffirmed, cf. G. GRISEZ – R. SHAW, *Beyond the New Morality*. However, the list is revised by Finnis. The basic good of Integrity, identified by Grisez, is included under the category of Practical Reasonableness, cf. J. FINNIS, *Natural Law and Natural Rights*, 86-90. The basic good of Work, albeit as a compliment to Play, first appears in G. GRISEZ, *The Way of the Lord Jesus*, II, 115-138. In later works the basic goods of Knowledge and Aesthetic Experiences are placed under the same category and Practical Reasonableness is divided into inner peace and authenticity, cf. J. FINNIS – J. BOYLE – G. GRISEZ, *Nuclear Deterrenc*, 279; G. GRISEZ – J. BOYLE – J. FINNIS, «Practical Principles», 107-108; J. FINNIS, *Moral Absolutes*, 42-43. Recently, Finnis has further modified the list by adding marriage and reintegrating inner peace and authenticity under the category of practical reasonableness, cf. J. FINNIS «Is Natural Law Theory Compatible with Limited Government?», 4. For a tabulation of the changes in Finnis's work, cf. S. ALKIRE, «The Basic Dimensions of Human Flourishing», 76. This chapter follows the list presented in *Natural Law and Natural Rights*.

⁶⁴ Cf. J.B. MURPHY, «A Natural Law of Human Labour», 74-95. In response, Finnis would argue that self-evidence does not mean everyone automatically knows them; cf. J. FINNIS, *Natural Law and Natural Rights*, 225.

⁶⁵ Cf. G. MOORE, «Natural Sex», 223-241; L. SOWLE CAHILL, «Grisez on Sex and Gender», 242-261; S. MACEDO, «Against the Old Sexual Morality», 27-48.

compares the list provided by Finnis to other lists offered by other philosophers, psychologists and anthropologists, while taking account of his criteria. The result is the identification of nine basic reasons for action, similar yet in some manners different to that of Finnis⁶⁶.

However, the Natural law, as argued by Finnis, is not a static theory but an ongoing and continual reflection of practical reason to discern and clarify the principles of action – that is, the basic goods as revealed by practical reason. He accepts that the list may be modified.

There is no need for the reader to accept the present list, just as it stands, still less its nomenclature (which simply gestures towards categories of human purpose that are each, though unified, nevertheless multi-faceted) [...] It seems to me that those seven purposes are all the basic purposes of human action, and that any other purpose which you or I might recognise and propose will turn out to represent, or be constituted or, some aspect(s) of some or all of them⁶⁷.

In fact, a vigorous debate on what are the basic values that universally inform our actions would be welcomed by Finnis for it would continue the re-establishment and an advancement of the natural law model of reasoning⁶⁸. Indeed, it will be later maintained that continued deliberation (and therefore, disagreement and debate) is essential and inherent to the working of the natural law⁶⁹. In some form or another, the basic goods «have been called in the Western philosophical tradition the first principles of natural law, because they lay down for us the outlines of everything one could reasonably want to do, to have, and to be»⁷⁰. Taken together they are all indispensable aspects of what was later described as «integral human fulfilment»⁷¹.

⁶⁶ Cf. S. ALKIRE, «The Basic Dimensions of Human Flourishing», 73-110. They are: life; understanding for its own sake; skilful performance and production; creative expression (play, humour, sport), friendship and affiliation; meaningful choice and identity; inner harmony between feelings, judgements, and behaviour; harmony with a greater-than-human source of meaning and value; harmony with the natural world.

⁶⁷ J. FINNIS, *Natural Law and Natural Rights*, 92.

⁶⁸ Olaf Anderson observes «there does need to be a corrective mechanism in natural law theory as there is in science. Where science can hypothesise and falsify and thus correct itself, natural law needs a similar tool». O. ANDERSON, «Is Contemporary Natural Law Theory a Beneficial Development?», 478-491, 490. For other contemporary philosophers influenced by Aristotelian models, who attempt similar projects to Finnis, cf. M.C. NUSSBAUM, *Women and Human Development*; D. BAYBROOKE, *Natural Law Modernised*.

⁶⁹ Cf. Ch. VI, Sec. 6.2 ff.

⁷⁰ J. FINNIS, *Natural Law and Natural Rights*, 97.

⁷¹ G. GRISEZ – J. BOYLE – J. FINNIS, «Practical Principles», 131.

There are three important features of the basic goods. Firstly, the basic goods are intrinsic to themselves and therefore recognisable as being irreducible. As a result, Finnis insists that the basic goods are incommensurable, that is, one may not be measured against another. No objective hierarchy exists between them, by which it may be judged one to be more important than another. Each may be regarded as having priority or importance according to the attention that it receives. It is, rather, the real life commitments of an individual which give priority to one over another. For example, a scholar may choose to commit herself to the value of knowledge. In order to do so, she may need to sacrifice another basic value such as play. Secondly, the basic goods are independent of one another. This is an important distinguishing characteristic of the systematic presentation of the New Natural Law Theory, representing a development of the Thomist tradition. Aquinas does not present such a list and offers only three inclinations – self-preservation, procreation and rationality-sociability⁷². Furthermore, Finnis denies the view commonly attributed to the scholastics, that there is a sole unifying good in the contemplation of God. Instead, the goods have no objective unification arranged according to their fulfilment in one sole good. Terence Kennedy observes: «Finnis, therefore, propounds a view of the last end of man not as the single good of the contemplation of God but as the fullness of life with all its complex and multiple goods in the Kingdom»⁷³. Thirdly, the basic goods are pre-moral, that is, they are identified as an objective part of human nature. They are human good rather than the moral good – simply they are those things that make life worthwhile. Moral norms do not inhere within them as such. However, they are directive of morality. In order to participate in the basic goods, that is, for a person to flourish and experience fulfilment, an active life must be pursued in a particular manner – to which I now turn⁷⁴.

3.3 *Requirements of Practical Reasoning*

In order for good to be achieved, that is, in order for a person to flourish, action must be pursued in a particular manner. The goods that facilitate flourishing direct practical reason. Practical reason, therefore,

⁷² Cf. Ch. I, Sec. 3.2.1 ff; *ST* Ia IIae, q. 94, a. 2.

⁷³ T. KENNEDY, «The Originality of John Finnis», 125.

⁷⁴ Cf. R. BLACK, «Introduction», 8-11. Black identifies six important features: pre-moral, incommensurable, non-hierarchical, constituent elements of human fulfilment, always culturally embodied and self-evident.

demands a coherent purpose or «integral directiveness»⁷⁵. Finnis exhorts:

Do not act pointlessly. The fundamental principle for moral thought is simply the demand to be fully rational: In so far as it is in your power, allow nothing but the basic reasons for action to shape your practical thinking as you find, develop, and use your opportunities to pursue human flourishing through your actions⁷⁶.

It is the concrete lived experience that reveals the means, or principles, by which a person may participate in all the goods. The principles are the basic requirements demanded of a person in her struggle to follow the right course of action in order to achieve good⁷⁷. Philosophically speaking, methodological requirements may be discerned, each representing the normative principles of practical deliberation and human action, to «guide the transition from judgements about human goods to judgements about the right thing to do here and now»⁷⁸. By bringing practical reason to bear on achieving the basic goods the norms of morality are produced – they become moral goods. «Thus, speaking very summarily, we could say that the requirements to which we now turn express the ‘natural law method’ of working out the (moral) ‘natural law’ from the first (pre-moral) ‘principles of natural law’ »⁷⁹.

Finnis argues that there are nine requirements of practical reasoning – which, taken together, constitutes practical wisdom or prudence⁸⁰. The nine requirements of practical reasoning are as follows⁸¹: first, to have a coherent life plan, which is the ability to see our life as a whole guided by commitments or projects, that is, to have a purpose; second, to make no arbitrary preferences amongst values, which requires that in the commitment to one good or some goods one should not deny any of the other values; third, to make no arbitrary preferences among people, which responds to the basic

⁷⁵ G. GRISEZ – J. BOYLE – J. FINNIS, «Practical Principles», 128.

⁷⁶ J. FINNIS, «Natural Law and Legal Reasoning», 137.

⁷⁷ «The history of moral philosophy [...] is the history of the search for the missing principles». J. FINNIS, *Fundamentals of Ethics*, 70.

⁷⁸ J. FINNIS, *Fundamentals of Ethics*, 70.

⁷⁹ J. FINNIS, *Natural Law and Natural Rights*, 103.

⁸⁰ Finnis (and the New Natural Law School) consider the listing of the requirements of practical reasoning to be filling a lacuna in Aquinas’ account. J. FINNIS, *Natural Law and Natural Rights*, 32.

⁸¹ Cf. J. FINNIS, *Natural Law and Natural Rights*, 100-127; ID, *Fundamentals of Ethics*, 70.

human dignity of each person; fourth and fifth, to have detachment and commitment, that is, to live a commitment but not to the extent that failure will lead to personal collapse; sixthly, to account for the (limited) relevance of consequences, which is to be efficient in attaining goals without reducing our goals to a mere measurement of utility; seventh, to have respect for every basic value in every act, as each act affirms or denies a basic value; eighth, to foster the requirements of the common good – which is the point of departure in Finnis’s reflections on justice and human rights; ninth, to follow one’s conscience, that is, to hold fast to what one believes to be a correct and reasonable judgement.

The application of these nine principles, or modes of responsibility, gives rise to morality. If an action is to be reasonable or to follow its own dictates, then it must take account of all these principles. By following such dictates of reason, one comes to discern the right thing to do in a given situation. In order to achieve human flourishing, we are bound to act according to the requirements that will bring it about. Practical reason, therefore, is the source of moral obligation; its principles «contribute to the sense, significance, and force of terms such as ‘moral’, ‘[morally] ought’, and ‘right’»⁸².

3.4 *The Natural Law and Nature*

The role of nature and, in particular, human nature has a critical place in the development of the natural law tradition. Outlined in Chapter I, changes in the conception of human nature effected developments in the natural law⁸³. It continues to mark many of the lines of debate.

The first principles of natural law, according to Finnis and the school of the New Natural Law Theory, are to be discerned from a thorough account of practical reason, that is, from ethical reflection on lived experience. They cannot be logically deduced or derived by theoretical reflection on human nature. To do so is to succumb to the naturalistic fallacy, or the impossibility of deriving an «ought» from the «is». Finnis claims that the natural law tradition, as epitomised by Aquinas (and Aristotle), does support his position:

for Aquinas, the way to discover what is morally right (virtue) and wrong (vice) is to ask, not what is in accordance with human nature, but what is reasonable. And this quest will eventually bring one back to the *underived*

⁸² J. FINNIS, *Natural Law and Natural Rights*, 127; cf. O. O’DONOVAN, «John Finnis on Moral Absolutes», 111-129.

⁸³ Cf. Ch. I, Sec. 3.1.

first principles of practical reasonableness, principles which make no reference at all to human nature, but only to human good⁸⁴.

As noted in a previous subsection⁸⁵, this present point – the impossibility of deriving moral claims from factual premises – is rejected by many others who claim to be aligned to the Aristotelian-Thomist tradition. At the heart of the critique is the claim that it ultimately undermines natural law theory⁸⁶. Of the argument that moral claims cannot be derived from factual premises, Jean Porter, in *Natural and Divine Law*, observes

No scholastic would interpret reason in such a way as to drive a wedge between the pre-rational aspects of our nature and rationality [...] In particular, [the scholastics maintain] the pre-rational components of human nature have their own intelligible structures, in virtue of which they provide starting points and parameters for the exercise of practical reason⁸⁷.

Pauline Westerman, in *The Disintegration of Natural Law Theory*, maintains that «the – professed – anxiety to commit the naturalistic fallacy as well as his foundation in ultimate and incommensurable values testify to the dominance of (Neo-)Kantian assumptions»; a strategy which, she argues, «turns out to be a dangerous one: once the enemy is encapsulated, it undermines natural law theory from within»⁸⁸. The previously mentioned Henry Veatch agrees. In *Human Rights: Fact of Fancy?*, he writes: «[from] a Kantian transcendental turn, it must inevitably follow that any attempt to find a proper justification for morals and ethics will thereby become hopelessly compromised»⁸⁹. The Kantian assumption is that the norms of morality are not to be found in nature but in the inescapable pre-conditions and structures of freedom

⁸⁴ J. FINNIS, *Natural Law and Natural Rights*, 36. Finnis quotes Aquinas *ST Ia IIae*, q 71, a 2c. «And so whatever is contrary to the order of reason is contrary to the nature of human beings as such; and what is reasonable is in accordance with human nature as such. *The good of the human being is being in accord with reason, and human evil is being outside the order of reasonableness* [...] So human virtue, which makes good both the human person and his works, is in accordance with human nature *just in so far as [tantum ... in quantum] it is in accordance with reason; and vice is contrary to human nature in so far as it is contrary to the order of reasonableness*». Italics added by Finnis.

⁸⁵ Cf. Ch. III, Sec. 2.

⁸⁶ Cf. R. MCINERNEY, «The Basic Principles of the Natural Law», 1-15.

⁸⁷ J. PORTER, *Natural and Divine Law*, 93. As a result, Porter argues that Finnis is «forced to deny the moral relevance of all those aspects of our humanity that we share with other animals».

⁸⁸ P. WESTERMAN, *The Disintegration of the Natural Law*, 288, 290.

⁸⁹ H.B. VEATCH, *Human Right*, 241-242.

characterised by practical reasoning⁹⁰. By accepting such an assumption, Finnis is accused of eclipsing metaphysics or the study of reality⁹¹.

In response, The New Natural Law argues that the accusation does not apply⁹². The naturalistic fallacy does not lead to the removal of nature from ethical discourse. «The logical distinction is not at all a “wall of separation”»⁹³. Finnis does not deny the important role to be played by theoretical (or metaphysical) knowledge of human nature. Drawing upon Aquinas in an article entitled «Natural Inclinations and Natural Rights: Deriving “ought” from “is” according to Aquinas», he writes that the ontological

presupposes and thus entails that the goodness of all human goods (and thus the appropriateness, the *convenientia*, of all human responsibilities) is derived from (i.e. depends upon) the nature which, by their goodness, those goods perfect. For those goods – which as ends are the *rationes* of practical norms or «ought» – would not perfect the nature were it other than it is. So, *ought* ontologically depends on – and in that sense certainly may be said to be derived from – *is*⁹⁴.

Such theoretical reflection is a derivative aspect of the one intelligible reflection. Finnis is focusing on the awareness of that intelligibility or the awareness of our coming to know. He is prioritising the role of epistemology, or more specifically the awareness of practical reasoning in coming to a full knowledge of the human person. And:

Epistemologically, (knowledge of) human nature is not the basis of ethics; rather ethics is *an indispensable preliminary* to a full and soundly based knowledge of human nature. What one can and should say about human nature as the result of one’s ethical inquiries, is not mere rhetorical addition; it finds a place in the sober and factual account of what it is to be human⁹⁵.

Ethics, or the disciplined reflection of and on practical reason, reveals the self-evident truths of the basic goods: they cannot be the conclusions of a theoretical (or metaphysical) knowledge of human nature. Referring again to Aquinas:

For we come to know human nature by knowing its potentialities, and these we come to know by knowing their actuations, which in turn we know by knowing their objects – the objects of the characteristically human *inclina-*

⁹⁰ Cf. Ch II, Sec. 3.4.1.

⁹¹ A. LISSKA, *Aquinas and Natural Law*, 150-165.

⁹² Cf. R. GEORGE, «Natural Law and Human Nature», 31-41.

⁹³ J. FINNIS, «Natural Law and the ‘Is’-‘Ought’ Question», 314-315.

⁹⁴ J. FINNIS, «Natural Inclinations and Natural Rights», 45.

⁹⁵ J. FINNIS, *Fundamentals of Ethics*, 21-22. Italics added.

tio and *actus*, the will, are precisely the primary human good. (So, if anything, an adequately full knowledge of human nature is derived from our practical and underived knowledge of the human goods [...]) In this sense «ought» is not derived from «is»⁹⁶.

Reflections on the facts of human nature do have a role for they help to deepen our understanding of the basic goods⁹⁷. In other words, studies of human nature, such as metaphysics, anthropology, sociology or psychology can provide knowledge from which norms can be inferred (but not deduced) «by way of an assemblage of reminders of the range of possibly worthwhile activities and orientations open to one»⁹⁸. What results is the previously outlined reflective equilibrium perceived of law and all the human sciences. There is a mutual necessity between the practical and the descriptive, creating a to-and-fro movement which deepens a full understanding of values and the human and cultural context⁹⁹.

In *Fundamentals of Ethics*, Finnis explicitly appreciates Kant's categorical imperatives as attempts to formulate the first principles of practical reasoning. In the principle of respect for humanity, Kant «rightly envisages a rational end (i.e. that which gives point to a choice) [...] but [...] fails to observe that human understanding grasps *intelligible ends*». As a result, Kant has «evacuated them of all content save the power and activity of reason itself»¹⁰⁰. According to Finnis, practical reason is able to discern – aided but not strictly derivable by theoretical reflection on human nature – the actual ends or basic goods which guide all human action.

4. The Common Good

To return to the pursuit of integral self-fulfilment of the person:

Integral human fulfilment is not individualistic satisfaction of desires or preferences. The ideal of integral human fulfilment is the realisation, so far as possible, of all the basic goods in all persons, living together in harmony¹⁰¹.

Its achievement is necessarily attained together. On one hand, the realisation of all the goods can only take place in partnership with others.

⁹⁶ J. FINNIS, «Natural Inclinations and Natural Rights», 46.

⁹⁷ G. GRISEZ – J. BOYLE – J. FINNIS, «Practical Principles», 111.

⁹⁸ J. FINNIS, *Natural Law and Natural Rights*, 81.

⁹⁹ This observation is an important point in a later chapter; cf. Ch. VII, Sec. 6.

¹⁰⁰ J. FINNIS, *Fundamentals of Ethics*, 123. On a brief presentation of Kant, cf. Ch. II, Sec. 3.4.1. The failure of Kant identified by Finnis is an important point in a later chapter; cf. Ch. VI, Sec. 6.4.

¹⁰¹ G. GRISEZ – J. BOYLE – J. FINNIS, «Practical Principles», 131.

The human person is a social being and the well-being of one is intrinsically bound with the well-being of others. Human fulfilment therefore is intrinsically other-orientated¹⁰². On the other hand, sociability (or friendship) is the basic good with a corresponding inclination in human nature – the person is a social being.

The general good of sociability can be instantiated in many forms, from intimacy to political association. Human relationships are natural and not simply conventional¹⁰³. In this regard, Finnis is perfectly in tune with the Aristotelian-Thomist tradition¹⁰⁴. However, Finnis maintains that for Aquinas – in comparison to Aristotle – the notion of a person as a political animal (*zoon politicon*) primarily refers to it as a social being and not narrowly political¹⁰⁵.

Each person acts within a network of overlapping relationships creating a unifying relationship or community. The human community is formed in part by common action. Community, therefore, should not be regarded as simply an association, in the sense of an entity or a thing but primarily as a sharing of life, action and interests, in the sense of relationship. It results from human interaction: «Every community is constituted by the communication and co-operation among its members»¹⁰⁶. A community's purpose – which is the vital question in the process of practical reasoning – is the facilitation of the flourishing of all its participants. The common good, therefore, is not the same as a common enterprise, but neither is the common good a simple sum-total of individual goods. Because it is through action and participation in the basic good of sociability that one may be fulfilled, a person should never be reduced to a cog in the wheel. To do so, is to deny human well-being¹⁰⁷. Each community or association ought to be allowed to prosper within its own sphere, thereby justifying the principle of subsidiarity. But even the deepest natural association such as the family has limitations. A further community is required:

There emerges the desirability for a complete community, an all-round association in which would be co-ordinated the initiatives and activates of in-

¹⁰² Cf. J. FINNIS, *Natural Law and Natural Rights*, 139-147. It contrasts with models of society based on rational self-interest, such as that offered by Thomas Hobbes; cf. Ch. II, Sec 1; Ch. II, Sec. 2.2.

¹⁰³ J. FINNIS, *Natural Law and Natural Rights*, 149. Finnis rejects the social contract as a form of reductionism and therefore a meagre account of the full extent of the human community.

¹⁰⁴ Cf. Ch. II, Sec. 1.

¹⁰⁵ J. FINNIS, *Aquinas*, 245-246.

¹⁰⁶ J. FINNIS, «Is Natural Law Theory Compatible with Limited Government?», 4.

¹⁰⁷ Cf. J. FINNIS, *Natural Law and Natural Rights*, 144-147.

dividuals, of families, and of the vast network of intermediate associations. The point of all-round association would be to secure the whole ensemble of material and other conditions [...] that tend to favour, facilitate, and foster the realisation by each individual of his or her development¹⁰⁸.

The «complete community» is the political and legal community because it is the fullest and expansive means of securing the good of its members. Political authority, therefore, is naturally necessary in order to solve co-ordination problems. In turn, legitimacy arises from the claims and success of the political and legal order to realise such an end. It is established by the ability of the political community to act in accordance to its own point or purpose, which is «the securing of a whole ensemble of material and other conditions that tend to favour the realisation, by each individual in the community, of his or her personal development»¹⁰⁹. In other words, the legitimacy of authority arises from the co-ordination of conditions that facilitate human flourishing – the common good.

On one hand, the political community is a manifestation of the good of sociability: participation in some community is necessary if an individual is to flourish. On the other, it also consists of the set of conditions which makes possible the exercise of practical reasonableness and achievement of fulfilled lives by its participants. The primary concern therefore of the political community is the public ordering of the concrete conditions which facilitate the individual good – that is, the common good. Therefore, good governance involves the provision of the essential pre-conditions for choice (a necessary requirement of human flourishing) and should not make basic choices for the citizens themselves. In short, the public good (or the common good as pursued by the instruments of the state) relates to justice, peace and public order.

The public good is instrumental to the facilitation of the basic goods¹¹⁰. Claiming to follow Aquinas, Finnis writes « – the public good – is not basic but, rather, instrumental to securing human goods which are basic (including other forms of community or association, especially domestic and religious associations) [...]»¹¹¹. However, Lawrence

¹⁰⁸ J. FINNIS, *Natural Law and Natural Rights*, 147.

¹⁰⁹ J. FINNIS, *Natural Law and Natural Rights*, 154.

¹¹⁰ J. FINNIS, «The Specifically Political Common Good in Aquinas», 191. «The specifically political common good which is interdefined with the responsibilities of state government and law seems indeed to be an instrumental good or set of goods, albeit of pre-eminent complexity, scope, dignity among instruments».

¹¹¹ J. FINNIS, *Aquinas*, 247; cf. ID., «Is Natural Law Theory Compatible with Limited Government», 5.

Dewan in «Aquinas, Finnis and the Political Good» argues that Aquinas did conceive the political good to be a basic good because of its central and necessary role in directly cultivating personal virtue¹¹². Of the position of Finnis, Dewan observes,

What is to be understood here is the rather «thin» character of the «public good» has in this picture. Its limitation to externals [...] In short, the focus is heavily upon the role of politics in maintaining external order, leaving free a space for the inner life and private life of the human being¹¹³.

Finnis contends that the natural law argues from principle for the limitation of government and not for an all-encompassing coercive promotion of virtue and repression of vice¹¹⁴. Accordingly, N.E. Simmonds deduces,

Finnis's account of the common good helps to underpin the conclusion that our moral concern for the common good need not be an obsessive concern with how well other people's lives are going, but is primarily a matter of fulfilling one's particular obligations in justice performing contracts, and so on¹¹⁵.

In sum, Finnis is making an appeal for the modern constitutional state¹¹⁶. This stance recalls characteristics identified in previous chapters. Firstly, the principle of limited state authority that respects the freedom of each citizen is a primary characteristic of the liberal tradition¹¹⁷. Secondly, the insistence that the state is secondary to and in service of society is characteristic of the Critical Tradition¹¹⁸.

4.1 *Justice*

Practical reasonableness is directed by the basic goods. In order that they may be achieved, a common good must be secured and respected. Promotion of the common good is, therefore, a requirement of practical reasonableness. According to Finnis's listing, this is the eighth requirement of practical reasonableness – or mode of responsibility – to

¹¹² L. DEWAN, «Aquinas, Finnis, and the Political Good», 373.

¹¹³ L. DEWAN, «Aquinas, Finnis, and the Political Good», 344.

¹¹⁴ J. FINNIS, «Is Natural Law Theory Compatible with Limited Government», 1-26.

¹¹⁵ N.E. SIMMONDS, *Central Issues of Jurisprudence*, 109.

¹¹⁶ Cf. C. COVELL, *The Defence of Natural Law*, 224.

¹¹⁷ Cf. Ch. II, Sec. 2.4.2. This parallel will become an important point in a later chapter; cf. Ch. VI, Sec. 7.1 ff.

¹¹⁸ Cf. Ch. II, Sec. 3.3.2. This parallel will become an important point in a later chapter; cf. Ch. VI, Sec. 7.1 ff.

guide our actions. In turn, the requirements of justice «are the concrete implications of the basic requirement of practical reasonableness that one is to favour and foster the common good of one's communities»¹¹⁹.

Justice entails three elements: other-directedness, duty and equality (proportionality)¹²⁰. Other-directedness refers to the aspect of justice or injustice which is primarily concerned with relations between people; justice is always interpersonal or inter-subjective and therefore concerns their interaction. Duty is that which is owed or due to another. Conversely, this gives rise to the right of the other, «or at least his "due" by right». Finally, equality – or more appropriately, proportionality or equilibrium – refers to that entailed by justice which is fitting to each of the parties involved.

The three elements resonate with the characteristics of justice identified by Aquinas and outlined in Chapter I¹²¹. Aquinas defines justice as follows: «the right and just is a work that is commensurate with another person according to some sort of fairness»¹²². Accordingly, justice always concerns another, that is, it is other-directed¹²³. Furthermore, it is determined by the demands of equity appropriate to the particular relationship¹²⁴. Justice, therefore, concerns the duty to give that which is owed to another. Aquinas wrote: «justice is the steady willingness to give others what is *theirs*»¹²⁵.

¹¹⁹ J. FINNIS, *Natural Law and Natural Rights*, 164.

¹²⁰ Cf. J. FINNIS, *Natural Law and Natural Rights*, 161-165. In fact, all the elements are to be regarded in their analogical sense «that is to say, it can be present in quite various ways». By metaphorical extension, we can apply the models of justice to the relations perceived within ourselves.

¹²¹ Cf. Ch. I, Sec. 3.2.1.

¹²² *ST IIa IIae*, 57, a. 2. «Dicendum quod, sicut dictum est, jus sive justum est aliquod opus adaequatum alteri secundum aliquam aequalitatis modum».

¹²³ *ST IIa IIae*, 57, a. 1. *ST IIa IIae*, 57, a. 1. «Illud enim in opera nostro dicitur esse justum quod respondet secundum aliquam aequalitatem alteri, puta recompensatio mercedis debitae pro servitio impenso»; «that which is correct is constituted by a relation to another, for a work of ours is said to be just when it meets another on the level, as with the payment of a fair wage for a service rendered».

¹²⁴ *ST IIa IIae*, 57, a. 1. *ST IIa IIae*, 57, a. 1. «Et propter hoc specialiter justitiae prae aliis virtutibus determinatur secundum se objectum, quod vocatur justum; et hoc quidem est *jus*. Unde manifestum est quod jus es objectum justitiae»; «an impersonal objective interest is fixed. We call it the just thing, and this is indeed a right. Clearly, then, right is the objective interest of justice».

¹²⁵ *ST IIa IIae*, 58 a. 1. «Videtur quod inconvenienter definiatur a jurisperitis quod justitia est *perpetua et constans voluntas jus suum unicuique tribuendi*. On this characteristic of justice, Aquinas took his point of departure from the Justinian Code; cf. Ch. I, Sec. 2.1.

This is justice in its general sense: it is a general disposition towards others in giving what is their due in an equitable manner. As such, it is an aspect of person's character or their virtue. Finnis writes,

Justice, as a quality of character, is in its general sense always a practical willingness to favour and foster the common good of one's communities, and the theory of justice is, in all its parts, the theory of what in outline is required for that common good¹²⁶.

Many contemporary commentators on Aquinas emphasise the virtue of justice as a character trait of individuals¹²⁷. Finnis, however, is primarily concerned with the external and effective collaboration of society. The common good requires the co-ordination of conduct and the subsequent sharing of benefits and burdens of communal enterprises. Justice, therefore, refers to «the good of a fair method of relating burdens to benefits, and persons to persons over an immensely complex and lasting but shifting set of persons and their aspirations and transactions»¹²⁸.

General justice is particularised into distributive and commutative justice. Distributive justice refers to the range of problems concerning the issue of distributing «resources, opportunities profits and advantages, roles and offices, responsibilities, taxes and burdens – in general, the common stock and the incidents of communal enterprise»¹²⁹. Commutative (or corrective) justice responds to the range of interactions that are not directly concerned with the issues of distribution. It concerns the correct regulation of relationships between individuals and issues like business contracts, murder and defamation¹³⁰.

Practical reasonableness is reflection on the lived reality of people in order to ascertain what leads to human flourishing. Accordingly, the as-

¹²⁶ J. FINNIS, *Natural Law and Natural Rights*, 165.

¹²⁷ Cf. J. PORTER, *The Recovery of Virtue*

¹²⁸ J. FINNIS, «The Authority of the Law», 137.

¹²⁹ J. FINNIS, *Natural Law and Natural Rights*, 166.

¹³⁰ Finnis lists five categories and examples of commutative justice: first, are failures of commutative justice between two individuals, for example, the failure to fulfil a contract, defamation, perjury; second, are the duties to commutative justice of an individual towards many ascertained people, for example, the law of tort in which someone deliberately or through carelessness causes harm or loss to another or their property; third, there are duties of commutative justice of an individual towards many unascertained individuals, for example, the abuse of the social welfare system; fourth, the duty of an individual to governing authorities, for example, the contempt of court; fifth, the corresponding duties of those in public authority towards those under their jurisdiction, for example, fair distribution of taxes and positions of responsibility J. FINNIS, *Natural Law and Natural Rights*, 184.

sociated «theory of justice is to establish what is due to a person in the circumstances in which he is, not in the circumstances of some other ‘ideal world’»¹³¹. As a result, Finnis strongly argues against the imposition of an ideal state of affairs to which which society and individuals must conform, thereby ruling out utopian ideologies. But more significantly, it rules out any accurate measurement of a future society, thereby also ruling out simple utilitarian measurement and balancing of future consequences as impossible. Both cases amount to a reductionism of the common good and, in particular, of the individual. The flourishing of an individual demands that she may not be subsumed into the common enterprise to her detriment.

To benefit the common good is to benefit the individual. But the community cannot be reduced to a mere collection of individuals. A tension exists, therefore, between individual pursuits and the common enterprise which the requirements of justice address. Because of the complexities of societies, «the requirement of general justice varies with time, place, and many different circumstances»¹³². As a result, there can be no absolute models of organisation. For example, the extent of private-public ownership depends on the actual requirements of human flourishing in particular cases. For instance, the redistribution of wealth requires attention to a number of criteria; namely, a minimum level of needs must be met in order to facilitate individual growth, certain roles and responsibilities within the community require different resources, etc¹³³. However, practical reasoning dictates that the extremes of private or public ownership limit human flourishing which the common good seeks to secure.

Essentially, this model emphasises the responsibilities that each person has to another by virtue of the web of commitments and dependencies that facilitate human fulfilment¹³⁴. Equality refers not to sameness but a set of conditions by which «all members of a community equally have the right to respectful consideration when the problem of distribution arises»¹³⁵.

5. Natural Law and Natural Rights

Natural Law and Natural Rights makes no effort «to give an ordered account of the long history of theorising about natural law and natural

¹³¹ J. FINNIS, *Natural Law and Natural Rights*, 170.

¹³² J. FINNIS, *Natural Law and Natural Rights*, 171.

¹³³ J. FINNIS, *Natural Law and Natural Rights*, 174. Other criteria include capacity, rewards and contributions, and entrepreneurial spirit.

¹³⁴ This will become an important point in a later chapter, Cf. Ch. VI, Sec. 8.3.

¹³⁵ J. FINNIS, *Natural Law and Natural Rights*, 173.

rights»¹³⁶. At certain points, however, in order to clarify definitions and relationships between concepts in their contemporary form, Finnis reviews their historical development. In particular, the text shows an interest in the transformation of the ethical and legal conceptual framework, «for this history has a watershed [...]»¹³⁷.

To take the example of justice: the earlier Aristotelian system (attributable also to Aquinas) classified distributive and commutative justice as applications of general justice – they were two categories of concrete norms guiding the virtue of justice exercised by the individuals of society. However, following the interpretations of Aquinas in the Second Scholasticism¹³⁸, the schema became three separate but related categories. Briefly: general justice concerned the virtue of individuals, distributive justice concerned the workings of the state and commutative justice concerned the regulation of the interaction between individuals. According to Finnis, this transformation created the modern identification of distributive justice with the role the state. In turn, it facilitated the view that justice concerned the claims of individuals against the state, creating the impression that there is an unavoidable tension between the person and state. It eclipses the members of society as the true source of responsibility. Instead, the state is an instrument, not a coercer, of the requirements of practical reason in order that all may attain human flourishing¹³⁹.

The watershed also affected the conceptualisation of rights: he claims it affects the meaning of *right* in comparison to its antecedent, *jus (ius)*. Broadly following the meaning of the Roman lawyers, Aquinas defined the primary meaning of *jus* as, the just thing itself, or «[O]ne could say that for Aquinas “*jus*” primarily means “the fair” or ‘the what’s fair’»¹⁴⁰. Finnis then jumps three centuries later and presents the differing analysis of Francisco Suárez in which *jus* is defined as a moral power over property or that to which he is due¹⁴¹. *Jus* or right has become something someone has: above all, it is a power or liberty that one possesses. It is «Aquinas’s primary meaning of «*jus*», but transformed by relating it exclusively to the beneficiary of the just relation-

¹³⁶ J. FINNIS, *Natural Law and Natural Rights*, i. He does so because «experience suggests that such accounts lull rather than stimulate an interest in their subject-matter».

¹³⁷ J. FINNIS, *Natural Law and Natural Rights*, 206.

¹³⁸ Cf. Ch. I, Sec. 5.3.

¹³⁹ Cf. J. FINNIS, *Natural Law and Natural Rights*, 184-188.

¹⁴⁰ J. FINNIS, *Natural Law and Natural Rights*, 206.

¹⁴¹ Cf. Ch. I, Sec. 5.3.2.

ship, above all to his doings and havings»¹⁴². The outcome was to place right outside the sphere of law which regulated the just relationship and thereby creating a contrast between law and rights¹⁴³. It corresponded to the transformation in the conceptualisation of justice: justice became defined by rights understood as liberty or freedoms which are possessed by an individual over and against the state.

The historical tangents are implicitly directed against models and traditions of justice and rights widespread since the sixteenth century and the assumptions drawn from it in the following centuries¹⁴⁴. Finnis maintains that contemporary legal practice and public moral debates have overly narrowed the picture of rights to issues of boundaries of freedom between individuals and the relation between the state and its citizens.

In *Natural Law and Natural Rights*, Finnis had maintained that «the meaning which for Suárez is primary does not appear in Aquinas's discussion at all. Somewhere between the two men we have crossed the watershed»¹⁴⁵. A later debate, in *The Review of Politics*, turned in part on the timing of the watershed. Of Finnis, Brian Tierney wrote, «The only thing wrong with this account is that the "watershed" did not come after Aquinas»¹⁴⁶. Instead, he argued that the genesis of rights occurred in twelfth century canonical jurisprudence¹⁴⁷. On the other hand, Ernst Fortin defended by David Kries, had argued that it occurred with Hobbes and the birth of modernity: «Contrary to what is suggested, the real "watershed" in the history of the rights doctrine is not to be located somewhere between Thomas and Suárez; it occurs with Hobbes [...]»¹⁴⁸.

The central topic of the debate was the relationship between the natural law and natural rights. Finnis admits in a footnote that «*Natural Law and Natural Rights* treats the differences between Thomist and modern idiom in right(s)-discourse as more significant and interesting than I do now think they are»¹⁴⁹. The watershed is no longer decisive. Part One of this dissertation presented a continual innovation in response to socio-economic challenges – the most dramatic development being the birth of modernity. Chapter I contended that rights may, and in fact

¹⁴² J. FINNIS, *Natural Law and Natural Rights*, 207.

¹⁴³ Such an outcome was arrived at in Thomas Hobbes; cf. Ch. II, Sec. 2.2.

¹⁴⁴ Cf. App. C.

¹⁴⁵ J. FINNIS, *Natural Law and Natural Rights*, 207.

¹⁴⁶ B. TIERNEY, «Author's Rejoinder», 416.

¹⁴⁷ Cf. Ch. I, Sec. 2.1.

¹⁴⁸ E. FORTIN, «New Rights Theory and the Natural Law», 602; cf. Ch. II, Sec. 2.2.1.

¹⁴⁹ J. FINNIS, «Aquinas on *ius*», 410.

were, inferred from the Thomistic framework. Aquinas himself, however, did not make use of an explicit doctrine of subjective rights. Similarly, in a work entitled *Aquinas*, and as suggested by the chapter title «Towards Human Rights», Finnis gives an exegetical re-reading of Aquinas, by which the idea of subjective rights may be coherently deduced¹⁵⁰.

The critical concern, however, is not the intention of Aquinas but the legitimacy of deducing natural rights from the Aristotelian-Thomist tradition of natural law¹⁵¹. In his contribution to the above debate, David Kries argues that post-Hobbesian natural rights anthropology is fundamentally opposed to the traditional natural law position. It is a defence of the position held by Ernest Fortin. He insists «that the natural law and natural rights theories are radically opposed to each other because they imply incompatible anthropologies»¹⁵². Throughout his career, Fortin argued that natural rights may not be deduced from the natural law because «In the last analysis, we are confronted with two vastly different conceptions of morality»¹⁵³. Because they are incompatible, to incorporate the logic of modern rights is to do violence to the earlier framework. In *Culture and the Thomist Tradition*, Tracey Rowland agrees. She warns against the incorporation of rights-rhetoric by Finnis because it distorts the Thomist tradition in serious ways such as to make it incoherent and lead to further social marginalisation of the tradition¹⁵⁴. In contrast, Finnis proclaims rights to be an invaluable ad-

¹⁵⁰ Cf. J. FINNIS, *Aquinas*, 132-186.

¹⁵¹ This will become an important point in a later chapter; cf. Ch. V, Sec. 7.4.

¹⁵² D. KRIES, «In Defence of Fortin», 412. He continues: «Since Thomas was an advocate of the natural law position, with its Aristotelian and Christian understanding of human nature, it would have been self-contradictory for him to accept the natural rights theory and its concomitant apolitical and ateleological anthropology».

¹⁵³ E. FORTIN, *Human Rights*, 22. Later, he writes: «I am well aware that the preceding account [...] runs counter to what is still far and away the most fashionable view among present-day scholars, the majority of whom look upon the rights-doctrine as nothing more than the perfected version of the old natural law doctrine [...] Such was the position taken a short generation ago by Jacques Maritain and John Courtney Murray, and such also is the one take in our day by John Finnis and Felicien Rousseau, to name only a few Catholic thinkers who speak for a host in this regard. It is emphatically not the position taken by the early modern thinkers themselves, all of whom were firmly convinced that, like Columbus, they had discovered a new continent and stood of fundamentally on different ground». E. FORTIN, *Human Rights*, 306. Cf. ID., «On the presumed Medieval Origin of Individual Rights», 245-257; ID., «Human Rights and the Common Good», 19-28.; B. BRADY, «An Analysis of the Use of Rights Language», 97-121.

¹⁵⁴ Cf. T. ROWLAND, *Culture and the Thomist Tradition*, 136-158. This point will become important in a later chapter; cf. Ch. VII, Sec. 7.4.

dition to the natural law tradition. They advance the tradition – when placed in the context of practical reasonableness about human flourishing – because rights rhetoric stresses the equality of all, undermines the utilitarian reduction of individuals and society to measurable entities, and finally provides a useful listing of «the various aspects of human flourishing and fundamental components of the way of life in community that tends to favour such flourishing in all»¹⁵⁵.

Finnis argues that it is possible to view rights within a Thomist framework. In the later re-reading of Aquinas, Finnis admits that although Aquinas «never uses a term translatable as “human rights”, he clearly has the concept»¹⁵⁶. The watershed is no longer significant. Justice, according to Aquinas and, as outlined above, is necessarily other-directed; it involves a relationship guided by an equality or proportionality between two people. As a result, Finnis argues that there is

an essential element in Aquinas’s conception: one cannot properly think of *ius* without thinking of the *other* to whom an act, forbearance, or acceptance is, in justice owed [...] Which *other*? The one who, as Aquinas promptly and constantly says, HAS the relevant *ius*. Thus *ius* can closely match our word «right», signifying something someone has¹⁵⁷.

Rights therefore are precepts of justice viewed from the perspective of the other. The precepts of justice, although presented as violations of the just thing, are implicitly a list of rights based on the radical equality of all. He surmises:

Aquinas would have welcomed the flexibility of modern languages which invite us to articulate the list not merely as forms of right-violation (*in-iuriae*) common to all, but straightforwardly as rights common to all: human rights.¹⁵⁸

Finnis may have changed his position on rights and Aquinas, but he always presented rights as a legitimate continuation to the Aristotelian-Thomist tradition. In the earlier *Natural Law and Natural Rights*, he writes,

There should be no question of wanting to put the clock back. The modern idiom of rights is more supple and, by being more specific in its standpoint or perspective, is *capable* of being used with more differentiation and precision than the pre-modern use the «the right» (*jus*) [...] there is no cause to

¹⁵⁵ J. FINNIS, *Natural Law and Natural Rights*, 221.

¹⁵⁶ J. FINNIS, *Aquinas*, 136.

¹⁵⁷ J. FINNIS, «Aquinas on *Ius* and Hart on Rights», 408.

¹⁵⁸ J. FINNIS, *Aquinas*, 137.

take sides as between older and the newer usages, as ways of expressing the implications of justice in a given context¹⁵⁹.

5.1 *The Grammar of Rights*

Finnis maintains that «The modern language of rights provides [...] a supple and potentially precise instrument for sorting out and expressing the demands of justice»¹⁶⁰. Translated into a natural law terminology, they are a contemporary concretisation of the demands of justice that facilitate the common good. They are the principles that make possible the participation in the basic goods by an individual according to requirements of practical reasonableness.

In order to uncover the logic of rights as instruments of justice, Finnis draws upon the comprehensive taxonomy of the uses of rights-language in law compiled by Wesley Hohfeld¹⁶¹. In particular, he draws attention to the distinction between a claim-right and a liberty. A claim-right has a correlative in another's duty and involves two dimensions: positively, it is a right to be given something or supported in some way; negatively, it is a right not to be interfered with or dealt in a certain manner by another. A liberty is one's freedom from duty and concerns the rights that relate to one's own acts or omissions¹⁶². The former is characterised as relational; the latter by independence. In the complex dealings that constitute a community, they often overlap and are mutually supportive. The emphasis given to either type will reflect an underlying model of rights. Firstly, rights may be categorised as benefits protected for an individual by the rules that regulate the relationships between people. Accordingly, rights secure various advantages for an individual; the assistance of others, the freedom to act, the freedom to change one's mind, and many others. Secondly, rights may be categorised according to the rules that entail or create a recognition and respect for a person's choice. Accordingly, rights make sense within an analysis of freedom and how people's freedoms ought to be balanced. The

¹⁵⁹ J. FINNIS, *Natural Law and Natural Rights*, 209-210.

¹⁶⁰ J. FINNIS, *Natural Law and Natural Rights*, 210. He writes, «the reader who follows the argument of this chapter will readily be able to translate most of the previous discussions of authority, law, and obligation, into the vocabulary and grammar of rights (whether 'natural' or 'legal')».

¹⁶¹ Cf. Ch. II, Sec. 5.2. To recall; Hohfeld described rights as one of the following: a) claim right, b) liberty, c) power, or d) immunity; and that a legal right involves a three term relationship of one person, one act-description and another person.

¹⁶² Cf. J. FINNIS, *Natural Law and Natural Rights*, 200.

first position is called the Benefit Theory and the second is named the Choice Theory (or Will Theory) of rights¹⁶³.

The Choice Theory of rights presents justice as an accepted balance of the claims of independent individuals. By contrast, a Benefit Theory of rights reflects the necessary relational aspect of justice. Finnis defends the second model because, conceived as that which is owed to another, rights are propositions that reflect a fuller model of justice. In particular, they reflect the needs and subsequent claims of the beneficiaries of a justice – they assert that which is owed to the right-holder. Finnis, therefore, defines the human rights discourse as follows:

In short, the modern vocabulary and grammar of rights is a many-faceted instrument for reporting and asserting the requirements of other implications of a relationship of justice *from the point of view of the person(s) who benefit(s) from that relationship*. It provides a way of talking about «what is just» from a special angle: the viewpoint of the «other(s)» to whom something (including, *inter alia*, freedom of choice) is owed or due, and who would be wronged if denied that something¹⁶⁴.

In contemporary western culture, legal practice and public moral debate tend to view rights to be attached to only particular benefits; namely the freedom of action or the power to impinge on the freedom of others. According to Finnis, this narrowing of the perspective has potentially damaging consequences. Rights restricted to individual freedom will in turn restrict the scope of justice and eclipse the vision of the common good¹⁶⁵. It is within the context of the common good that duty or responsibility takes on a more important role (as strategically prior to rights) in analysing the requirements of justice, «for the common good is precisely the good of the individuals whose *benefit*, from fulfilment of duty by others, is their *right* because *required* of others in justice»¹⁶⁶. In order for a right-holder to claim the benefit of a relationship in justice, duty must be upheld and fostered as essential to a just society.

5.2 *Rights and the Common Good*

Aimed towards one or more of the basic goods yet in respect of them all, individual human flourishing is multi-faceted. Innumerable judg-

¹⁶³ Cf. J. FINNIS, *Natural Law and Natural Rights*, 202-204.

¹⁶⁴ J. FINNIS, *Natural Law and Natural Rights*, 205.

¹⁶⁵ This point becomes important in a later chapter; cf. Ch. VI, Sec. 5.2.

¹⁶⁶ J. FINNIS, *Natural Law and Natural Rights*, 210.

ments are required therefore within the necessary network of relationships of a community.

The strength of right-talk is that, carefully employed, it can express precisely the various aspects of a decision involving more than one person, indicating just what is and is not required of each person concerned, and just when and how one of those persons can affect those requirements¹⁶⁷.

Rights are the propositions that express the practical wisdom of living in community. They express in formulaic fashion the outcomes or end-results of reflections on justice – they have conclusory force. *The Universal Declaration of Human Rights* (and its derivative and parallel documents) is an example of the listing of conclusory prescriptions.

Finnis highlights two important features of the document. Firstly, the document uses two legal formulas or canonical forms: «Everyone has the right to [...]» and (B) «No one shall [...]». That there are two forms where only one would have sufficed is due to the second feature of the document (and all similar documents). It recognises that the «exercise of the rights and freedoms» proclaimed are to be «subject of limitation». For example, Article 29 of the *Universal Declaration of Human Rights* provides a general limitation for all rights previously proclaimed in the document. Finnis argues that the first canonical form («Everyone has the right to [...]») refers to positive or legal rights, and the second canonical form («No one shall [...]») refers to those human rights that are capable of claiming an absolute (in the sense of exception-less) priority. Rights of the first formula have guiding force in the process of rational decision-making. Although they are inalienable, some limitations are allowed for in their application within society. Rights of the second formula have conclusory force. Limitations may not be applied to rights of this sort: for example, Article 5, «No one shall be subjected to torture [...]».

Article 29 (2) prescribes four possible grounds by which rights may be limited. It reads:

In the exercise of his rights and freedom, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due (a) recognition and respect for the rights and freedoms of others and of meeting the just requirements of (b) morality, (c) public order and (d) the general welfare in a democratic society¹⁶⁸.

Finnis regards the last of these grounds (the general welfare in a democratic society) to be without meaning because an aggregate common

¹⁶⁷ J. FINNIS, *Natural Law and Natural Rights*, 210.

¹⁶⁸ Cf. UNITED NATIONS, «United Nations Declaration on Human Rights» in I. BROWNLIE – G. GOODWIN-GILL, ed., *Basic Documents*, 17-23, 21.

good is incoherent and therefore beyond rational identification. The general welfare cannot be gauged in simple utilitarian terms. Rather, it is according to the first ground that is the basis of effective limitations of rights, namely, the recognition and respect for the rights and freedoms of others. The declaration proclaims such rights including, life, liberty, security of person (art. 3), equality before the law (art. 7) participation in government (art. 21) and education (art. 26)¹⁶⁹. According to Finnis,

When we survey this list we realise what the modern «manifesto» conception of human rights amounts to. It is simply a way of sketching the outlines of the common good, the various aspects of individual well-being in community¹⁷⁰.

Human rights are implications of the common good. For that reason, they are the moral prescriptions which must be considered at all times by those responsible in society in order to facilitate the common good. On one hand, to foster human rights is to foster the common good. However, rights are subject to or limited according the wider demands of that common good. Therefore, it is the discernment of the common good that provides the specification of the rights. In other words, what rights we actually have is determined by the perceived common good. Finnis explains that,

There is no alternative but to hold in one's mind's eye some pattern, or range of patterns, of human character, conduct, and interaction in community, and then to choose such specification of rights as tends to favour that pattern, or range of patterns. In other words, one needs some conception of human good, of individual flourishing in a form (or range of forms) of communal life that fosters rather than hinders such flourishing¹⁷¹.

The pattern(s) should not be imagined in abstraction from the real interactions of people; neither should they be cast-iron moulds in which society must shape itself. Rather, the resolution of issues regarding human rights is a process guided and fostered by practical wisdom. Practical reasoning may produce various reasonable solutions to facilitate human flourishing. The ensuing debate «should be settled by some decision-making procedure which is authoritative but which does not pretend to be infallible or to silence further rational discussion or to forbid

¹⁶⁹ Others include; rights against slavery (art. 4), cruelty (art. 5), arbitrary arrest (art. 9), and rights of freedom of movement (art. 13), to property (art. 17) and to thought, conscience and religion (art. 18).

¹⁷⁰ J. FINNIS, *Natural Law and Natural Rights*, 214.

¹⁷¹ J. FINNIS, *Natural Law and Natural Rights*, 219-220.

the reconsideration of the decision»¹⁷². The law, which co-ordinates community relations in accordance with the demands of justice, must be guided and therefore embody some conception or range of conceptions of human flourishing. Justice and law are intimately bound with the good. Finnis's response to those who argue for the necessary neutrality of justice in matters of the good life will be considered in Chapter VI¹⁷³.

In the many patterns of life that may be stipulated in order to discern appropriate models of human flourishing, Finnis argues that there are unchanging co-ordinates or «fixed points». Finnis invites the question:

Are there no fixed points in that pattern of life which one must hold in one's mind's eye, in resolving problems of rights? Are there no «absolute» rights, rights that are not to be limited or overridden for the sake of any conception of the good life in community, not even «to prevent catastrophe»¹⁷⁴?

In response, a utilitarian must deny absolute rights, in the sense of exceptionless, because of the moral priority of circumstances. Circumstances may always be perceived or imagined that appear to make an absolute right intolerable, and it is accounting for this possibility that restrains governments and ruling elites from applying absolute rights in practice, despite declarations of commitment. For example, governments are willing to make credible threats against potential enemies. Military policy necessarily prepares itself for inflicting harm and death on others and clearly admits to the possibility of exceptions to absolute rights. Indeed, many of these governments are freely elected and their policies advocated by their people¹⁷⁵.

Yet, Finnis avows the contrary. The seventh requirement of practical reasonableness states that it is always unreasonable to choose against a basic value or good for others or ourselves. This entails exceptionless duties towards others. Correlative to such duties are exceptionless human right claims. These include: the right not to have one's life taken as a means rather than an end; the right not to be positively lied to; the right not to be condemned on knowingly false charges; the right to respectful consideration in any assessment of the common good. «The solid core of the notion of human dignity»¹⁷⁶ is the immeasurable value of the human person in each of its basic aspects and demands to

¹⁷² J. FINNIS, *Natural Law and Natural Rights*, 220.

¹⁷³ Cf. Ch. VI, Sec. 6 ff.

¹⁷⁴ J. FINNIS, *Natural Law and Natural Rights*, 224.

¹⁷⁵ Cf. J. FINNIS – J. BOYLE – G. GRISEZ, *Nuclear Deterrence*.

¹⁷⁶ J. FINNIS, *Natural Law and Natural Rights*, 225.

be protected. Yet catastrophes do loom that threaten to destroy the common good of all. Concrete judgements have to be made that respect the human good of each and those who fall under our care. This can only be made by a steady determination of the conditions that allow for the flourishing of these goods for all.

6. The Law

As noted quoted above, *Natural Law and Natural Rights* begins with the assertion that it is necessarily through the institutions of law that the conditions which enable people to flourish may be secured. Simply put, the law has meaning in the context of the common good. In order that an individual may flourish, she requires a somewhat ordered society consisting of reliable expectations about the behaviour of others. Human conduct must be co-ordinated or ordered and this is only possible by way of law.

It is the role of the political community to serve the requirements of social co-ordination. The problems of social co-ordination require solutions based on reasonable choices that respect the reasonable needs of all. According to Finnis, «There are, in the final analysis, only two ways of making a choice between alternative ways of co-ordinating action [...] either unanimity, or authority»¹⁷⁷. Political authority is ultimately based then on the needs of social co-ordination in situations in which unanimity is impossible.

Political institutions in all its [sic] manifestations, including legal institutions, is a technique for doing without unanimity in making social choices – where unanimity would almost always be unattainable or temporary – in order to secure practical (near-) unanimity about how to co-ordinate the actions (including forbearances) of members of the society¹⁷⁸.

Social co-ordination of the common good is the end or purpose of political authority and is given to those who can effectively solve the problems of co-ordination¹⁷⁹. Authority, then, is not a good but is instrumental to the securing of the basic goods. It is only in this light that authority may be legitimised, for in doing so it accords to the demands of practical reasonableness, «which are the limits, side-constraints, recognised in the conscientious deliberations of every decent person»¹⁸⁰.

¹⁷⁷ J. FINNIS, *Natural Law and Natural Rights*, 232.

¹⁷⁸ J. FINNIS, «Natural Law and Legal Reasoning», 141-142.

¹⁷⁹ It allows Finnis to distinguish between authority and types of governance. For instance, in certain times and places, authority may be given to one or many – but both in both cases it may be reasonable.

¹⁸⁰ J. FINNIS, «Is Natural Law Theory Compatible with Limited Government?», 2.

Authority is limited by the demands of the common good – it is limited by its own goal, purpose or rationale. In other words, it is limited according to the protection and ascertainment of human rights which provide a «usefully detailed listing of the various aspects of human flourishing and fundamental components of the way of life in community that tends to favour such flourishing in all»¹⁸¹. Significantly, authority can be held accountable because all actions must be publicly accountable, since «morality is a matter of what reason requires and reasons are inherently intelligible, shared, common»¹⁸².

The actions of authority require continual justification on the basis of realising the basic goods of all¹⁸³. It is in this way that authority becomes acceptable to those over whom authority is held¹⁸⁴. Furthermore, it grounds the obligation of the governed to follow the law. In a sense, following the law is in our own self-interest. However, unlike Hobbesian self-interest, the necessity of following the law is not selfishly motivated; rather it is motivated by desire for fulfilment because we are moved by the good. In the end, obligation and authority are based on the reciprocity necessary for human flourishing.

The law is the exercise of authority guiding social coordination – which, in its respect for human rights, embodies the requirements of justice and so promotes the common good. Because authority is sourced, guided and accepted by the demands of practical reasonableness, the force of the law is derived from its reasonableness and not from the will of the authority. In this regard, Finnis rejects a strand of the natural law tradition, from Ockham to Suárez that sourced the law in the will of the sovereign.

He further rejects the position of Aristotle, which held that authority could legislate for virtue. Instead, the proper function of the State's law and government is necessarily limited. «In particular, its role is not (as Aristotle has supposed) to make people integrally good but only to maintain peace and justice in inter-personal relationships»¹⁸⁵. He argues that integral human fulfilment is only possible through the chosen ac-

¹⁸¹ J. FINNIS, *Natural Law and Natural Rights*, 221.

¹⁸² J. FINNIS, «Is Natural Law Theory Compatible with Limited Government?», 3.

¹⁸³ This is an important point in a later chapter; cf. Ch. VI, Sec. 6.2 ff.

¹⁸⁴ The political process is the expression of a community's attempt to attain its own common good. In this process, differing forms of co-ordination are possible and equally reasonable – as the principles of practical reasonableness only offer the most general of guidelines.

¹⁸⁵ J. FINNIS, «Public Reason, Abortion and Cloning», 363. Cited in J. HARRIS, *Ethics in Constitutional Law*, 181; cf. J. FINNIS, «Is the Natural Law Theory Compatible with Limited Government», 7-9.

tions of individuals themselves – according to the sixth principle of practical reasoning. It cannot be directly imposed or coerced by way of legislation: government in principle must be limited¹⁸⁶. Legislation should limit itself to the conditions that facilitate such fulfilment. There is a pluralism of goods and the state must recognise all of them. It may not be neutral in the face of the various goods. In fact, neutral government is illogical and impossible.

Conversely the abuse of authority – motivated by ideology or exploitation or both – is an act against the common good. Autocrats and dictators subvert the law towards their own ends rather than the true ends that constitute human flourishing. Finnis is claiming that abuse of the law or authority is the destruction not only of society but also of individuals¹⁸⁷. Unjust laws exercised by an abusive authority are best described, in Aquinas's pithy phrase, as «not law but the corruption of law»¹⁸⁸. They may retain the character of law but, according to Finnis's terminology, they no longer adhere to the «focal meaning of the law»¹⁸⁹. He does not discuss at length the resulting rights of citizens to reject unjust laws or engage in civil disobedience¹⁹⁰.

The practical concern of natural law theory is the relationship(s) between the particular laws of particular societies and the permanently relevant principles of practical reasonableness. In other words, how may the former be brought into accord with the latter; or as traditionally stated, how may positive law be derived from natural law? Aquinas had proposed two means: by way of deductive reasoning to conclusions (primary precepts) or by way of careful working through the implications of general principles (secondary precepts)¹⁹¹. For Finnis, Aquinas's general idea is fundamentally correct «but vaguely

¹⁸⁶ This will become an important point in a later chapter; cf. Ch. VI, Sec. 5 ff.

¹⁸⁷ J. FINNIS, *Natural Law and Natural Rights*, 262-266. It is in this context that Finnis treats punishment. He considers it to be more than a means of restoring society order. Rather, its final aim ought also to be the restoration of the personality of the criminal to be able to live reasonable and good lives.

¹⁸⁸ J. FINNIS, *Natural Law and Natural Rights*, 363; cf. *ST Ia IIae*, q. 95, a. 2c. «non lex sed legis corruptio».

¹⁸⁹ J. FINNIS, *Natural Law and Natural Rights*, 276.

¹⁹⁰ J. FINNIS, *Natural Law and Natural Rights*, 362. He writes, «Much can be said on such questions, but little that is not highly contingent upon social, political, and cultural values [...] no-one should expect generally usable but precise guides for action in circumstances where the normally authoritative sources of precise guidance have broken down».

¹⁹¹ J. FINNIS, *Natural Law and Natural Rights*, 284. Secondary precepts are «derived from natural law like implementations [*determinationes*] of general directives»; cf. *ST Ia IIae*, q. 95, a. 2; *ST Ia IIae*, q. 94, a. 4; cf. Ch. II, Sec. 3.2.1

stated and seriously underdeveloped»¹⁹². Finnis argues that for the most part the working of a modern legal system follows the second mode¹⁹³. It is because some societies are homogenous, such as that of Aquinas, that it often appears to those within those societies that the former is the the case. John Harris comments,

Finnis's problem with Aquinas may be explained by the different intellectual culture he is called upon to address. Aquinas could presume a certain unity of intellectual purpose within the medieval culture whereas for the modern pluralistic western culture a more detailed explanation of what Finnis is proposing is required. Aquinas speaks from within a theological vision that is eudaemonistic while Finnis is intent on justifying the norm living in a world of ethical studies that is basically deontological¹⁹⁴.

The working of a modern legal system is based primarily on the determinations of the legislators and judiciary. The draughtsmen and interpreters of the law are required to take into account a whole variety of issues: «The effort to integrate these subject-matters into the Rule of Law will require of judge and legislator countless elaborations»¹⁹⁵. Finnis draws upon Aquinas's analogy of architecture. An architect has to determine the correct proportions of a door that will fit the overall plan of a house. Likewise, legislators need to determine the role and place and correct definition of a piece of law within the overall framework of the law – guided, of course, by the general principles of practical reason, which comprise the natural law. They make a fit between the demands of reasonableness, the rule of law, and circumstances to which they are responding. In light of this, the legal draughtsmen ought to respect «those human goods which are the fragile and cumulative achievement of past effort, investment, discipline etc. are not to be treated lightly in the pursuit of future goods»¹⁹⁶.

7. Christianity

As outlined above, the dynamic of practical reasoning, which discloses the basic goods, turns on the question: what for? In other words,

¹⁹² J. FINNIS, *Natural Law and Natural Rights*, 282.

¹⁹³ J. FINNIS, *Natural Law and Natural Rights*, 284.

¹⁹⁴ J. HARRIS, *Ethics in Constitutional Law*, 186.

¹⁹⁵ J. FINNIS, *Natural Law and Natural Rights*, 289. The actual phrasing of modern law is not made of simple normative statements of the natural law. A code does not simply say «Though shalt not kill» but «It is in offence to kill».

¹⁹⁶ J. FINNIS, *Natural Law and Natural Rights*, 287.

what is the point of our actions?¹⁹⁷ Yet individuals and communities experience challenges which demand a final question: is there not a further point by which to make sense of it all? «The urgency with which thoughtful persons press these questions is amply evidenced by the course of human speculation»¹⁹⁸. This experience of contingent realities, including «human persons and their lives, point to a transcendent reality: something which is, is not contingent, and is the source of everything contingent. Only such a source can account for the *is* of what *is but need not be*»¹⁹⁹.

In the final chapter of *Natural Law and Natural Rights*, he argues that speculative reasoning is capable of postulating an uncaused cause that exists in something like the mode of personal life²⁰⁰. But the principles of practical reason are not directly derivable from metaphysics. Practical reasonableness alone cannot assert the actual reality of God; rather, it recognises the necessary role of the search and acknowledgement of the transcendent as an opportunity for human flourishing. It is only on the final page that he explicitly maintains that practical reasoning is capable of saying that «God is an unrestricted, “absolute” value and that harmony with God (religion) is a basic human value»²⁰¹.

But, as previously asserted, the basic goods are not commensurable. There is no objective order among them and this includes religion. One cannot directly choose against the other goods on the basis of religion – or *vice versa*. Instead, the human person’s «way of realising the proposed friendship with God builds on all the requirements of practical reasonableness in the pursuit of, and respect for, all the basic forms of human

¹⁹⁷ J. FINNIS, *Natural Law and Natural Rights*, 51. Hence the moral exhortation: do not act pointlessly.

¹⁹⁸ J. FINNIS, *Natural Law and Natural Rights*, 373. The question may be experienced in a number of ways. For instance, in times when the basic goods may no longer be achievable or fail us completely, as in ill-health, fading intellectual abilities, parting friendships and experience of death. It may be a legitimate question in times of conflict between one person’s choices of a good that result in the limitation of other person’s real choice. The question is reasonable in the self-awareness of continuing self-sacrifice of one’s own goods for the well-being of others. Finally, it is an appropriate response in facing the vastness and complexity of the universe.

¹⁹⁹ G. GRISEZ – J. BOYLE – J. FINNIS, «Practical Principles:», 141.

²⁰⁰ Cf. J. FINNIS, *Natural Law and Natural Rights*, 371-410; ID., *Fundamentals of Ethics*, 145-146. He writes that «ethics, can, however, say something about what might be the significance of the relationship(s) that might be possible between each of us and that being [...]».

²⁰¹ J. FINNIS, *Natural Law and Natural Rights*, 410. It was earlier provisionally listed as part of the basic goods; cf. J. FINNIS, *Natural Law and Natural Rights*, 89-90. Cf. ID., *Fundamentals of Ethics*, 145 ff.

good»²⁰². No one final basic good may count as the one ultimate good for all; rather it «must involve a plurality of goods, such is the irreducible complexity of integral human fulfilment»²⁰³. Terence Kennedy observes that this moves away from the medieval tradition, which viewed the final beatific vision as a single unifying good. Instead of propounding

the view of the last end of man not as the single good of the contemplation of God but as the fullness of life with all its complex and multiple goods in the Kingdom [...] Instead of the traditional theme of the desire for God as the uniting factor in all moral theology he accentuates, in typically modern tones, the possibility of a personal relationship with God²⁰⁴.

An intimate relationship with a God who is personally disclosed is briefly sketched according to the analogies of friendship and play. In friendship, people enter into a relationship that fosters the well-being of each other for the sake of «who» they are rather than «what» they are. Although a human being cannot act for the well-being of God who is self-sufficient, she can act for the sake of God, favouring and advancing the concerns and goods of God out of friendship. With no purpose beyond its own activity, God's action may be viewed as a form of play:

a free but patterned expression of life and activity, meaningful though with no point beyond itself, yet in no way frivolous, but rather a glorious manifestation of the goodness and the source of all goods whatever. Thus any friendship with God must be regarded as a sharing, in a limited way, in the divine play [...] ²⁰⁵.

Friendship widens the horizon of our actions. Consideration of the other as a basic good places the fulfilment of the self within the necessary context of the fulfilment of a concrete individual other and, by extension, the wider community. The process of integral human fulfilment, then, is not merely a refined form of self-cultivation for «every form of genuine friendship relativises our self-love without destroying or discrediting it»²⁰⁶.

Natural Law and Natural Rights briefly and tentatively proposes the necessary role of religion. Although similarly placed at the end of the text, Finnis, along with Germain Grisez and Joseph Boyle in *Nuclear Deterrence, Morality and Realism*, present the theory and its application

²⁰² J. FINNIS, *Natural Law and Natural Rights*, 410.

²⁰³ J. FINNIS, «Aquinas Lecture», 448.

²⁰⁴ T. KENNEDY, «The Originality of John Finnis», 125; cf. R. BLACK, «Is the New Natural Law Theory Christian?» 148-163.

²⁰⁵ J. FINNIS, *Fundamentals of Ethics*, 148.

²⁰⁶ J. FINNIS, *Fundamentals of Ethics*, 148.

within a more explicit account of the Christian faith²⁰⁷. In it, they argue that the policy and public discourse regarding the nuclear deterrent in the West is justified according to a consequentialist mode of thought that subordinates basic and absolute moral principles – in this case, the killing (or intention to kill) innocent civilians – to particular ends. In maintaining the deterrent in order to protect itself from others, the west is ultimately undermining itself. They defend their own position:

Moral purism? Let right be done though the heavens may fall? Perhaps. At the heart of what some dismiss as moral purism lies the great truth that, in one's choices, moral rightness is more important than any other worldly good²⁰⁸.

They maintain that this great truth lies at the heart of the western philosophical tradition following from Plato and Aristotle, and more profoundly in the Christian faith²⁰⁹. The Christian vision places moral choices that appear to have overwhelmingly negative consequences into a new light. Christianity insists that there is no complete foresight or complete control over the future – and to think otherwise is to narrow the horizon of possibilities²¹⁰. Finnis stresses, then, the central role of providence in Christianity which «if followed to the end, is sure to lead to suffering, and likely to lead to disaster in this world as it did for Jesus. But any loss required at present by perfect fidelity to the requirements of morality is no waste, but rather the wisest investment»²¹¹. It is in this light that he criticises certain trends of modern moral theology as «incoherent with faith in divine providence»²¹².

8. Conclusion: Some Observations

Some final observations may be made to conclude the chapter.

Firstly, it is a central element of the narrative of this thesis that traditions of enquiry adapt in response to significant socio-economic and

²⁰⁷ Cf. J. FINNIS – J. BOYLE – G. GRISEZ, *Nuclear Deterrence*, 372 ff.

²⁰⁸ J. FINNIS – J. BOYLE – G. GRISEZ, *Nuclear Deterrence*, 382. They continue, «that (as Newman forcibly recalled) in the perspective of choice, non-moral evil and suffering can never be equivalent to even a venial sin one commits».

²⁰⁹ Finnis often uses the example of Socrates whose own refusal to kill led to his own death, living out the principle that he himself defended – it is better to suffer evil than to perpetrate it. Cf. J. FINNIS, *Moral Absolutes*, 27, 47-50; ID., *Fundamentals of Ethics*, 109-124.

²¹⁰ J. FINNIS, *Moral Absolutes*, 12. For a person to «hope to take on the architectonic role of providence is not wisdom but folly».

²¹¹ J. FINNIS – J. BOYLE – G. GRISEZ, *Nuclear Deterrence*, 377.

²¹² J. FINNIS, *Moral Absolutes*, 20.

political challenges. Furthermore, they consolidate or change in response to being contested by other traditions of enquiry, while trying to remain consistent with the resources and models of reasoning which are normative with the tradition²¹³. I wish to defend the position that Finnis may be regarded as a legitimate moment in this dynamic – despite the reservations of some. As proposed previously, Finnis echoes the theorists of the Second Scholasticism (De Vitoria, Suarez and others) in their deep desire to return to the sources of the tradition (Aquinas) in order to respond to the practical issues of the day²¹⁴.

Secondly, our era has seen an explosion of specific rights-claims and the ever-widening use of rights-language in moral and political discourse. It is important to note for the later dialogue that there are certain characteristics of our era that are reflected in, and recognised by, his theoretical reflections. For instance, the modern emphasis on the individual in the moral and political order is mirrored in his theoretical marginalisation of metaphysics and the subsequent turn to the subject. Contemporary pluralism is reflected in the priority of choice and the consequent plurality of goods that refuses to endorse any particular model or hierarchy. Even much of his wording is attractive to the contemporary mind: for instance, the identification of the final good as «integral human fulfilment». Such aspects make him an ideal conversation partner in a dialogue with modernity. Many disagree with such adaptations, as previously outlined. However, I would like to argue that perhaps the opposite is the case. Instead, he is too self-conscious of such criticisms – and therefore does not wish to be seen to concede too much ground. Accepting that he can claim a legitimate adaptation of the tradition, I would argue that he does not go far enough. As a result, he fails to explore other significant issues central to modernity, and so rights, such as power and democracy. Such issues require a more thorough appraisal, if the natural law is to provide a viable alternative to supporting many contemporary institutions, as desired by Finnis.

Thirdly, there is a desire in the work of Finnis to reinstate the original typology of objective justice, subjective rights and the law, proposed by the early tradition and identified in Chapter I. A deeper account of the approach of Finnis will be outlined in a later chapter in order to facilitate a dialogue by way of the four crucial terms of the «lattice-work». At this point, however, they may be briefly highlighted. The primary moving idea is «the good», disclosed in the basic reasons provided by way of reasonable deliberation. First, therefore, the «com-

²¹³ This will be further detailed in a later chapter, cf Ch. VII, Sec. 2; Ch. VII, Sec. 7.

²¹⁴ Cf. Ch. I, Sec. 3.3.2.

mon good» is the primary mark of justice, identified as the sum of the conditions that facilitate the good of the individual. Second, in striving for the good, the free choices that are made by a person may be described as a purposive freedom. Third, the law is in accord to human reason, for it is reason that discloses its necessity in supporting the common good. Finally, the state is also a natural necessity that is bound by the requirements, and so limitations, of the common good. Human rights, then, are conclusionary statements that capture the requirements of the common good in supporting the integral human fulfilment of each individual.

Fourthly, the defining feature of «order» identified in Chapter I also significantly affects the theory of the New Natural Law. The individual and society are conceived of having a natural order that may be disclosed by way of reason. Therefore, justice, freedom, law and the state will also have their own inherent order, considered to be natural and so necessary for the well-being of the individual and society. However, as the word «order» has different meanings (structure, harmony, command), so also the theory is marked by different characteristics. Firstly, it has the advantageous claim of objectivity arising from a disclosed order or «structure». Secondly, it implies an attractive «harmonious condition» that results from aligning to the «order». However, and finally, it is also open to a paternalistic view of society, implied by its «regulatory» meaning. For instance, Finnis's reflections on specific ethical issues often insist on the protection of the cultural environment or public realm – which can narrow the free-space of the individual quite considerably.

I now turn to present a similar exposition of the second theorist, also representative of his respective tradition – Ronald Dworkin and a Liberal Theory of Rights.

CHAPTER IV

Ronald Dworkin: A Liberal Theory of Rights

1. Introduction

Ronald Dworkin (1931-), an American legal philosopher, is a significant figure in contemporary jurisprudence, political science and ethics. In *Reading Dworkin Critically*, Alan Hunt introduces Dworkin as «probably the most influential figure in Anglo-American legal theory»¹. Justine Burley, in *Dworkin and His Critics*, begins by asserting that his «sophisticated appreciation of the relationship between moral, legal, and political philosophy, and of the mutual dependence of these branches of inquiry and practical controversy, is unrivalled by his contemporaries»². Judith Wagner DeCew concurs, commenting that in particular, he «has probably been most influential in emphasising the force of rights arguments in moral theory»³.

Born in Worcester, Massachusetts, Ronald Myles Dworkin studied in the United States at Harvard University and in the United Kingdom at Oxford University. He became a member of the New York Bar in 1958 and worked in law until 1962. His academic career began as professor at Yale University (1962-1969), where in 1968 he became the holder of the Wesley H. Hohfeld Chair of Jurisprudence. In the following year, he succeeded H.L.A. Hart as Professor of Jurisprudence at Oxford University. Since 1975, he has held in addition the Professor-

¹ A. HUNT, «Introduction», in ID., ed., *Reading Dworkin*, 1.

² J. BURLEY, «Introduction», in ID., ed., *Dworkin and His Critics*, xii.

³ J. WAGNER DECEW, «Moral Rights», 65.

ship of Law and Philosophy at New York University. He currently remains in this position and has assumed the Professorship of Jurisprudence at University College, London since retirement from Oxford.

Throughout his career, he has publicly engaged in many of the controversial social concerns of the time, particularly in the United States: issues include civil disobedience against the backdrop of the Vietnam War during the 1970s⁴; the continuing legal struggles regarding abortion and euthanasia in the US Supreme Court⁵; and the recent alarm relating to the curbing of civil rights in the so-called War-on-Terror⁶. Throughout this time, he has been a regular contributor to the public debate through *The New York Review of Books*⁷. In the United Kingdom, he was been a strong advocate of the inclusion of a Bill of Rights into the British constitutional system⁸. He is both a member of the American Academy of Arts and Science and a Fellow of the British Academy⁹.

This chapter investigates Dworkin's account of human rights as a means of moral and legal reasoning. It focuses on Dworkin's general theoretical framework; that is, how he defines and establishes in systematic relation the concepts of justice, rights and law. It takes account of Dworkin's reflections on specific individual right-claims only to the extent that it illuminates our general discussion. For instance, the main exposition will be followed by an outline of Dworkin's position on abortion. The conclusion proposes a number of pertinent points that connect to previous chapters and indicate important issues for later chapters.

2. Situating Dworkin

Dworkin states, in *Taking Rights Seriously*, his own intention «to define and defend a liberal theory of law»¹⁰. Liberal theory, however,

⁴ Cf. R. DWORKIN, «On Not Prosecuting Civil Disobedience»; ID., *Taking Rights Seriously*, 206-222; ID., *A Matter of Principle*, 104-117.

⁵ Cf. R. DWORKIN, *Life's Dominion*; ID., *Freedom's Law*, 39-146; ID., *Sovereign Virtue*, 453-473.

⁶ Cf. R. DWORKIN, «Rights and Terror», 1-34.

⁷ Cf. <http://www.nybooks.com>

⁸ Cf. R. DWORKIN, *A Bill of Rights for Britain*; ID., *Freedom's Law*, 352-372. In 1998 the Human Rights Act was belatedly incorporated the European Convention on Human Rights into U.K. Law.

⁹ Dworkin is co-chairman of the (American) Democratic Party Abroad. He is involved with a number of Foundations including acting as a consultant on human rights to the Ford Foundation.

¹⁰ R. DWORKIN, *Taking Rights Seriously*, vii.

covers a large number of differing models. In an interview, he accepts, «I did say that we [contemporary liberals; namely Rawls, Nozick, and Dworkin himself] were all “working the same street”, but I want to make plain that we each have very different theories»¹¹. Before further outline is given in the course of this chapter, it may be said, as a broad characterisation, that Dworkin’s writings present a liberalism marked by a central regard for equality, thereby challenging the traditional liberal priority of liberty. Rather than viewing liberty and equality as competitive notions, Dworkin claims that his conception of equality as meriting equal concern and respect supports and facilitates liberty. Among the formerly named contemporary liberal theorists, he diverges from the liberalism associated with the weighting of liberty over equality exemplified by Robert Nozick¹², but he shares a similar commitment to equality as advanced by John Rawls¹³.

Dworkin’s writings rarely reference central figures in legal, political or moral theory, especially those within his self-confessed liberal tradition. In the preface of *Law’s Empire*, his first full-length work which completed his theory of law, he writes, «I have not tried generally to compare my views with those of other legal and political philosophers, either classical or contemporary, or to point out how far I have been influenced by or have drawn from their work»¹⁴. It is this feature of his thought that makes it difficult to locate Dworkin¹⁵.

Dworkin has claimed two broad categories for his own work. The primary, as previously mentioned, is liberal theory. He shares the liberal centrality of the individual and the need to protect the individual from government abuses by way of a strong commitment to rights – archetypal in John Locke¹⁶. However, his preoccupation with equality resists any attempt to reduce his position to a simple libertarian dedication to negative freedom that marked the early liberal tradition from Thomas Hobbes¹⁷. Rather, the primary concern for equality, distinctive

¹¹ B. MAGEE, *Men of Ideas*, 259.

¹² Cf. R. NOZICK, *Anarchy, State and Utopia*; F. HAYEK, *The Constitution of Liberty*. They argue that the primary function of the state is to uphold property rights and the rule of law and involve itself in as little intervention in society as possible

¹³ Cf. J. RAWLS, *A Theory of Justice*; ID., *Political Liberalism*, ID., *Justice as Fairness*; M. WALZER, *Spheres of Justice*. They argue that the state has a responsibility to intervene in society to uphold a basic equality.

¹⁴ R. DWORKIN, *Law’s Empire*, ix.

¹⁵ Cf. App C.

¹⁶ Cf. Ch. II, Sec. 2.4 ff.

¹⁷ Cf. Ch. II, Sec. 2.2.

in Dworkin, is a feature of political philosophy since Kant. In an article entitled «Liberalism», Dworkin writes,

What does it mean for the government to treat its citizens as equals? That is, I think, the same question as the question of what it means for the government to treat all its citizens as free, or as independent, or with equal dignity. In any case, it is a question that has been central to political theory at least since Kant¹⁸.

The contemporary interest in a Kantian-influenced liberalism is commonly attributed to John Rawls¹⁹. Dworkin utilizes the arguments of Rawls – some critically – in the course of his own theorising, which shall be outlined in closer detail in the course of this chapter.

Dworkin's work may also be delineated by its critique of other approaches to law and morality; that is, it may be characterised by what he claims not to be. He has consistently criticised a positivist account of law and its consequences. In particular, H.L.A. Hart, whom he replaced in Oxford University, typifies the style of legal theorising against which Dworkin is reacting. Of Rawls and Hart – responding constructively to the former and critically to the latter – Stephen Guest comments: «The milieu of legal and political theorising in which Dworkin writes is largely their creation»²⁰.

Central to Dworkin's contention regarding the positivist account of law is the insistence on the necessary relationship between law and morality. A positivist approach claims to provide an empirical and purely descriptive study of the law, independent of any evaluative, normative or moral considerations. However, he insists that morality is essential to any thorough account of the actual practices of law. This internal connection between morality and law is a fundamental feature of the natural law²¹. Although a fundamental feature of his thought²², this

¹⁸ R. DWORKIN, «Liberalism», 127; ID., *Matter of Principle*, 259-265.

¹⁹ Cf. C. FARRELLY, *Introduction to Contemporary Political Theory*, 73 ff. Onora O'Neill observes «the most definite Kantian programme in ethics recently has been that of John Rawls». O. O'NEILL, «Kantian Ethics», 184.

²⁰ S. GUEST, *Ronald Dworkin*, 4.

²¹ Providing an overview, Brian Bix writes, «A diverse family of theories carries the label “natural law”. Within legal theory, there are two well-known groupings which cover most [...] (1) “traditional natural law” sets out a moral theory (or an approach to moral theory) in which one can better analyse how to think about and act on legal matters; and (2) “modern natural law theory” argues that one cannot properly understand or describe the law without moral evaluation». B. BIX, «Natural Law Theory», 223-240, 239. On the development of the two models, cf. Ch. II, Sec. 1.

²² In a critical review of *Taking Rights Seriously*, Joseph Raz writes, «Of all the views propagated in these essays, the Natural Law Thesis is the one which is most ob-

second categorisation has only recently been admitted by Dworkin himself. In «Natural Law Revisited», he very broadly defines Natural Law as a legal theory with normative (or moral) aspirations. He writes:

Everyone likes categories, and legal philosophers like them very much. So we spend a good deal of time, not all of it profitably, labelling ourselves and the theories of law we defend. One label, however, is particularly dreaded: no one wants to be called a natural lawyer. Natural law insists that what the law is depends in some way on what the law should be²³.

He admits that it is a crude characterisation of the natural law. But he concludes, «Suppose this is natural law. What in the world is wrong with it?»²⁴? At its simplest, Dworkin's acceptance of the natural law categorisation is in order to delineate himself apart from legal positivism. As already noted, there are many conceptions of liberalism: equally, there are many versions of the natural law. Writing of Dworkin, Brian Bix argues that he is a natural law theorist, «in that he denies the conceptual separation of law and morality, and asserts instead that moral evaluation is integral to the description and evaluation of the law»²⁵. In light of the analysis by Noberto Bobbio, the introduction to Chapter II maintained that there are two broad traditions of natural law – the Aristotelian-Thomist tradition and the Modern Natural Law tradition. Furthermore, it was argued that the latter fostered early liberal theory. Dworkin's own theory represents a variant of the tradition of modern conceptual natural law that is decisively different from an Aristotelian-Thomist alternative tradition²⁶. Dworkin's lack of engagement with the canonical sources means that, at times, he fails to take on board the consequences of such distinctions²⁷.

Stephen Guest defends Dworkin's lack of reference to his influences. He writes,

I think, however, that a search for origins in Dworkin's case is fruitless. He is – as it were – a pure philosopher rather than a scholar. His interest is in

scurely and least explicitly stated». J. RAZ, «Professor Dworkin's Theory of Rights», 136.

²³ R. DWORKIN, «Natural Law Revisited», 163.

²⁴ R. DWORKIN, «Natural Law Revisited», 163.

²⁵ B. BIX, «Natural Law Theory», 237. Accordingly, Dworkin is categorised by Bix as a modern natural lawyer, cf. Ch. IV, Sec. 2, n. 21.

²⁶ Cf. Ch II, Sec. 1; App. C.

²⁷ As a result, Robert Moles bemoans that he has «cut us adrift from our past, from any sense of the development of ideas within our discipline». R.N. MOLES, «The Decline and Fall», 83.

problems of law, state and morality. He much prefers to go straight to the problem without relentless enquiry into what other people say²⁸.

The direct route – referred to by Guest – is to focus on the actual practices of judicial decision making. In other words, Dworkin is proposing «a phenomenology of adjudication»²⁹. In particular, his attention centres on the conduct of the legal system and judiciary in adjudicating the actions of state and society; for such social practice is the nexus through which the law, politics and morality converge and manifest themselves in a concrete manner. The overall thrust of his project is to offer a coherent and normative theory that is capable of guiding the reflection of public officials and their decisions in difficult situations.

Many of his books, *Taking Rights Seriously* (1977), *A Matter of Principle* (1985), *Freedom's Law* (1996) and parts of *Sovereign Virtue* (2000), are collections of slightly modified and mutually supportive articles. *Law's Empire* (1986) is his most significant book-length presentation on legal, political and moral philosophy. *Life's Dominion* (1993) concerns the concrete issues of abortion and euthanasia. Many of his books, due to their origins as journal or seminar pieces, deny a simple chapter-by-chapter logic. It will be necessary therefore to extrapolate the general theoretical framework in which justice, rights and law are defined by Dworkin³⁰.

Dworkin's work typically involves a critical and a constructive movement. This chapter proceeds accordingly: first, it outlines the sustained critique that motivates his theoretical project; subsequently, it considers the positive construction of his own framework; the conception of rights advanced by Dworkin is then outlined; finally, the chapter places these rights within his political and moral applications.

3. Critique of Legal Positivism

In presenting a liberal theory of law, Dworkin is sharply critical of what he calls the ascendant model of law. Initially referred to as the «ruling theory of law»³¹, it has two necessarily independent parts. The first element focuses on the question of what the law is: it is the theory of legal positivism, holding that legal propositions are simply the exter-

²⁸ S. GUEST, *Ronald Dworkin*, 7.

²⁹ R. DWORKIN, *Law's Empire*, viii.

³⁰ For a near complete bibliography recently compiled, cf. J. BURLEY, *Ronald Dworkin and his Critics*, 398-404. For an earlier complete listing, cf. R. GUEST, *Ronald Dworkin*, 244-259. For a selected bibliography on critical responses to Dworkin, cf. M. COHEN, ed., *Ronald Dworkin and Contemporary Jurisprudence*, 300.

³¹ R. DWORKIN, *Taking Rights Seriously*, vii.

nal rules and procedures adopted by specific social institutions³². The second element concerns how the law ought to be shaped: it is the theory of utilitarianism, holding that the law and associated institutions should only be guided by the general welfare. He acknowledges that both theories originate within the liberal tradition and are generally connected with that tradition, but his critique and subsequent constructive theory is motivated by the need to emphasise «an idea that is also part of the liberal tradition, but that has no place in either legal positivism or utilitarianism. This is the old idea of individual human rights»³³.

As an aspect of the liberal tradition, legal positivism may be traced back to Thomas Hobbes³⁴. In contrast to the previous tradition, Hobbes asserted a fundamental division between right and law, which is parallel to the contrast between liberty and obligation. Rights concern liberties; law refers to obligations. In order to make social order possible in a world of conflicting rights and liberties, law and obligation must be imposed by a strong authority. It is by the power or will of the legislative authority that a rule becomes a law. The coercion or imposition of the law is justified because it ultimately protects and facilitates natural rights or liberties. By doing so, the authority acts justly – for natural rights are the final basis of the natural law or justice.

However, the division between rights and law, embryonic in the early modern period, becomes very influential in the later Enlightenment Era. Rights – which interconnected justice and law in Hobbes and Locke – were sceptically undermined by Jeremy Bentham. Like Hobbes, he treated the law as a body of commands laid down by the authority of the legislative body in a legal system. But natural rights do not form the basis for the law. Rather, the law was treated separately. It is a social fact resulting from the continual compliance of the population and in need of empirical explanation. The division became a decisive gulf, in which the law was isolated from justice. According to Bentham, rights only served to continue confusion between two different categorical approaches to the proper exposition of the law: «expository jurisprudence», which accounts for the law as actually existing, and «censorial jurisprudence», which analyses law from a moral (or more

³² Cf. J.L. COLEMAN – B. LEITSER, «Legal Positivism», 241-260.

³³ R. DWORKIN, *Taking Rights Seriously*, vii. It is for this reason Neil MacCormick writes, «The key fact about Dworkin is that he is a pre-Benthamite». N. MACCORMICK, «Dworkin as a Pre-Benthamite», 183. This is because Dworkin has rejected the Benthamite distinctions that led to an unacceptable division between law and justice. On the historical development of this distinction, cf. Ch. II, Sec. 4.1.2.

³⁴ N.E. SIMMONDS, *Central Issues in Jurisprudence*, 124; cf. Ch. II, Sec. 2.2.1.

specifically utility) point of view, that is, to identify weakness and propose reform. From the former category springs legal positivism, and from the latter arises utilitarianism in legal and society analysis. For Bentham, and followers such as John Austin (1790-1859), the nature of the law is primarily a matter of considering rule-following social behaviour, based on enacted law and supported by the authority of the sovereign – independent of moral concerns. Any moral import was according to the principle of utility, which judged the law according to its efficiency in maximising the general welfare of the community. As is usual in his work, Dworkin does not trace such development, but simply acknowledges: «Both parts of the ruling theory derive from the philosophy of Jeremy Bentham»³⁵.

Instead, Dworkin focuses on the contemporary form of legal positivism³⁶ exemplified by H.L.A. Hart (1907-1992) whom he replaced as Professor of Law at Oxford³⁷. Hart's proposal, which is decisive to Dworkin's critique, is «the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so»³⁸. Legal positivism, Hart argues, can allow for the contingent, historical or local interaction between law and morality. But there is no necessary connection and morality is not necessary in order to identify the law.

Legal positivism identifies valid law as only those rules which are derivable from basic conventional criteria of legal validity accepted in a particular legal system. Bentham (and Austin) had proposed that the nature of the law is the regular pattern of social practice of rule-conforming behaviour and that the criteria of legal validity may be ascertained by empirical description of such practice. Hart argued that from the point of view of the participants in the social practice there must be a basic rule of recognition which specifies «some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts»³⁹. The basic requirement of such a rule of recognition is to identify and validate a body of rules which will be considered the law. Primarily it acts to identify the sources – statutes,

³⁵ R. DWORKIN, *Taking Rights Seriously*, vii.

³⁶ Cf. R. DWORKIN, *Taking Rights Seriously*, 17-22; ID., «Is Law a System of Rules?», 38-65.

³⁷ On Hart's position, cf. H.L.A. HART, *The Concept of the Law*; ID., «Positivism», 17-37.

³⁸ H.L.A. HART, *The Concept of the Law*, 185.

³⁹ H.L.A. HART, *The Concept of the Law*, 94.

judicial decisions etc – of our body of rules. A rule then is law if it emanates from such a source. Significantly, the rule of recognition will be ascertained by the empirical examination of the body of rules or existing law recognised by the legal system. An analytic conception of the law, therefore, can be identified without any reference to normative standards outside the law.

According to Dworkin, herein lies the problem. An analysis of the legal system for the rule of recognition is not, in fact, ascertainable by pointing to the body of enacted rules and sources. Dworkin asserts that when lawyers argue and judges adjudicate in concrete hard cases they use standards that are not identifiable as mere rules. Positivism, he argues, «is a model of and for a system of rules, and its central notion of a single fundamental test for law forces us to miss the important roles of these standards that are not rules»⁴⁰. Dworkin is claiming that in the actual processes of legal debate and judicial adjudication the participants justify their claims according to standards that are not strictly enacted rules.

3.1 *Principles and Policies*

To illustrate his point, he describes the case *Riggs v. Palmer*, in New York (1889), in which a grandson claimed his inheritance as the named beneficiary of his grandfather – having previously murdered his grandfather. There were no precedents by which to judge the case. The court admitted that the will was valid and in perfect accordance with the law but rejected the grandson's petition according to the principle that no-one should profit from their crimes. Such a maxim, according to Dworkin, is different in character from the legal rules.

Although they both set parameters to particular decisions, a legal rule (a will is invalid unless signed by three witnesses) differs from a legal principle (a man may not profit from his own wrong) because it is the nature of rules to be comprehensively applicable – all or nothing. At this level, validity is established by consistently following the rules, otherwise no legal obligation can be enforced. However, principles do not necessitate a particular decision; rather, they argue in a particular direction. According to Dworkin, rules may be functionally important, but principles have added weight and importance.

I call a «principle» a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable,

⁴⁰ R. DWORKIN, *Taking Rights Seriously*, 22.

but because it is a requirement of justice or fairness or some other dimension of morality⁴¹.

Such principles are embedded in the very concept of law itself. Principles are contained within the legal system as expressions of the community's political morality. He rejects a duality between morality and law, for it creates a division of theoretical spheres to the impoverishment of both⁴². Importantly, these principles cannot simply be identified by consulting certain sources, but only by engaging in a moral or political discussion of what principles should be invoked to defend the fundamental rules of the law.

Such a defence, or justification of judicial decisions, reveals a further set of standards; namely, policies. Dworkin defines policy as,

that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community (though some goals are negative, in that they stipulate that some present feature is to be protected from adverse change)⁴³.

A true account of adjudication – particularly of hard cases in which the rules are unavailable or inconclusive – reveal decisions justified by appeal to policy or principle. An appeal to policy is to justify a decision by the advance or protection of some common goal, such as a subsidy for an aircraft manufacturer in order to protect national defence. In contrast, a decision in favour of anti-discrimination laws would appeal to principle, such as the right to equal respect and concern⁴⁴.

3.2 *Principles as Rights*

Dworkin's contention regarding rights turns on his alternative theory of adjudication in the hard cases that appear before a court. According to legal positivism, in a situation that is not clearly covered by the rules, a judge has discretion to decide the case. By doing so, she has created and retrospectively applied new legal rights. According to Dworkin, such a model is inadequate because the purpose of the judiciary is to discover the rights of the parties involved – not to invent them.

All public officials, including judges, are obliged to articulate their reasons for particular decisions in a consistent manner⁴⁵. In the main,

⁴¹ R. DWORKIN, *Taking Rights Seriously*, 22.

⁴² Cf. R. DWORKIN, *Taking Rights Seriously*, 46 ff; ID., «Social Rules», 855 ff.

⁴³ R. DWORKIN, *Taking Rights Seriously*, 22.

⁴⁴ R. DWORKIN, *Taking Rights Seriously*, 82; cf. ID., «Hard Cases», 1057 ff.

⁴⁵ This and the following point will become important in a later chapter; cf. Ch. VI, Sec. 4.3; Ch. VI, Sec. 6.1 ff.

justification of judicial and political decisions is proposed by arguments from principle and/or arguments from policy. Although difficult to delineate clearly, Dworkin basically asserts that,

Arguments of principle are arguments intended to establish an individual right; arguments of policy are arguments intended to establish a collective goal. Principles are propositions that describe rights; policies are propositions that describe goals⁴⁶.

Policy arguments tend to justify decisions according to the collective goals of a community. Principled arguments, on the other hand, have a threshold weight against collective policies. Principles may be distinguished from but not subordinated to collective goals offered by democracy, jurisprudence, utility or economics. Concretely, rights are principles defined «so as to express more definitely the weight they have against other political aims on particular occasions»⁴⁷. It is through consideration and protection of concrete rights that political or judicial decisions are not subordinated to policy or utility. Rather, they tend to provide criteria by which the collective goals may be distributed fairly; that is, they are expressions of a concept of justice.

Because they are expressions of a conception of justice, principles and their implications provide decisive justification. Judges (as do all public officials) have an inescapable duty to provide justification or a coherent schema of principles and positive rules. Hard cases are inherently controversial because two standards clash, both of which are necessary to the effective working of the system. Yet the responsibility remains. In an article entitled «Hard Cases», Dworkin introduces Hercules, an imaginary superhuman judge, who is capable of comprehensively and explicitly doing what normal judges do in a more limited and less self-conscious manner⁴⁸. It is for the judge to justify his decision in accordance with a law internally consistent and in compliance to pre-established principles. Cases need to be consistent with each other and with the background legal and political principles. Hercules, therefore, must proceed according to a general theory of law and society that engages with the political morality of his community. Adjudication, as a result, is necessarily ethical and political – by which he does not mean party political – and bears a responsibility towards justification, application and consistency. Such a theory will necessarily be a complex matrix of principles and rights. According to Dworkin, the rights

⁴⁶ R. DWORKIN, *Taking Rights Seriously*, 90.

⁴⁷ R. DWORKIN, *Taking Rights Seriously*, 93.

⁴⁸ R. DWORKIN, *Taking Rights Seriously*, 105.

thesis best explains the process of adjudication. Essentially, «Dworkin holds that his account of law and adjudication accords more closely to our experience than does that of Hart»⁴⁹.

These principles and rights have normative authority in guiding judicial decision making: justice (and morality) is inherent in the very operation of reaching adjudication in the legal system. The standards of justice are not to be applied with discretion, as proposed by legal positivists, but are necessary parameters and norms that guide and bind a judge's decision. In this manner, Dworkin justifies judicial activism. He denies that he is undermining the constitutional systematic relation of powers fundamental to western democracies, in which an independent judiciary is bound to legislative supremacy. Rather, he is emphasising the responsibility of the judiciary to assess the relationship between the collective commitments of policy and the principles that underlie the legal system of that community⁵⁰. Dworkin is proposing that a rights thesis or model is the only alternative because only it is capable of providing the soundest theory of law – it fits.

4. A Theory of Justice

As noted in an earlier subsection, Dworkin's reflections on a theory of law depart from a critique of H.L.A Hart, and his considerations of the nature of justice proceed from a constructive appraisal of John Rawls⁵¹. As Hart exemplified the legal positivist tradition, so Rawls epitomises the contemporary liberal tradition. In «Justice and Rights», Dworkin writes of three salient features of John Rawls' presentation of justice published in *A Theory of Justice* (1971) – reflective equilibrium, the social contract, and the original position. According to Dworkin, they act as a portal or «a half-way point in a deeper theory that provides philosophical arguments for its conditions»⁵².

A Theory of Justice imagines a group of men and women who come together to create and agree a social contract⁵³. Their original position is under a veil of ignorance, that is, they agree without self-awareness of their own talents, abilities or resources. From this theoretical starting

⁴⁹ N.E. SIMMONDS, *Central Issues in Jurisprudence*, 190.

⁵⁰ Cf. R. DWORKIN, *Taking Rights Seriously*, 131-149; ID., «The Jurisprudence of Richard Nixon».

⁵¹ Cf. Ch. IV, Sec. 2.

⁵² R. DWORKIN, *Taking Rights Seriously*, 158.

⁵³ J. RAWLS, *A Theory of Justice*; cf. ID., *Political Liberalism*; ID., *Collected Papers*. For commentary, cf. B. BARRY, *Theories of Justice*; N. DANIELS, ed., *Reading Rawls*; T. POGGE, *Realising Rawls*.

point, Rawls attempts to show that rational people acting in their own self-interest would choose two principles of justice. First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others⁵⁴. Second: social and economic inequalities are just to the extent that they operate to the benefit of the least advantaged people of society⁵⁵.

The thought-experiment utilises the previously mentioned three important features. Firstly, reflective equilibrium is the methodology or process by which each come to a conclusion regarding the importance of these principles. Secondly, the appeal to the social contract is a theoretical device in order to appeal to the inherent fairness of the principles that are being asserted. Thirdly, the original position, the starting point of this theoretical device, protects the posited equality of each individual. According to Dworkin, each of the three devices presupposes certain essential moral elements to a theory of justice. The following subsections take each in turn.

4.1 *A Coherence Model of Morality*

The technique of equilibrium is the process by which individuals search for consistency or balance between moral intuitions and social practices (or institutions). The presupposition of this technique is a coherence theory of morality, of which Dworkin sketches two models. On the one hand, the natural model proposes an objective empirical moral reality to which our intuitions merely point. Accordingly, a theory of justice discovers that reality, in a manner similar to the empirical sciences: to act justly is to correspond our actions to that reality⁵⁶. On the other hand, a constructive model is analogous to common law adjudication. According to this model, individuals have a responsibility to fit their intuitions within a coherent program of action. He rejects the former model because inconsistency will be repressed in the belief that a more sophisticated set of principles will be discovered to correspond to reality. A constructive model, however, demands that any apparent in-

⁵⁴ Cf. J. RAWLS, *A Theory of Justice*, 60 ff. Importantly, it holds a priority over the second principle, to which Dworkin, as will be outlined, will disagree.

⁵⁵ Cf. J. RAWLS, *A Theory of Justice*, 302-303 ff. The second principle comes in two parts: a) conditions are to be of the greatest benefit to the least-advantaged members of society (the difference principle) and b) offices and positions must be open to everyone under conditions of fair equality of opportunity (principle of equal opportunity).

⁵⁶ Recall that a similar criticism of neo-scholastic versions of natural law was made by John Finnis, cf. Ch. III, Sec. 2.

consistency must never be submerged. In fact, every decision must be accounted for within a coherent theory of justice: the technique of equilibrium is a two-way process in which we move back and forth between adjustments to theory and change of conviction until the best-fit possible is achieved⁵⁷. He maintains that the technique of equilibrium is a characteristic of our everyday moral reflection and is only compatible with the constructive model of morality.

4.2 *A Rights Based Morality*

According to the constructive model outlined above, responsible justification of our actions and institutions requires consistency. Within the political sphere, we can say that actions may be justified according to three concepts – goals, rights and duties. First: a *goal* is some state of affairs that guides political action and decisions. It may be specific, like full employment, or relatively abstract, like creating a utopian society or stronger nation. Second: an individual has a *right* to a particular political act if failure to provide that act is unjustified. Third: an individual has a *duty* to act if the act can be justified within the theory as a whole and not simply towards a particular goal – for instance, individuals may have a duty to worship God, even though no goal need be stipulated. Political theories and theories of justice will differ from each other in proportion to the importance attached to particular goals, rights and duties and how they interconnect each notion.

Such a theory might be goal-based, in which case it would take some goal, like improving the general welfare, as fundamental; it might be right-based, taking some right, like the right of all men to the greatest possible overall liberty, as fundamental; it might be duty-based, taking some duty, like the duty to obey God's will as set forth in the Ten Commandments as fundamental⁵⁸.

With regard to the individual: goal-based theories are primarily concerned with some stipulated state of affairs to which all individuals must conform; and right-based and duty-based theories place the indi-

⁵⁷ R. DWORKIN, *Taking Rights Seriously*, 162. Crucially, Dworkin claims that the constructive model does not imply scepticism or relativism. In fact, the model neither denies nor affirms the objective standing of any ontological convictions. Such questions of metaphysical foundations are left open. However, he claims that the natural model does presuppose a dependency on nature. This characteristic of moral and legal reasoning will be an important point in a later chapter; cf. Ch. VI, Sec. 6.3.

⁵⁸ R. DWORKIN, *Taking Rights Seriously*, 171-172. He continues, «Utilitarianism is, as my example suggested, a goal-based theory; Kant's categorical imperatives compose a duty-based theory; and Tom Paine's theory of revolution is right-based».

vidual at the centre. But each of these latter two theories places the individual in a different moral light. Duty-based theories consider the moral code to be of the essence of the person. Therefore, it is mainly concerned with the standards of behaviour of an individual. However, right-based theories treat moral codes of conduct as instrumental. Their primary purpose is to protect the independence of the person to act rather than creating conformity with a standard⁵⁹. The social contract of Rawls is an example of a rights-based theory because it respects the individual's consent and, hence, the freedom and independence of each participant.

Critically, Dworkin maintains that such a rights theory is based on the concept of *natural* rights. Although not arising from an objective empirical reality, rights are not mere conventions or the results of legislation. He avoids the use of the term because of its metaphysical connotations – they are not special attributes inherent in an objective reality. Instead, he uses terms like «moral rights», «strong sense rights», «fundamental rights» and «paradigmatic rights». The constructive model allows Dworkin to assert the independence of rights to which we can appeal in constructing an argument.

On the constructive model, the assumption that rights are in this sense natural is simply one assumption to be made and examined for its power to unite and explain our political conviction, a basic programmatic decision to submit to this test of coherence and experience⁶⁰.

Natural rights, therefore, are concrete expressions of the principles of a best-fitting general theory of justice.

4.3 *Equal Respect and Concern*

In the Social Contract tradition⁶¹, an innovative aspect of Rawls's theory is his description of the original position. The participants to the social contract are placed under a veil of ignorance in which they are unaware of the talents or resources of each other. Dworkin argues that this device, like the social contract, is incompatible with a goal-based theory because the veil removes all knowledge of future

⁵⁹ R. DWORKIN, *Taking Rights Seriously*, 172. The different theories may be appropriate to different conditions. For example, a goal-based theory is compatible in a homogeneous society or one that must unite in order to achieve an immediate goal such as a natural disaster or victory in war.

⁶⁰ R. DWORKIN, *Taking Rights Seriously*, 177.

⁶¹ Cf. App. C; Thomas Hobbes, Ch. II, Sec.2.2.1; John Locke, Ch II, Sec. 2.4.1; Jean-Jacques Rousseau, Ch. II, Sec. 3.3.1.

states-of-affairs. Uninformed of the future, the participants must make very abstract judgements. According to Rawls, the members would choose the right to liberty and the right to equality. However, Dworkin maintains that the right to equality is necessarily more fundamental: the members of the contract cannot but choose to protect the right to equality, and liberty is the result of such an arrangement⁶². The basic sense of equality that is considered fundamental is the right to equal concern and respect in the design and administration of the political institutions that govern them. Therefore, the principle of equal concern and respect is the most basic principle of any theory of justice.

We may therefore say that justice as fairness [Rawls' model] rests on the assumption of a natural right of all men and women to equality of concern and respect, a right they possess not by virtue of birth or characteristic or merit or excellence but simply as human beings with the capacity to make plans and give justice⁶³.

The three presuppositions – a coherence model of morality, rights-based theory and the principle of equal respect and concern – are more than mere characteristics. According to Dworkin they are constitutive of any contemporary theory of justice and the associated general theory of law. In particular, they constitute the central methodological axioms of his ethical framework. They appear and reappear throughout his jurisprudential, moral and political reflections.

5. The Logic of Rights

As described above, Dworkin's insights regarding rights turn, in part, on the distinction between principles and policies. In the necessary justification of legislative and judicial decisions and actions, propositions are put forward that follow two basic lines of reasoning: to repeat, «Principles are propositions that describe rights; policies are propositions that describe goals»⁶⁴. On one hand, justification may be advanced according to principles irrespective of the consequences or desired goals of the community. On the other hand, justification may be forwarded according to legitimate and identifiable community goals. The former need not take the latter into account.

⁶² R. DWORKIN, *Taking Rights Seriously*, 179.

⁶³ R. DWORKIN, *Taking Rights Seriously*, 182.

⁶⁴ R. DWORKIN, *Taking Rights Seriously*, 91.

5.1 A Formal Definition: *Rights as Trumps*

Propositions are distinguished as principles or policy according to how they function within a moral, legal and political reasoning. The distinction, therefore, is based not on content but on form – that is, the particular mode or manner it operates within a wider discussion or a particular political theory⁶⁵. As such, his theory does not claim to show the actual rights of men and women. Rather, it claims to show how rights may be identified by their place within the general justification (or political theory) of political aims.

A political aim – a proposal that claims to make a community better off as a whole – is a state of affairs advanced by some general political justification or theory. Political aims may be divided into individuated aims (rights) or non-individuated aims (goals). Whether, a political aim may be a right or a goal depends on its place and function within a political theory⁶⁶.

A political right is an individuated political aim. An individual has a right to some opportunity or resource or liberty if it counts in favour of a political decision that the decision is likely to advance or protect the state of affairs in which he enjoys the right, even when no other political aim is served and some political aim is disserved thereby, and counts against that decision that it will retard or endanger that state of affairs, even when some other political aim is thereby served⁶⁷.

It contrasts with a goal or a non-individuated political aim because a goal does not propose any specific opportunity or resource for particular individuals. There are necessary collective goals of a community – such as economic efficiency or equality – requiring a balancing and trade-off between benefits and burdens. A collective goal requires a particular distribution in order to create a balance.

Rights are in tension with goals. They are those principles that are characterised by the fact that they may not be subordinated to the collective goal. «We may define the weight of a right, assuming it is not absolute, as its power to withstand competition. It follows from the

⁶⁵ This will become an important point in a later chapter; cf. Ch. VI, Sec. 4.3.

⁶⁶ As the theory is one of form and not content, the same political aim may be either a goal or a right depending on its place within the political theory. To give an example from Stephen Guest: the practice of internment (detention of people indefinitely without trial) may be unwarranted according to different justifications or political theory. It may be unjustified inasmuch as it does not accord with stated goals (it will lead to less violence in society) or it may be unjustified according to principle (it infringes on the freedom of the individual). Cf. S. GUEST, *Ronald Dworkin*, 62-63.

⁶⁷ R. DWORKIN, *Taking Rights Seriously*, 91.

definition of a right that it cannot be outweighed by all social goals»⁶⁸. Accordingly, a right is defined by its capacity to resist competition against non-urgent aims. Hence,

Rights [...] are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole. If someone has the right to moral independence, this means that it is for some reason wrong for officials to act in violation of that right, even if they (correctly) believe that the community as a whole would be better off if they did⁶⁹.

The analogy of rights-as-trumps is a formal idea, that is, it concerns how they function or how they work within a political theory. It reveals its characteristic purpose within a political theory: «it fixes the general function of rights within any particular theory that uses the idea at all»⁷⁰.

5.2 *Rights and Utilitarianism*

If rights are to trump, they must trump something, some common goals or desired state-of-affairs by which a community organises itself. Actual rights then will depend, to a large extent, on what are considered the common goals and there are many political theories about what makes a community better off on the whole. Therefore,

To some extent, the argument in favour of a particular right must depend on which of these theories about desirable goals has been accepted: it must depend, that is, on what general background justification for decisions the right in question proposes to trump⁷¹.

Dworkin maintains that in contemporary Western democracies, the most influential background justification is some form of utilitarianism, or general welfare, «which takes, as the goal of politics, the fulfilment of as many of people's goals for their own lives as possible»⁷². Applied to this particular background justification, the analogy of «rights as trumps» signifies their ability to override considerations of general welfare⁷³. As utilitarianism is the most influential background justification,

⁶⁸ R. DWORKIN, *Taking Rights Seriously*, 92.

⁶⁹ R. DWORKIN, *A Matter of Principle*, 359; cf. ID., «Do We Have a Right to Pornography?», 177-212; ID., «Rights as Trumps», 153-167.

⁷⁰ R. DWORKIN, «A Reply by Ronald Dworkin», 281.

⁷¹ R. DWORKIN, *A Matter of Principle*, 359.

⁷² R. DWORKIN, *A Matter of Principle*, 360.

⁷³ The analogy is similar to rights-as-claims put forward by Joel Feinberg outlined in the Introduction. Cf. J. FEINBERG, «The Nature and Value of Rights», 23-43.

rights will be experienced in contemporary Western democracies as anti-utilitarian.

If someone has the right to something, then it would be wrong for the government to deny it to him even though it would be in the general interest to do so. This sense of a right (which may be called the anti-utilitarian concept of right) seems to me very close to the sense of right principally used in political and legal writing and argument in recent years⁷⁴.

Rights, according to this definition, act contrary to utilitarianism. However, Dworkin admits that utilitarianism continues to be attractive to political philosophy particularly because of its common link to democracy⁷⁵. One model, called preference utilitarianism, argues that a policy is to be favoured if it satisfies a greater amount of preferences of individuals than alternative policies, despite the fact that it may dissatisfy the preferences of some. The basic purpose of government is «to provide for the satisfaction of the preferences of individual citizens [...] the basic purpose is to let people have and do what they want as fully as possible»⁷⁶.

But Dworkin responds that taking account of the preferences of citizens does not allow for duplicity in the actual preferences held by citizens. Preferences with regard to a particular policy may be either a personal preference of a person for her own enjoyment of goods or opportunities, or an external preference for the assignment of goods and opportunities to others, or both. Dworkin claims,

The distinction between personal and external preferences is of great importance for this reason. If a utilitarian argument counts external preferences along with personal preferences, then the egalitarian character of that argument is corrupted, because the chance that anyone's preferences have to succeed will then depend, not only on the demands that the personal preferences of others make on scarce resources, but on the respect or affection they have for him or for his way of life. If external preferences tip the balance, then the fact that a policy makes the community better off in a utilitarian sense would not provide a justification compatible with the right of those it disadvantages to be treated as equals⁷⁷.

Such a model is not an acceptable mode of making public decisions because it results in a form of double-counting – failing to treat individuals with equal respect and concern.

⁷⁴ R. DWORKIN, *Taking Rights Seriously*, 269.

⁷⁵ R. DWORKIN, *Taking Rights Seriously*, 275.

⁷⁶ D.H. REGAN, «Glosses on Dworkin», 120.

⁷⁷ R. DWORKIN, *Taking Rights Seriously*, 236.

To take an example: Dworkin imagines a group of people, many of whom do not swim, preferring a swimming pool over a theatre because they altruistically approve of sport, or morally disapprove of plays. If altruistic preferences are counted then the swimmers (who have a personal preference for the pool) will be supported by the non-swimmers (who have an external preference) – creating a form of double-counting. If disapproving preferences are counted, actors and audiences will suffer because their (personal) preferences are outweighed as they are held in lesser respect. In either manner, not all those affected by the decision are held in equal concern and respect by the government. To apply the example: Dworkin argued that the segregation policies of Texas during the 1960s should not be enforced because the preferences that supported them were either distinctly external or inextricably bound to external preferences; therefore they corrupted the claim of equal concern and respect. Again, if an official has to decide whether pornographic literature ought to be prohibited, she is obliged – according to utilitarianism – to fulfil the most preferences. But, Dworkin argues that cuts across a right that does allow for personal use of pornography⁷⁸.

However, at a practical level, the counting of preferences is precisely how the democratic system operates. Democracy facilitates the counting of preferences of all, but it is unable to make the above distinction and so implement a reconstructed utilitarianism that would be able to account for personal preferences and exclude external preferences.

Accordingly, Dworkin writes,

I wish now to propose the following general theory of rights. The concept of an individual right, in the strong anti-utilitarian sense [...] is a response to the philosophical defects of a utilitarianism that counts external preferences and the practical impossibility of a utilitarianism that does not. It allows us to enjoy the institutions of democracy, which enforce overall or unrefined utilitarianism, and yet protect the fundamental rights of citizens to equal concern and respect by prohibiting decisions that seem, antecedently, likely to have been reached by virtue of the external components of the preferences democracy reveals⁷⁹.

Dworkin deduces that if utilitarianism is «suitably reconstructed so as to count only personal preferences, then the liberal thesis [equal respect and

⁷⁸ Cf. R. DWORKIN, *A Matter of Principle*, 359-365.

⁷⁹ R. DWORKIN, *Taking Rights Seriously*, 277.

concern] is a consequence, not an enemy, of that theory»⁸⁰. Rights create that reconstruction⁸¹.

There is an ambiguity towards democracy in the writings of Dworkin. The democratic forum is considered to be primarily guided by policy rather than by principle. But if the institutions of democracy enforce preference utilitarianism, then rights may be said to be anti-democratic. In response, Dworkin argues that rights are necessary to democracy for they act, in part, as barriers to its own potential problems. But by considering the judiciary, and legal system, as the forum of principle, he does appear to be inverting the normal hierarchy of powers in Western democracies⁸².

5.3 A Taxonomy of Rights

Within the formal definition of rights, Dworkin proposes internal distinctions, creating a kind of taxonomy of rights⁸³. As a formal category, the use and emphasis on each category will depend on the political theory in which it operates. Rights may be «absolute» or «less-than-absolute», depending on the threshold weight which is accorded to a right within a political theory. The former can withstand all competition, but the latter cannot. For example, a theory that posits an absolute right to life would exclude any justifications for capital punishment.

He distinguishes between «background» and «institutional» rights. The former are rights that argue towards a state of affairs without par-

⁸⁰ R. DWORKIN, *Taking Rights Seriously*, 236; cf. ID., «On Not Prosecuting Civil Disobedience».

⁸¹ For critical commentators on the rights/utility distinction made by Dworkin, cf. H.L.A. HART, «Between Utility and Rights», 214-226; R. SARTORIUS, «Dworkin on Rights», 205-213. Dworkin replies to both authors by reaffirming that his theory is formal. He does not think that utilitarianism is the best general political theory but simply an example of how rights will function in a Western society that accepts utilitarian justification, cf. R. DWORKIN, «A Reply by Ronald Dworkin», 247-300, 282.

⁸² It appears to me that the division between principle and policy, which underpins his reflection, creates a further division between the judiciary as the guardian of principle and the legislature as merely the forum of policy. But this is to bracket out, and thereby devalue, the role of principle in public and political debate and democracy. Jeremy Waldron gives a more practical example: the American state and federal courts struck down 150 pieces of legislation concerning labour relations, labour conditions and working hours between 1885 and 1930, a time when advancement in such areas needed to be made. Therefore, it invites Waldron's question: «if unelected officials can have so much power, how can Dworkin's confidence in judicial review as the forum of principle be compatible with democracy»? J. WALDRON, «Judicial Review and the Conditions of Democracy», 337-338.

⁸³ Cf. R. DWORKIN, *Taking Rights Seriously*, 92-94.

ticular reference to the institution that encapsulates that right. Such rights may be proposed by a political theory or the common political morality but are not, in fact, enshrined in law. An example may be the right to steal in dire need. Although background rights may not be named in a particular legal system, they do make sense within a political theory⁸⁴.

Dworkin further distinguishes between «abstract» rights and «concrete» rights. Abstract rights are those principles that assert a strong stance. They do not indicate the impact intended in particular social situations, or how they are to be compromised against other rights. Concrete rights, however, are more or less clear on such issues. An example of the former is the right to free speech; an example of the latter is the right to personal information utilised by the government.

In practice, it is the institutions of governance that ultimately decide on which rights apply, the scope of those rights, and the hierarchy of their importance. Throughout his work, Dworkin is trying to explicate what is key to a scheme of government that claims principle (encapsulated as rights) to be decisive in particular cases. If so, as in Western democracies, «We can insist that it take rights seriously, follow a coherent theory of what these rights are, and act consistently with it own professions»⁸⁵. In other words, to take rights seriously is to take the justification and effectiveness of governance seriously.

Rights as trumps function by placing limitations and restrictions on the pursuit of goals. Although upheld by Governments, they actually restrict their ability to advance the goals of society. Therefore, a necessary implication of rights as trumps is that «citizens have moral rights against their governments»⁸⁶. Crucially, rights trump or restrict the actions of government, creating a level of protection for the individual over and against the Government⁸⁷. In accordance with the liberal tradition, rights act as limits to authority. A government that claims to take rights seriously therefore places limits on itself in the name of the principle of equal concern and re-

⁸⁴ This argues against Bentham's assertion, echoed by legal positivism, that the only rights are those enshrined in law. At this point, Dworkin is not arguing for substantive rights independent of the law but rather on their functioning. In this latter sense, they may be said to make sense within any political theory.

⁸⁵ Cf. R. DWORKIN, *Taking Rights Seriously*, 184-205, 186.

⁸⁶ R. DWORKIN, *Taking Rights Seriously*, 184.

⁸⁷ «At first Ronald Dworkin's position appears to fit well within a Lockean natural rights tradition. But whereas Lockean rights are principles governing the relationship among individuals, Dworkin's rights theory pertains to the principles governing the relationship between individuals and their government». T.R. MACHAN, «Some Recent Work in Human Rights Theory», 111.

spect for its citizens. Is it possible, then, for rights to trump the law, by which the Government exercises its authority? Does one have the right to break the law⁸⁸? The question reveals important ambiguities in rights-rhetoric.

Dworkin draws an important distinction between two meanings in the term «right» used in public discourse⁸⁹. In the first context, to say that someone has a right to do something implies that it would be wrong to interfere (or at least, some special reasons must exist in order to permit any interference). Dworkin calls this a «strong sense right». For example,

I use this strong sense of right when I say that you have the right to spend your money gambling, if you wish, though you ought to spend it in a more worthwhile way. I mean that it would be wrong for me to interfere with you even though you propose to spend your money in a way that I think is wrong⁹⁰.

A strong sense right therefore is a sphere of action protected from undue interference from others, and in particular, the government.

In the second context, to say that something is the «right» thing to do implies a judgment of an individual (or community) to whether it is «right» to act according to her principles. The person in the above example may have the right to gamble but it may be the wrong thing for her to do⁹¹. Rights, conceived as trumps, primarily concern the former. Therefore,

The claim that citizens have a right to free speech must imply that it would be wrong for the Government to stop them from speaking, even when the Government believes that what they will say will cause more harm than good. The claim cannot mean [...] that citizens do no wrong in speaking their minds⁹².

The strong sense of right claims that it would be wrong for a Government to interfere. Importantly, Dworkin does not overemphasize the point because there are situations such that may justify overriding a

⁸⁸ Dworkin gives the example of Muhammad Ali who was denied the right to box. «If Ali, in spite of his religious scruples, had joined the Army, he would have been allowed to box even though, on the principles [rights] these officials say they honour, he would have been a worse human being for having done so». R. DWORKIN, *Taking Rights Seriously*, 188. Parenthesis added.

⁸⁹ In a manner, Dworkin is calling on distinctions that were outlined in the typology of a rights theory identified at the beginning of this thesis; cf. Ch I, Sec. 1.

⁹⁰ R. DWORKIN, *Taking Rights Seriously*, 188.

⁹¹ The contasting play between the two meanings of right is indicative of the rights-typology identified in the later tradition in Part One of this thesis, differing from the complimentary relationship as proposed by the earlier tradition; cf. Ch. II, Sec. 1.

⁹² R. DWORKIN, *Taking Rights Seriously*, 190.

right, such as national emergency. To return to the above example, a government may force the shutting down of all gambling facilities in order to save electricity in time of scarce resources. But such actions can never be on minimal grounds because to do so is to render the notion of a strong sense right meaningless.

Accordingly, Dworkin maintains that there is a right to break the law. The right to free speech implies that an individual has the right to break any law that interferes with that right. It is not a separate right but one that arises from the character of rights themselves. For a law that indiscriminately interferes with a person's freedom contradicts the functioning of the very rights claimed as important by a Government. To deny that implication is to deny rights themselves. Dworkin must conclude that any general duty to obey the law is almost incoherent in a society that acknowledges rights. It is self-contradictory to hold that rights are part of the legal system and to assert that one must follow the law at all times. In the last analysis,

any society that claims to recognize rights at all must abandon the notion of a general duty to obey the law that holds in all cases. This is important, because it shows that there are no short cuts to meeting a citizen's claim to rights⁹³.

Of course, having the right to break the law in the strong sense leaves open the question of whether breaking the law in a particular case is, in fact, the right thing to do.

5.4 *The Delineation of Rights*

The issue of which substantive rights there are often divide society. However, there are fundamental or paradigm rights that have widespread agreement in clear-cut cases – for example, the right to free speech⁹⁴. Dworkin argues that much of the discussion about the substance of rights actually revolves around the delineation of such core rights. The definition of rights concerns their scope and extent and it is the responsibility of the institutions of governments, by way of statutes, judicial decisions and administrative application to officially declare, in a justifiable manner, the scope of such rights in law. While they should not be overly restricted, they should not be overly inflated.

He outlines two models used to guide the process of demarcation. The first proposes a balance to be struck between individual rights and

⁹³ R. DWORKIN, *Taking Rights Seriously*, 196.

⁹⁴ As conceded in the Introduction, this thesis focuses on the so-called Western democratic and constitutional system and society.

the rights of society. Governments ought to steer a middle course leading to an appropriate balance between the infringement on the rights of the individual by the state and the inflation of rights to the detriment of the general benefit of society. He rejects this model on the basis that «balance» is a flawed metaphor. It mistakes the identification of society's rights with the rights of individual members of a society. It creates an unfair weighting that threatens to dilute the individual, thereby destroying rights themselves.

The second model proposes the central role of the principles of human dignity and political equality. Human dignity «supposes that there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and holds that such treatment is profoundly unjust»⁹⁵. Political equality

supposes that the weaker members of a political community are entitled to the same concern and respect of their government as the more powerful members have secured for themselves, so that if some men have freedom of decision whatever the effect of the general good, then all men must have the same freedom⁹⁶.

Dworkin argues that if rights make sense at all then it is in order to protect these principles. To do otherwise is to do a grave injustice. The institution of rights rests on the protection of the individual from such injustice and the conviction that it is worth paying the price to prevent it. To infringe on a right is to do a grave injustice but to inflate a right is merely to acknowledge a further cost to society.

Essentially, the latter is the model of the criminal system. The due process of law acknowledges that the risks to the individual are high and is so willing to pay the appropriate price in order to protect that person – it is better that many guilty go free than one innocent person be punished. It holds that once a right is acknowledged in clear-cut cases, then the Government should act to limit that right according to a compelling reason that is consistent with the presuppositions on which the original right is based. A government that fails to extend a right becomes guilty of creating a sham of the original right. A right becomes «a promise that it intends to keep only until that becomes inconvenient»⁹⁷.

In a controversial case, a marginal issue tests the extent of an accepted paradigm right. First, a marginal issue will be outside the

⁹⁵ R. DWORKIN, *Taking Rights Seriously*, 198.

⁹⁶ R. DWORKIN, *Taking Rights Seriously*, 199.

⁹⁷ R. DWORKIN, *Taking Rights Seriously*, 200. This will become an important point in a later chapter, cf. Ch. VI, Sec. 6.

boundary of a right if the values associated with the original right are not at stake in the marginal issue. Second, a marginal issue will fall outside the scope of an accepted right, if inclusion will create a conflict with another strong sense right. Third, marginal issues cannot be included in the scope of a right if the cost would be of such disproportionate cost as to create an injustice against the dignity and equality of the person⁹⁸.

These are «Hard Cases» and are necessarily controversial because they involve the continual refinement of the principles that inhere within the judicial and legislative system and express the common political morality.

5.5 *Right to Liberty and Rights to Liberties*

A central component to the early liberal tradition was to re-conceptualise freedom as a lack of impediment⁹⁹. Isaiah Berlin characterises such a notion as negative liberty: «The sense of freedom, in which I use this term, entails not simply the absence of frustration but the absence of obstacles to possible choices and activities – absence of obstructions on roads along which a man can decide to walk»¹⁰⁰. Consequently, political freedom or liberty was formulated as the absence of any unnecessary restriction by a government in the affairs of an individual, and governments were to be evaluated accordingly.

Interestingly however, Dworkin denies that there is any general right to liberty¹⁰¹, such as that proclaimed in the American Declaration of Independence or the Preamble of the Constitution of the United States¹⁰². In general public discourse, he argues, a government's actions may be judged to have infringed on an individual's liberty in two ways. First, restrictions of liberties may be a denial of the commodity of lib-

⁹⁸ Cf. R. DWORKIN, *Taking Rights Seriously*, 200-204.

⁹⁹ Cf. Ch. II, Sec. 2.4.2.

¹⁰⁰ Cf. I. BERLIN, «Two concepts of Liberty», 118-172.

¹⁰¹ As noted earlier, the tendency to contextualise, rather than prioritise negative liberty, is a means by which Dworkin may be located in relation to other contemporary liberals.

¹⁰² The declaration states: «We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are the rights of life, *liberty* and the pursuit of happiness». The Preamble states « We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of *Liberty* to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America». Cf. M. ISHAY, ed., *The Human Rights Reader*, 127 ff.

erty. Second, they may be understood as damaging the person in some way. But the former is untrue – liberty cannot be perceived as a commodity – and the second is too vague. Instead, he argues that infringements of basic liberties are not an assault on a general right to liberty but of the deeper politico-moral principles of justice, namely equal respect and concern.

In the decision making process, governments may justify their actions according to principle or to policy – to which Dworkin argues that priority must be given to the former. Rights act as principled trumps to the necessary role of a policy guided by a democratic utilitarianism. Because they trump, they safeguard against a tyranny of the majority. Denial of basic liberties, such as the freedom of speech, religion or movement, is the denial to take seriously the relationship between government and its citizens and the means by which that relationship is concretised – the law. «If the Government does not take rights seriously, then it does not take the law seriously either»¹⁰³. What is more, if a government does not take rights seriously, it does not take political morality – justice based on equal concern and respect – that is presupposed in the law seriously also.

The institution of rights is therefore crucial, because it represents the majority's promise to the minorities that their dignity and equality will be respected. When the divisions among the groups are most violent, then this gesture, if law is to work must be most sincere¹⁰⁴.

However, there remains a tension. On one hand, Dworkin admits that much of the law is guided by policy. Therefore,

The bulk of the law – that part which defines and implements social, economic, and foreign policy – cannot be neutral. It must state, in its greatest part, the majority's view of the common good.

Yet, respect and concern of the government must be afforded to all its citizens in an equal manner. «It must not constrain liberty on the ground that one citizen's conception of the good life of one group is nobler or superior to another's»¹⁰⁵. Dworkin is arguing that in core issues the government must remain «neutral on what might be called the question of the good life», claiming that this is the core of liberalism's «constitutive political morality»¹⁰⁶. Although he maintains

¹⁰³ R. DWORKIN, *Taking Rights Seriously*, 205.

¹⁰⁴ R. DWORKIN, *Taking Rights Seriously*, 205.

¹⁰⁵ R. DWORKIN, *Taking Rights Seriously*, 273.

¹⁰⁶ R. DWORKIN, «Liberalism», 127.

that considering everyone with equal respect and concern justifies some intervention by government (as in positive discrimination or affirmative action¹⁰⁷), neutrality plays a bigger part. Again, there is a further ambiguity in Dworkin's work: the one principle appears to justify two possible and contradictory reactions of government¹⁰⁸. The thesis shall return to this issue in course of the comparative study¹⁰⁹.

6. Legal Theory

In *Law's Empire*, Dworkin presents his fullest exposition of legal theory. From the outset, he asserts the necessary interconnection of public morality and justice.

Lawsuits matter in another way that cannot be measured in money or even liberty. There is inevitably a moral dimension to an action at law, and so a standing risk of a distinct form of public injustice [...] If this judgement is unfair, then the community has inflicted a moral injury on one of its members because it has stamped him in some degree or dimension as outlaw¹¹⁰.

The text offers a reformulation of his theory of law and adjudication, drawing on the earlier presuppositions outlined above. According to Charles Covell, he develops his position in three respects¹¹¹. First, Dworkin broadens the claim that all judicial deliberation, and not simply hard cases, is inevitably bound to moral and political presuppositions. Second, he further deepens his theory of law and adjudication to central issues of political philosophy: for example, obligation and legitimacy. Third, he represents his judicial adjudication as a theory of interpretation functioning within the legal system. At base, the development is a move from analysis of legal practice to legal theory as such. «Since it matters in these different ways how

¹⁰⁷ Cf. R. DWORKIN, *Taking Rights Seriously*, 223-249; ID., *Sovereign Virtue*, 386-452; ID., *A Matter of Principle*, 316-334.

¹⁰⁸ Joseph Raz identifies the lack of content to the principle of equal concern for this ability justify apparently contradictory positions: «The right to be treated as an equal [...] is [...] empty. It is consistent with diverting more resources to treating the ill on the ground that they have a greater need, and equally consistent with diverting more resources to the educated rich on the ground that they have more expensive tastes and are more difficult to satisfy». J. RAZ, «Professor Dworkin's Theory of Rights», 129.

¹⁰⁹ Cf. Ch. VI, Sec. 5.2 ff.

¹¹⁰ R. DWORKIN, *Law's Empire*, 1.

¹¹¹ Cf. C. COVELL, *In Defence of Natural Law*, 152-153.

judges decide cases, it also matters what they think the law is, and when they disagree about this, it matters what kind of disagreement they are having»¹¹².

In *The American Language of Rights*, Richard A. Primus offers the analogy of a game in order to illustrate the functioning of the legal system – after all, law and politics are often embroiled in game-like competitive situations. However, he points to a critical difference concerning the relationship between the rules and the play of a game, in order to highlight the distinctive dynamic of the legal and political system. In games like chess, the rules are pre-established, accepted by all and give it definition. We can point to the rules in order to identify the game. However,

In political and legal argument, part of the contest is over how the issue in dispute will be characterised and what kind of arguments will count as valid or superior [...] In legal and political discourse, then, shaping the rules is not something that happens before the game is played but is itself the subject of a contest, and attempts to shape the rules are not preliminaries to the game but moves within the game itself¹¹³.

In the practice of law, the dispute regarding the appropriate rules to apply is intimately bound to the question: what is the law to do?

To present the law as mere rule-application, according to Dworkin, is to present the law as plain-fact¹¹⁴. This model portrays law in a manner similar to the game of chess. Any disputes in the playing of the game are settled by the correct application of an identifiable law. Theoretical concerns regarding the nature or purpose of the practice (of a game of chess or of a legal system) are not necessary. It is a model epitomised by legal positivism. But such a model does not reflect the actual game or contest of law and politics, as shown earlier by Dworkin. As described by the above analogy, in the legal system the purpose of the rules themselves are continually questioned in the disputes regarding which rule to apply. To participate in legal reasoning is to be continually involved in debating its purpose, point and meaning, that is, its relation to justice or political morality¹¹⁵.

¹¹² R. DWORKIN, *Law's Empire*, 3.

¹¹³ R.A. PRIMUS, *The American Language of Rights*, 1-2.

¹¹⁴ R. DWORKIN, *Law's Empire*, 31.

¹¹⁵ Cf. R. DWORKIN, *Law's Empire*, 45-46. Recall that Finnis makes a similar point: to answer the question what the law is the same as to answer the question what it is the purpose of the law. Cf. Ch. II, Sec. 3; Ch. II, Sec. 6; Ch. VI, Sec. 6.4.

6.1 *The Right-Answer Thesis*

Dworkin defends the position that there is often a right answer in «Hard Cases» or complex questions of law and political morality. Dworkin's defence of the possibility of right answers is a defence of the responsible practice of legal argumentation without reducing the process to either just opinion (scepticism): «the no-right-answer thesis is hostile to the rights thesis I defend»¹¹⁶. Stephen Guest comments that Dworkin's

argument is, and has always been, purely defensive. He does not provide arguments to say that there are right answers, over and above his arguments to say what the right answers are. He does not think that any such arguments are needed¹¹⁷.

The legal system is presupposed and moved by the very practice of continual argumentation and justification and it is Dworkin's emphasis on argumentation that moulds his response to scepticism about the possibility of right answers.

He categorises two kinds of scepticism – external and internal. External scepticism denies any objectivity to moral judgement. Everything is merely opinion. Dworkin denies that such a position is in fact possible. More importantly, he argues that it denies the responsibility of taking a public stance and offering a justification. If all legal positions are mere opinion, then none need to be publicly justified.

Internal scepticism, however, refers to whether particular or individual arguments are mistaken or doubtful but is still committed to the possibility that other interpretations of the law may be better. This is the form of scepticism within the legal system as lawyers

return to their knitting – making, accepting, resisting, rejecting arguments in the normal way, consulting, revising, deploying convictions pertinent to deciding which of competing accounts of legal practice provides the best justification for that practice. My advice is straightforward: this preliminary dance of scepticism is silly and wasteful; it neither adds to nor subtracts from the business at hand. The only scepticism worth anything is scepticism of the internal kind, and this must be earned by arguments of the same contested character as the arguments it opposes, not claimed in advance by some pretence at hard-hitting empirical metaphysics¹¹⁸.

Importantly, his defence of possible right-answers should not be equated with a simplistic model that reduces the identification of a

¹¹⁶ R. DWORKIN, *Taking Rights Seriously*, 280.

¹¹⁷ S. GUEST, *Ronald Dworkin*, 138.

¹¹⁸ R. DWORKIN, *Law's Empire*, 85-86.

right-answer to what can be merely demonstrated in a statute or law report. To do so is a crude form of legal positivism. Although demonstration is an important part of legal argumentation, it cannot be the main criteria of truth.

Rather, the appropriate criteria of truth are found in a responsible argumentative process. Judges, lawyers and legislators must «articulate consistently». That process places a duty on the participants to justify their assertions and to remain coherent in those claims. Truth then is marked by coherence, underpinned by reflective equilibrium and a constructive model of morality outlined earlier¹¹⁹. As constructive, it is open ended. It presents itself as the best possible hypothesis, open to further examination, development and evaluation according to two central criteria – fit and appeal.

6.2 *Constructive Interpretation*

In legal reasoning and adjudication, questions initially arise for the participants (judges, lawyers and other interested parties) because they disagree about a specific legal proposition. But, as argued by Dworkin (and Primus), their disagreement actually concerns a more fundamental disagreement concerning the meaning or purpose of the practice of the law itself. Legal argumentation, therefore, is between competing perceived purposes, theories or interpretations of the law and it is for the judge to make a final adjudication on which ought to apply by considering which interpretation fits best or appeals more. The interpretative theories are part of the legal argument itself and

not descriptions that stand outside the game but rather are moves within the game. The descriptive and the prescriptive collapse on this model, as theories about law are seen as attempts to construct law in one way rather than another¹²⁰.

The interpretative theories are implicitly normative for they guide which rules and principles to apply (and how they may be applied). The law then is moved and shaped by the interpretative theories that govern it.

Dworkin explains by way of describing the operations of complex social practices¹²¹. In contrast to a blind acceptance of rules (such as ta-

¹¹⁹ This will be an important point in a later chapter; cf. Ch. VI, Sec. 6.3.

¹²⁰ R.A. PRIMUS, *The American Language of Rights*, 2.

¹²¹ R. DWORKIN, *Law's Empire*, 49-53. Dworkin uses the example of courtesy to illustrate the dynamic of interpretation. Firstly, certain social practices, such as raising your hat, are initially accepted by all as acts of courtesy. Then theories are offered to

boo) or complex social practices (such as the law) are maintained because the participants presume that they have a general point, value or meaning. By accepting that a social practice has value, participants will offer interpretations that are constructive or positive. Such «constructive interpretations» put the social practice in its best light and propose the best manner by which to maintain the social practice. The practice may be adapted to changing conditions in order to fulfil the perceived purpose. Accordingly, normative prescriptions are constructed by way of reflective equilibrium, that is, a reflection that moves to and fro between the system and the intuitions and reflections regarding its meaning and purpose¹²². The methodology imposes form onto the object by the interpreter and a derivation of form from the object as the interpreter is constrained by the object and cannot impose any interpretation willy-nilly. Underpinning «constructive interpretation» is the constructive mode of morality and the process of reflective equilibrium outlined earlier¹²³.

A social practice may simultaneously contain many different interpretations. The best interpretations will satisfy two basic criteria – fit and appeal. An interpretation must adequately fit the observations of participants of the social practice and it must present an appeal to be the best interpretation it can be. Debate between interpretations will then centre on the disputes regarding further criteria which test how good a fit each interpretation appeals to be.

When applied to the law, the process of constructive interpretation moves as follows: a general legal theory first interprets «the main point and structure of legal practice»; the main point aims «to show legal

explain the purpose of such acts, for example to show respect. However, opinions may change as to who is worthy of respect. Therefore, the theory becomes critical of the practice and the practice is transformed accordingly. Brian Bix offers the following examples: «One can think of constructive interpretation as being similar to the way people have looked at collections of stars and seen there pictures of mythic figures, or the way modern statistical methods can analyse points on a graph (representing data), and determine what line (representing a mathematical equation, and thus a correlation of some form between variables) best explains that data». B. BIX, «Natural Law Theory», 235-236.

¹²² Normative prescriptions compose an institutional reality, as opposed to an empirical reality. They have an independent existence embedded within the social practice. Dworkin, as other supporters of this method, denies that it undermines objectivity in the knowledge of social practices.

¹²³ Cf. Ch. IV, Sec. 4.1. Dworkin further believes that it is a method that is also appropriate to artistic and literary works. Admittedly a controversial analogy, he often his writings compares the role of a judge to that of a literary critic or artist. Cf. R. DWORKIN, *A Matter of Principle*, 146-166.

practice as a whole in its best light»; which it does by achieving «equilibrium between legal practice as they find it and the interpretation of that practice»¹²⁴.

Dworkin outlines three stages in this process: first, the pre-interpretative stage is the point at which the basic rules and standards are identified; second, an interpretative stage in which a general justification is formulated; third, a post-interpretative stage in which the relevant rules and standards are prioritised. The pre-interpretative stage is a simple recognition and consensus on the basic practices and does not propose any criteria as such. The interpretative stage is the movement between the best fit and appeal in which various meanings and purposes are debated. In the post-interpretative stage, previously held notions and practices are revised to more accurately reflect the new interpretation.

In other words: there is an initial agreement on what counts as law such as a constitution, statutes and so on. This agreement is thrown into a question by a hard case in need of adjudication. The question is not simply a matter of what rules apply but the nature of the practice itself in an unprecedented context. One interpretation or general legal theory is decided upon by which the rules are revised or applied in one particular way as against another. Importantly, Dworkin is arguing that every piece of judicial adjudication tacitly presupposes general legal theory:

Any legal argument, no matter how detailed and limited, assumes the kind of abstract foundation jurisprudence offers, and when rival foundations compete, a legal argument assumes one and rejects another. So any judge's opinion is itself a piece of legal philosophy, even when the philosophy is hidden and the visible argument is dominated by the citation and lists of facts. Jurisprudence is the general part of adjudication, silent prologue to any decision at law¹²⁵.

6.3 *Law as Integrity*

The most commonly accepted general legal theories agree in a pre-interpretative manner to the general content of the law – constitutions, statutes, by-laws etc. In practice, lawyers are capable of accepting what counts as law while proposing differing interpretations. At the second stage, a purpose is proposed. At the third stage, rival

¹²⁴ R. DWORKIN, *Law's Empire*, 90.

¹²⁵ R. DWORKIN, *Law's Empire*, 90.

theories can then offer differing explanations to how this purpose relates to the actual practice of law. Significantly, Dworkin maintains:

Our discussions about law by and large assume, I suggest, that the most abstract and fundamental point of legal practice is to guide and constrain the power of government in the following way. Law insists that force not be used or withheld [...] except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified¹²⁶.

Such a purpose is very suggestive of John Locke and the central concerns of the liberal tradition¹²⁷. Yet, Dworkin presumes that it may be accepted by all as relatively unproblematic. But others, as outlined in the later comparative study, disagree profoundly that this is indeed the purpose of the law.

According to Dworkin, the general legal theories utilised by judges may be categorised as conventionalism, pragmatism and law as integrity. Each reflects distinctions outlined previously: conventionalism includes the moral equivalent of legal positivism; pragmatism proposes the primacy of policy, including utilitarianism; and law as integrity corresponds to Dworkin's own theory of legal reasoning¹²⁸.

Dworkin characterises conventionalism as a theory which identifies the law with identifiable decisions of precedent. According to this theory, judges should stick to established convention. The legal system gives people fair warning on what circumstances will incur sanction: «collective force should be used only in accordance with standards chosen and read through procedures the community as a whole knows will be used for that purpose»¹²⁹. Pragmatism offers an instrumental theory of law and adjudication based on what best serves the needs of the community. The judge obtains the necessary justification for coercive law in the beneficence or efficiency of the coercive decision itself: «If judges are guided by this advice [...] the coercion they direct will make the community's future brighter, liberated from the dead hand of the past and the fetish of consistency for its own sake»¹³⁰. In contrast to the previous theory that justifies by way of the past, pragmatism looks to the future.

As before, Dworkin rejects both theories because they fail to «fit» the actual functioning of the legal practice as supported by the par-

¹²⁶ R. DWORKIN, *Law's Empire*, 93

¹²⁷ Cf. Ch. I, Sec. 2.4.2.

¹²⁸ Cf. R. DWORKIN, *Law's Empire*, 90-96.

¹²⁹ Cf. R. DWORKIN, *Law's Empire*, 114-150; 139.

¹³⁰ Cf. R. DWORKIN, *Law's Empire*, 151-175; 151.

ticipants. His third model is fundamentally different because it is an open programme of interpretation. The model of law as integrity is the proposal of a political virtue rather than a methodological rule of thumb. Integrity, according to Dworkin, is related to, but markedly different from, other ideals of the legal and political system, such as justice, fairness, and due process¹³¹.

Integrity is both a characteristic of and a guiding principle for a judge and a legal system that holds and adheres to a consistent set of moral and legal principles. Law as integrity affirms that the norms guiding judges are grounded by more substantive principles of justice and fairness embodied in the political and legal structures and doctrine. Constructive interpretations are the accountable manifestation of the courts' integrity to their own principles requiring that legislation and adjudication within a legal system be coherent to internally self-consistent principles of political morality, precedence and the needs of the community. Most of all, it is the supreme virtue of Hercules whom he re-introduces in order to illustrate how integrity is both a commitment to the process of «fit» and «appeal» and a guiding principle within the process of interpretation and adjudication¹³².

According to Dworkin, integrity is already inherent within a legal system. In a hypothetical situation, justice and fairness could justify decisions that have a checkerboard quality – a compromise that permits in one area but declares illegal in another on rather arbitrary criteria¹³³. This type of legislation may exist in practical matters such as zoning for city-planning but in matters of principle, such as abortion, such a solution is not accepted by the participants. It may be defensible according to justice or fairness, but integrity is valued in the law: decisions are expected to be consistent and not to divide the public into arbitrary groups. Understood in this way, integrity represents the virtue associated to the principle of equal concern and respect, and is both demanded and presumed of the actions of the state that claim to be guided by such a political morality.

¹³¹ Cf. R. DWORKIN, *Law's Empire*, 224-226.

¹³² Cf. R. DWORKIN, *Law's Empire*, 239 ff.

¹³³ To give the hypothetical example of abortion: theoretically, a compromise may propose that abortion may be permissible to women born on an odd year and not to those who are born on an even year. However, societies that believe themselves to be under a rule of law adhere to society-wide decisions in matters of principle rather than decisions that are divided arbitrarily.

6.4 *Legal Obligation and Community*

General theories of law unite the law itself (legislation, statutes, precedence etc.) with the justification of the enforcement of law (morality, principles, policy etc.). In other words, «that the concept of law – the plateau where argument among conceptions is most useful – connects law with the justification of official coercion»¹³⁴. As such, Dworkin claims that his own model fits better and has greater appeal. The law is legitimised by justification (the process of constructive interpretation), and as legitimised, free people accept their obligation to the law and coerciveness of the law.

The classical liberal tradition justified obligation to the law by way of implicit consent (Hobbes) or voluntary agreement (Locke). By contrast, Dworkin locates obligation within already existing «associative obligations» that exist in a community. He considers obligation to be a responsibility only possible in a fraternal community. In a manner, this is similar to the earlier Aristotelian-Thomist tradition.

He proposes three idealised models of a political community. «Each model describes the attitudes members of a political community would self-consciously take toward one another if they held the view of community the model expresses»¹³⁵. The first model presents the members treating their community as an accident of history or geography. The second model, or «the rulebook model», describes members as considering their community as a general commitment to obeying the established rules. The third model is a community of principle which portrays the members understanding their own community in a genuinely fraternal manner.

One means by which the attitude of fraternal responsibility is manifested is by way of a general attitude of concern, equal for all¹³⁶. The rule of law, applied according to such a principle, will be accepted as a manifestation of a fraternal community – a community of principle.

¹³⁴ R. DWORKIN, *Law's Empire*, 190.

¹³⁵ R. DWORKIN, *Law's Empire*, 209. The three models parallel the tripartite division of pragmatism, conventionalism and law as integrity.

¹³⁶ Dworkin is criticised for being naïve in his description of the community. He does not take into account the many conflicts that often inhere in a modern community and how they manifest themselves in the law. Using the earlier division of principle from policy, Dworkin elevates the law and judiciary to an elevated place, out of the murky waters of democracy and politics; cf. Ch. III, Sec. 5.3, n. 82. Alan Hunt describes it as a “*fear of politics*”. This fear of politics and the corresponding dream of discovering a means of resolving political problems by some means other than politics is [...] endemic in the liberal tradition”. A. HUNT, “Law’s Empire”, 39.

When governed with integrity, citizens are treated as equals, for the principles of justice and fairness are applied to everyone; and by being governed as equals, citizens are constituted into a community. Dworkin writes,

Here, then, is our case for integrity, our reason for striving to see, so far as we can, both its legislative and adjudicative principles vivid in our political life. A community of principle accepts integrity. It condemns checkerboard statutes and less dramatic violations of that ideal as violating the associative character of its deep organisation. Internally compromised statutes cannot be seen as flowing from any single coherent scheme of principle; on the contrary, they serve the incompatible aim of a rulebook community, which is to compromise convictions along lines of power. They contradict rather than confirm the commitment necessary to make a large and diverse political society a genuine rather than a bare community: the promise that law will be chosen, changed, developed, and interpreted in an overall principled way. A community of principle, faithful to that promise, can claim the authority of a genuine associative community and can therefore claim moral legitimacy – that its collective decisions are matters of obligation and not bare power – in the name of fraternity¹³⁷.

The law's ability to obligate citizens is the result of the attitude towards the community held by its members – of the citizens towards each other. Law becomes legitimate when a genuine political community embodies the law by way of integrity to the very principles presupposed by that very community. Although Dworkin is rejecting a methodological individualism of classical liberalism, he continues to privilege the role of the individual and continually remains preoccupied with the possibility of structural conflict between society and the individual¹³⁸.

7. Equality and Liberty

«Equality is a popular but mysterious ideal»¹³⁹. So begins Dworkin's account of an ethics of equal concern presented in *Sovereign Virtue*.

Equality played an essential but ambiguous role in the early modern natural law and associated liberal theory. On one hand, the necessary liberty and equality of all are postulated in the state of nature. But on the other hand, as the state of nature unfolds, the equal rights of each lead to conflict and a resulting inequality. Thomas Hobbes wrote: «From this

¹³⁷ R. DWORKIN, *Law's Empire*, 214.

¹³⁸ Cf. V. KERRUISH – A. HUNT, «Dworkin's Dutiful Daughter», 213 ff. This will become an important point in a later chapter, cf. Ch. VI, Sec. 5 ff.

¹³⁹ R. DWORKIN, *Sovereign Virtue*, 11; cf. ID., «What is Equality? Part 1», 185-146.

equality of ability [...] they become enemies; and in the way to their End, (which is principally their own conservation, and sometimes their delectation only,) endeavour to destroy, or subdue one another»¹⁴⁰. Although beginning with the necessary freedom and equality of all, John Locke ends up justifying inequality; «it is plain that men have agreed to a disproportionate and unequal possession of the earth [...]»¹⁴¹. Equality, in the end, becomes a casualty of the priority of the liberty of an individual. Such an apparent contradiction was identified by Rousseau who argued in his critique of early modernity that the inequalities of society are due to the prizing of a selfish liberty: «All ran headlong to their chains in hopes of securing their liberty»¹⁴². The guise of liberty to justify inequality became a feature of the socialist critique of the capitalist system and associated liberal rights¹⁴³.

The ambiguity concerning the relationship between liberty and equality remains within contemporary liberalism. As noted previously, the strands of contemporary liberalism may be distinguished to the extent that they interconnect liberty and equality¹⁴⁴. As continually argued by Dworkin, equal concern is the primary principle of justice and therefore the legitimacy of government.

No government is legitimate that does not show equal concern for the fate of all those citizens over whom it claims dominion and from whom it claims allegiance. Equal concern is the sovereign virtue of political community – without it government is only tyranny – and when a nation's wealth is very unequally distributed, as wealth of even very prosperous nations now is, then its equal concern [and hence legitimacy] is suspect¹⁴⁵.

In this recent work, Dworkin proposes a «comprehensive liberalism» that rests on two fundamental principles of ethical individualism – that

¹⁴⁰ T. HOBBS, *Leviathan*, 87.

¹⁴¹ J. LOCKE, *Two Treatises of Government*, 302.

¹⁴² J.J. ROUSSEAU, *Discourse on Inequality*, 235.

¹⁴³ Cf. Ch. II, Sec.2.4.2.

¹⁴⁴ Cf. Ch. III, Sec. 2. To recall: At one end of the spectrum, Robert Nozick represents a particularly strong emphasis on the liberty influenced by John Locke. More centrally, John Rawls presents a post-Kantian concern with the role of equality in the protection of freedom. At the opposing end, Dworkin claims that liberty is an aspect of equality rather than an independent ideal in potential conflict. Alan Hunt observes «As a broad characterisation his writings exemplify a position that strives to be a radical liberalism whose hallmark lies in the central preoccupation with equality as a primary political and ethical value, a conception in which equality stands alongside rather than subservient to the traditional liberal priority accorded to liberty». A. HUNT, «Introduction», in ID., *Reading Dworkin Critically*, 1.

¹⁴⁵ R. DWORKIN, *Sovereign Virtue*, 1.

is, a political ethics in which normative priority is given to the importance of each individual and the corresponding equal concern shown to him or her by the state. The first is the principle of equal importance: «it is important, from an objective point of view, that human lives be successful rather than wasted, and this is equally important, from the objective point of view, for each human life». The second is the principle of special responsibility: «though we must all recognise the equal objective importance of the success of a human life, one person has a special and final responsibility for that success – the person whose life it is»¹⁴⁶. They echo and reformulate the starting premises of the equality and freedom of all individuals in the early liberal tradition. The re-statements have a post-Kantian character, that is, the equality and freedom of individuals are not the result of any particular property or quality of a person but are important in and of themselves¹⁴⁷.

Dworkin however wishes to overcome to some degree the exclusion of considerations of the good life in matters of justice that have marked the liberal tradition since Kant¹⁴⁸. The two principles of a comprehensive liberalism present what he calls a «Challenge Model of Ethics»¹⁴⁹. The model responds to the question, what does it mean to live a successful life? It holds «that living a life is itself a performance that demands skill, that it is the most comprehensive and important challenge we face, and that our critical interests consist in achievements, events, and experiences that mean that we have met the challenge well»¹⁵⁰. Importantly, it is formal – it does consider the substantial issues of what would qualify as a successful life. «The challenge model does not assess these views; it is a way of thinking about how we should live, not a standard for assessing how we should live»¹⁵¹. Instead, and in accordance with the second principle, it is the responsibility of the person to make such considerations. The model, therefore, will focus on the pre-

¹⁴⁶ R. DWORKIN, *Sovereign Virtue*, 5.

¹⁴⁷ Cf. Ch II, Sec. 3.4.1.

¹⁴⁸ It is epitomised in the Rawls's slogan that a correct theory of justice must uphold a «priority of right over the good». Cf. J. RAWLS, *A Theory of Justice*, 27. This will become an important point in a later chapter; cf. Ch. VI, Sec. 5

¹⁴⁹ He compares it to «Impact Model» which holds that a successful life is identifiable according to the impact it may be said to have in life. «The impact of a person's life is the difference his life makes to the objective value in the world [...] The model of impact [...] is parasitic on and measured by the value of its consequences for the rest of the world». Cf. R. DWORKIN, *Sovereign Virtue*, 252, 237-284; cf. ID., *Foundations of Liberal Equality*, 190-206.

¹⁵⁰ R. DWORKIN, *Sovereign Virtue*, 253.

¹⁵¹ R.J. ARNESON, «Cracked Foundations», 80.

conditions that will facilitate the personal choice of the good life – for instance, matters of justice, education or health. It advocates a limited intervention into society in order to create such conditions which may be described as a weak paternalism. It may be called «a thin theory of the good», for it shuns a substantial account of what the good life might be in fear that it may justify a strong paternalism that interferes with the freedom of each individual¹⁵². According to the liberal tradition, the rejection of strong paternalism is the practical implication of the neutrality of state in the personal affairs of the individual¹⁵³. How then may the state justify the interventions it must make?

7.1 *Ethics of Equal Concern*

Each principle makes different demands on a government. The former requires a «government to adopt laws and policies that ensure that its citizens' fates are, so far as government can achieve this, insensitive to whom they otherwise are – their economic background, gender, race, or particular set of skills and handicaps». The latter «demands that the government work, again as far as it can achieve this, to make their fates sensitive to the choices they have made»¹⁵⁴. Accordingly, the application of justice in distribution must be «circumstance-insensitive» and «choice-sensitive». On one hand, distribution should rectify inequalities resulting from people's natural abilities or social circumstances; and on the other it should allow for differences that arise due to people's choices. People accrue wealth as a result of different choices, in work, leisure, consumption, savings or risk. However, unequal wealth as a result of circumstances, either socially or in natural talents, is morally arbitrary and therefore unjust. The central intuition is that a person ought to be guided by her choices about how to lead her own life and not by the circumstances in which they find themselves. Therefore, an individual's choices about how she leads her life – and their resulting wealth – ought to be protected and any disadvantageous circumstances which limits her choices, opportunities or access to resources ought to be negated.

In this light, Dworkin considers two general theories of distributional equality – «equality of welfare» and «equality of resources»¹⁵⁵. He rejects the former because it fails to fulfil both principles. It has an appeal

¹⁵² This will become an important point in a later chapter; cf. Ch. VI, Sec. 5.2 ff

¹⁵³ Cf. R.J. ARNESON, «Cracked Foundations», 95; M. CLAYTON, «A Puzzle», 99-110.

¹⁵⁴ R. DWORKIN, *Sovereign Virtue*, 6.

¹⁵⁵ Cf. R. DWORKIN, *Sovereign Virtue*, 11-119; ID., «What is Equality? Part I», 185-246; What is Equality? Part II», 283-345.

because it fits the first principle – equal importance. It proposes the provision of extra resources for those in need in order to enjoy the same level of welfare as others. However, according to Dworkin, it fails to accommodate the second principle – special responsibility. At base, theories of welfare cannot legitimately distinguish between the inequalities that result from circumstances and those that result from choice.

In response, Dworkin proposes a theory of equality of resources. He begins with a thought-experiment in which survivors on a deserted island must share its abundant resources. It is presumed that all the survivors have equal natural talents and abilities. In order to divide the resources, each person is given a hundred clam shells to bid according to their own preferences, wants and needs. An auction means that the value of the resources will be proportionate to the extent that they are desired by the survivors¹⁵⁶. The inequalities that arise from this are not unjust because they result from choice based on personal preferences. To eliminate such inequality would be unfair: some inequality is therefore legitimate. According to Dworkin, the economic market is a mechanism that best supports an equality that is sensitive to choice and responsibility. The initial situation captures both concerns for the equality and special responsibility principles. But as the participants of the auction carry on with their lives the principles become undermined. In particular, inequalities due to natural endowment, such as disability, limit the successful choices of some.

At this point, Dworkin introduces another aspect to his thought-experiment – the hypothetical insurance scheme. The scheme allows a certain amount of clam-shells to be paid in order to insure against unforeseen natural inequalities. The survivors are denied information to their natural endowments and given the opportunity to purchase insurance against handicaps and unequal skills. All might pay forty of their one-hundred clam-shells. Those who fare poorly on the island will re-

¹⁵⁶ In a manner, the thought-experiment acts like the state of nature proposed in the Social Contract tradition. The process of moving towards an organised society is reminiscent of John Locke's account, eg. people impose value on property, skill, resources. Similarly to Locke, Dworkin is building a capitalist structure into the very premises of the just organisation of the state. But the capitalist structure, of itself, is not value-neutral for, despite attempts at modification, inherently favours particularly interest groups. Dworkin continues the link between liberal theory and the justification of the mature capitalist system; cf. Ch. II, Sec. 2.4.2. Throughout his work, Dworkin is motivated by a desire to counteract exploitation but is poor in analysing and accounting for the structural reasons that may support it. He therefore ends up, as Locke, justifying economic inequality, diluting any radical intent of the theory.

ceive compensation. Under such conditions, individuals would be willing to part with some of their clam-shells. A tax system could be established as a means of maintaining such a process.

The thought-experiment is an appeal to the perceived inherent fairness of state intervention to create situations of distributional equality in resources. Admittedly, it is a very abstract theory: it does not propose any specific structure of distribution¹⁵⁷. But Dworkin insists that it is capable of evaluating and guiding the fairness and justice of actual distributive proposals. For example, certain proposals, such as abolishing a health service, may be ruled out as unjust¹⁵⁸.

8. The Sanctity of Life?

In *Life's Dominion*, Dworkin approaches the heated issues of abortion and euthanasia: «the argument has always brought us back to life, to life's dominion rather than death's, to the devastatingly important truth that what death means hinges on how and why our lives are sacred»¹⁵⁹. He argues that the debates regarding abortion and euthanasia have become conceptually confused because they are too often presented as arguments about rights. The clash of rights is not the true source of the controversies. Rather, he insists that it has a deeper concern which cuts across the conflict.

A crucial distinction needs to be maintained between two types of familiar arguments made in public discussion. To take the example of abortion: the first is to claim that abortion is wrong because it is a violation of someone's right not to be killed. «I shall call this the *derivative* objection to abortion because it presupposes and is derived from rights and interests that it assumes all human beings, including fetuses, have»¹⁶⁰. The second is to claim that abortion is wrong because it «insults the intrinsic value, the sacred character, on any stage or form of life. I shall call this the *detached* objection to abortion, because it does not depend on or presuppose any particular

¹⁵⁷ Cf. C. FARRELLY, *Introduction to Contemporary Political Theory*, 79-84. For a selection of articles concerning coherence and consistency of the abstract theory, cf. G.A. COHEN, «Expensive Taste Rides Again», 3-30; M. COHEN-CRISTOFIDIS, «Talent, Slavery, and Envy», 30-44; P. VAN PARIJS, «Equality of Resources Versus Undominated Diversity», 45-69.

¹⁵⁸ On the potential applications of Dworkin's theory, cf. J. BURLEY, «Justice and the New Genetics», 170-192; L.A. JACOBS, «Justice in Health Care», 134-149; W. KYMLICKA, «Dworkin on Freedom and Culture», 113-133.

¹⁵⁹ R. DWORKIN, *Life's Dominion*, 238.

¹⁶⁰ R. DWORKIN, *Life's Dominion*, 11.

rights or interests»¹⁶¹. If this distinction is kept in mind he argues, then the correct constitutional response becomes clearer.

Of the former derivative argument, he claims that a foetus cannot claim rights for it has no interests of its own to be protected by rights: it cannot have interests of its own unless it has some form of consciousness¹⁶². But, he does claim that the right to procreational autonomy is integral to the American Constitution. Accepting that such a right is not actually present in the document, Dworkin rejects a narrow theory of constitutional law based solely on the original intentions of the founding authors. Rather, he argues that the

Constitution insists that our judges do their best collectively to construct, reinspect, and revise, generation by generation, the skeleton of freedom and equality of concern that its great clauses, in their majestic abstraction, command [...] and seek genuine constraints in the only place where they are found: in good argument¹⁶³.

Accordingly, he argues that the principal of procreational autonomy is integral to the coherent interpretative construction of the American Constitution, based on the right to freedom based on dignity and individual responsibility.

Dworkin further claims that the detached argument, which asserts the sacredness of life, further confirms and indeed grounds the stance of the Constitution. Essentially, the view that life is sacred is held by everyone. Whether it is an explicitly religious assertion held by religious denominations or a secular conviction held by everyone¹⁶⁴. It is there-

¹⁶¹ R. DWORKIN, *Life's Dominion*, 11.

¹⁶² R. DWORKIN, *Life's Dominion*, 16. The question of whether the foetus is a person is set aside «not because that question is unanswerable or metaphysical, as many judges and commentators have declared, but because it is too ambiguous to be helpful». R. DWORKIN, *Life's Dominion*, 23.

¹⁶³ R. DWORKIN, *Life's Dominion*, 145.

¹⁶⁴ Dworkin wishes to use the term "sacred" to emphasis the value of each person – a dignity that ought to be respected. He attempts to explain such sacredness in terms of each person being a «creative masterpiece». R. DWORKIN, *Life's Dominion*, 82. Michael Perry criticises Dworkin for misunderstanding (rather mischievously) the term. Dworkin, he argues, wishes to provide an intrinsic value to each person but in fact can only provide a weaker applied version. He writes, «To say that every human being is sacred is ordinarily to say something about (what is believed to be) the true nature of every human being. Something might inspire awe in us, and we might therefore value it – it might have value for us, both objective value and intrinsic value – because it is sacred (or at least, because we believe it to be sacred). But to suggest, as in his book Dworkin at least sometimes does, that something is sacred because it inspires awe in us, because we value it, is to reverse the ordinary order of things». Cf. M.J. PERRY, *The Idea of Human Rights*, 25-29, 27.

fore a quasi-religious dispute. In the light of this, the Constitution is compelled to remain neutral according to its own basic principles – stated in the First Amendment – that forbid the state to favour one religious denomination or conviction over another¹⁶⁵. Therefore, he writes,

So the popular sense that the abortion issue is fundamentally a religious one, and some lawyers' sense that it therefore lies outside the proper limits of state action, are at bottom sound [...] They rest on a natural – indeed irresistible – understanding of the First Amendment: that a state has no business prescribing what people should think about the ultimate point and value of human life, about why life has intrinsic importance, and about how that value is respected or dishonoured in different circumstances¹⁶⁶.

Yet the sacredness of life places demands on the government to restrict and provide normative guidelines for behaviour. But such judgments ought to be guided with the goal of fostering responsibility rather than coercing a final decision. In the end, in modern democracies it is for the individual to decide their own conviction *vis-à-vis* the sanctity of life¹⁶⁷.

Dworkin, by re-conceptualising the abortion debate in terms of religious convictions, may be said to be returning to the sources of the liberal tradition. Religious tolerance has marked that tradition from the beginning: a tradition partly born in reaction to religious wars and persecutions¹⁶⁸. The state claimed neutrality between religious beliefs and allowed the free space for each to pursue their own particular religious expression. He claims the principle of tolerance still applies to all issues of such deeply held convictions. If what motivates the convictions of all in abortion and euthanasia debates are essentially religious convictions then the State must remain neutral and ultimately allow each their responsible freedom to pursue their own conviction.

Tolerance is a cost we must pay for our adventure in liberty. We are committed, by our love of liberty and dignity, to live in communities in which no group is thought clever or spiritual or numerous enough to decide essen-

¹⁶⁵ The First Amendment of the United States states: «Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances». The Ten Original Amendments are otherwise known as the Bill of Rights.

¹⁶⁶ R. DWORKIN, *Life's Dominion*, 164-165.

¹⁶⁷ For a critical commentary on Dworkin's position, cf. F. M. KAMM, «Ronald Dworkin's Views», 218-241; E. RAKOWSKI, «Reverence for Life», 241-263; S. VALENTINE-SHRIFFRIN, «Autonomy, Beneficence», 195-217.

¹⁶⁸ Cf. Ch II, Sec. 2.4.2.

tially religious matters for everyone else. If we have genuine concern for the lives others lead, we will also accept that no life is a good one lived against the grain of conviction, that it does not help someone else's life but spoils it to force values upon him he cannot accept but can only bow before out of fear or prudence¹⁶⁹.

9. Conclusion: Some Observations

To conclude with a number of observations:

Firstly, as previously stated this thesis presupposes that traditions of enquiry respond to both significant socio-economic and political challenges and to the interaction (positively or negatively) with other traditions, while trying to remain consistent with the resources and models of reasoning which are normative within itself¹⁷⁰. Despite rarely dwelling on the source texts or theorists of his tradition (Locke, Kant), his reassertion of the central role of individual rights in political morality is a return to the core normative ideas of a posited liberty and equality¹⁷¹. Another crucial element of the early tradition appears in his later work, namely property. As a result, I would argue that this means he follows the early theorists in ultimately justifying systematic inequalities resulting from market economics, despite an attempt to moderate its worse excesses¹⁷².

Secondly, rights are an integral part of contemporary western culture. Consequently, an appraisal of rights is often intertwined with an evaluation of western society. While they may be viewed as moral progress by most, they may also be associated with moral decline by others. A central motivation of this thesis is to defend the contention that they are a sign of moral progress. Therefore, a positive assessment of modernity is implied – or, to be more precise, certain aspects of its normative traditions (such as individual liberty) and its institutions (such as divisions of power). In particular, the later dialogue wishes to accept the central functioning of rights in placing a principled limit on state power – as proposed by the liberal tradition¹⁷³. This is not, however, to imply a complete approval. Outlined in a later chapter, my central criticism, (by way of Dworkin) is that modernity lacks a sufficient understanding of the good, thereby emptying out our understanding of the human person and our re-

¹⁶⁹ R. DWORKIN, *Life's Dominion*, 167-168.

¹⁷⁰ Cf. Ch. VII, Sec. 2; Ch VII, Sec. 7.

¹⁷¹ Cf. Ch. II, Sec. 2.4.2.

¹⁷² Cf. Ch. IV, Sec. 7.1

¹⁷³ Cf. Ch. VI, Sec. 8.1.

sources for moral reasoning¹⁷⁴. Furthermore, this thesis does not wish to imply an endorsement for the specific ethical stances of Dworkin on abortion and euthanasia.

Thirdly, a central political principle of the liberal tradition is the neutrality of the state on fundamentally religious questions. Dworkin proposes the central liberal value of «tolerance» as an appropriate response to many of the contentious moral issues of today, including abortion and euthanasia. However, therein lays the challenge. On one hand, tolerance is a particularly important virtue in a pluralist society that includes many races, cultures and religions. However, in order to include, there are certain statements, beliefs or actions that ought not to be tolerated. How does one draw the line in a consistent manner? It is my contention, that beyond the appeal to equal concern and respect, Dworkin lacks any real way of specifying more clearly what is required. I will return to this point in a later chapter¹⁷⁵.

Fourthly, Dworkin wishes to re-establish the role of rights in linking law and justice. In doing so, he is responding to the scepticism that lead to a breakdown of the typology (identified in Chapter I), isolating justice and law from one another. In order to facilitate a deeper analysis and dialogue in a later chapter, I wish to briefly characterize some of the central terms of the «lattice-work» - justice, freedom, law and the state-society. The deontological model of Dworkin (and modernity) requires that terms be defined according to principles that are independent of ends, purposes or goals. His primary motivating idea is to establish principles that will protect and facilitate equal concern and respect for all members of the community or, in other words, to foster as far as possible the equal freedom of each to pursue their own chosen good. Accordingly, the terms of the lattice work may be described as follows. First, the equal freedom of all is protected by a system of negative rights. Even those positive rights defended by Dworkin aim to foster the equal freedom of all. Second, freedom primarily concerns the capacity to make personal choices about one's own good. Third, it is the functioning of the law to make principled judgments, and so to positively enact what is just. Dworkin, therefore, places a lot of faith in the ability of the law to stay true to its own internal principles of justice. Finally, the state is viewed somewhat negatively. It needs to be kept in check and the definition of rights as «trumps» highlights such a function. Yet such a definition is formal and so lacks a means by which it may be

¹⁷⁴ Cf. Ch. VI, Sec. 5 ff; Ch. VI, Sec. 7.4

¹⁷⁵ Cf. Ch. VI, Sec. 6.

specified into more substantive principles, beyond another formal or procedural account of the workings of the legal system.

Fifthly, it was proposed in concluding Chapter II that a defining feature of the liberal tradition is «tolerance». As noted above, it is also a distinctive feature of the deliberations of Dworkin. However, rather than a simple and widespread lenience, perhaps it would be more precise to describe it as an active tolerance. On one hand, it wishes to allow as much freedom as possible for each individual to pursue their own path, and, on the other, it proposes to modify those structures in society that deny some people the same freedom afforded to others.

I now turn to give a similar account of the third theorist, also representative of his respective tradition – Jürgen Habermas and a Critical Theory of Rights.

CHAPTER V

Jürgen Habermas: A Critical Theory of Rights

1. Introduction

Many regard the German philosopher Jürgen Habermas (1929-) as one of the foremost intellectuals of his generation. William Outhwaite introduces a collection of Habermas's readings: «The work of Jürgen Habermas is central to many of the most pressing intellectual and practical concerns of the contemporary world»¹. In a collection of critical responses entitled *Habermas: Critical Debates*, the editors observe that he «has assumed an extraordinary stature [...] In view of the relevance and importance of Habermas's work, there is an urgent need for a sustained critical discussion of his ideas»². Most recently, at a public debate with the then Cardinal Ratzinger, Dr. Florian Schuller, director of the *Katholische Akademie Bayern* in Munich, presented Habermas as the «most influential German philosopher since Marx, Nietzsche and Heidegger; his role seems even to be that of a public conscience of the political culture of the country»³.

¹ W. OUTHWAITE, «Introduction» in ID., ed., *The Habermas Reader*, 3.

² J.B. THOMPSON – D. HELD, «Introduction» in ID., ed., *Habermas: Critical Debates*, 1.

³ *Rheinischer Merkur*, January 22, 2004: «seit Marx, Nietzsche und Heidegger einflussreichste deutsche Philosoph, seine Rolle scheint sogar die eines öffentlichen Gewissens der politischen Kultur des Landes zu sein». The debate, entitled «Duel of the Spirits: Towards a Political and Moral Basis for a Liberal State», took place on January 19, 2004.

Born in Düsseldorf, Jürgen Habermas (1929-) finished his doctoral studies in 1954 at the University of Bonn and completed the *Habilitationschrift* at the University of Marburg in 1961⁴. His career began as Theodor Adorno's assistant at the University of Frankfurt's Institute for Social Research (1956-1959). After an associate professorship at the University of Heidelberg (1961-1964), he assumed the Chair of Philosophy and Sociology previously held by Max Horkheimer at the University of Frankfurt (1964). In 1971, he became Director of the Max-Planck-Institute for Social Sciences, Starnburg (near Munich) before returning to the University of Frankfurt as Professor of History of Philosophy (1984). Presently, he is Professor Emeritus of the University of Frankfurt and Permanent Visiting Professor of Northwestern University in the United States.

In the words of Stephen Bronner, «Habermas has been an exemplary public intellectual»⁵. His first published piece – a newspaper article in 1953 – created a public storm by criticising Martin Heidegger's (1889-1976) unedited publication of the 1935 lectures, *An Introduction to Metaphysics*, which supported Nazi ideology⁶. He continued throughout his career to confront major issues of the time: responding to the student protests of the 1960's⁷, challenging historians who would diminish the Nazi past⁸, and recently taking a strong anti-war stance⁹. In a rare reflection on the relation between his own biography and theoretical concerns he concludes,

on what I believe I have learned about the role of the public intellectual in our times – from my own mistakes and those of others. Intellectuals should make public use of the professional knowledge that they possess [...] in other words, they should endeavour to improve the deplorable discursive level of public debates [...] For if there is one thing that intellectuals - a

⁴ His initial doctorate, entitled *Das Absolute und die Geschichte* or *The Absolute and History*, concerned F.J.W. Schelling. He published his habilitation in 1962 entitled J. HABERMAS, *Strukturwandel der Öffentlichkeit – Structural Transformations of the Public Sphere*.

⁵ S.E. BRONNER, *Of Critical Theory*, 189.

⁶ M. HEIDEGGER, *Einführung in die Metaphysik*.

⁷ R. HOLUB, *Jürgen Habermas*, 78 ff.

⁸ Cf. J. HABERMAS, *The New Conservatism*; J. KNOWLTON – T. CATES, *Forever in the Shadow of Hitler?*

⁹ In 2003, at the presentation of the Prince of Asturias Prize, Spain's highest distinction, he praised the European people's anti-war stance. Cf <http://www.fundacionprincipedeasturias.org/ing/premios/galardones/galardonados/discursos/discurso769.html>

species that has so often attacked their own kind and declared the intellectual dead – cannot allow themselves then, it is to be cynical¹⁰.

The current chapter presents an analytical exposition of the central insights of Habermas on public reasoning (moral and legal) in the public sphere – within which human rights play a critical role. Habermas is not a jurist and therefore is not primarily concerned with the legal workings of specific rights. Rather, he proposes a number of implications of his ethical and sociological framework for the foundations and systematic relationship between the concepts of justice, rights and law in the social practices of contemporary western society. After the main exposition, the chapter concludes firstly with Habermas's considerations of religion and a summary of points that relate to previous chapters and point to issues that will become important in later chapters.

2. Situating Habermas

In 1994, Jürgen Habermas retired from both the chair of Philosophy at the Goethe University in Frankfurt and the directorship of the Institute for Social Research. On doing so, he became Professor Emeritus with the institution and associated school of thought to which his name is universally associated – the Frankfurt School of Critical Theory.

The Frankfurt School of Critical Theory can be loosely identified as a group of scholars¹¹, initially inspired by a humanist reading of Karl Marx and originally centred on the Institute of Social Research of Frankfurt University¹². It was commonly categorised as a school of thought some thirty years after its founding. Rolf Wiggershaus admits «the characteristic attributes of a «school» were certainly present, either constantly, temporarily or only from time to time»¹³.

¹⁰ J. HABERMAS, «Public Space and Political Public Sphere», *Commemorative Lecture on Reception of the Kyoto Prize*, Nov 2004. http://homepage.mac.com/gedavis/JH/Kyoto_lecture_Nov_2004.pdf For other biographical reflections, cf. J. HABERMAS, «Dual-Layered Time»; ID., *The Past as Future*, 119-120; M. STEPHENS, «Jürgen Habermas».

¹¹ Significant figures include Max Horkheimer (1895-1971), Theodor Adorno (1903-1969), Walter Benjamin (1892-1940) and Herbert Marcuse (1892-1940). For a selection of significant primary texts, cf. R. KEARNEY – M. RAINWATER, ed., *The Continental Philosophy Reader*, 194 – 253.

¹² Max Horkheimer founded the Institute in 1923. It closed in 1934 due to the rise of National Socialism and moved to New York as the New School for Research Sciences. It returned to Frankfurt in the 1950s.

¹³ R. WIGGERSHAUS, *The Frankfurt School*, 2. Among the characteristics are: an organisational framework in the Institute of Social Research; a charismatic leader with a new theoretical programme in Max Horkheimer; a manifesto provided by

However, he argues that the breadth and variety of directions «makes it advisable not to take the term «Frankfurt School» too seriously»¹⁴. As the heading of Frankfurt School is somewhat vague, so also is the title of Critical Theory¹⁵. David Held writes, «Critical Theory, it should be emphasised, does not form a unity; it does not mean the same thing to all its adherents»¹⁶. However, a common purpose may be discerned and attributed to each of the central theorists. He continues:

The motivation for this enterprise appears similar for each of the theorists – the aim being to lay the foundation for an exploration, in an interdisciplinary research context, of questions concerning the conditions which make possible the reproduction and transformation of society, the meaning of culture, and the relation between the individual, society and nature¹⁷.

The movement arose against the backdrop of the First World War and the Russian Revolution. Firstly, the war questioned, among other things, the identification of technology with progress and science with moral development. Secondly, the revolution, according to the historical materialism of Karl Marx's *Das Kapital* (1867), was only meant to happen in advanced capitalist societies. Against the subsequent reassertion of the capitalist order in the west and the orthodox Marxist doctrines in the Soviet Union, the first generation of the Frankfurt School (and others) undertook «a revision of Marxian categories and an anachronistic theory of revolution in order to expose what inhibited revolutionary practice and its emancipatory power»¹⁸. Accordingly, all modes of domination and oppression were to be identified and critiqued in order to open out the possibilities of emancipation and freedom. Against the strictures of economic determinism in the orthodox Marxist interpretation of historical materialism, the Frankfurt School emphasised the philosophical and humanist aspects of Marx. Against the alienating impulses of western society, it advanced penetrating forms of ideological and cultural criticism (*Kulturkritik*), arising from an engagement with the newly developing social sciences, phenomenology and Freudian psychoanalysis.

Horkheimer's 1931 lecture, entitled *The Present State of Social Philosophy and the Tasks Facing an Institute of Social Research*; a new paradigm called 'Critical Theory'; and a means of disseminating their ideas such as the *Zeitschrift für Sozialforschung*.

¹⁴ R. WIGGERSHUAS, *The Frankfurt School*, 3.

¹⁵ R. BUBNER, «Habermas's Concept of Critical Theory», 44-45.

¹⁶ D. HELD, *Introduction to Critical Theory*, 14.

¹⁷ D. HELD, *Introduction to Critical Theory*, 16.

¹⁸ S.E. BRONNER, *Of Critical Theory*, 5.

The Dialectic of Enlightenment, written by Max Horkheimer (1895-1971) and Theodor Adorno (1903-1969), may be considered central to the canon of Critical Theory, presenting an illustration of some of its dominant motifs. It abandons significant axioms of Marxist thought: the notion of history in which the proletariat are the primary subject of history; that progress inevitably marches towards emancipation; that technology needs only to be redirected towards new ends. The dialectic of the title refers to the inherent contradiction driving the optimism of reason in the Enlightenment Era: «Myth is already enlightenment, and: enlightenment reverts to mythology»¹⁹. The Enlightenment celebration of reason as capable of emancipating people is shown by the authors to be a descent into a form of instrumental reason that dominates nature, and in turn controls people – ultimately leading to its own destruction in totalitarian regimes or in the mediocrity and bureaucracy of contemporary culture. In one passage, they write,

Man imagines himself free from fear when there is no longer anything unknown. This has determined the path of demythologisation [...] Enlightenment is mythical fear radicalised. The pure immanence of positivism, its ultimate product, is nothing other than a form of universal taboo. Nothing is allowed to remain outside, since the mere idea of the «outside» is the real source of fear²⁰.

As a second generation inheritor of the school, Habermas shows interest in similar themes but advances and widens much of the central concerns. As with Horkheimer and Adorno, he is motivated to expose the means by which power structures inhibit the freedom of all. In particular, he shares their interest in modes of reasoning that legitimatise contemporary power structures in dominating of the outsider. «For it is a central tenet of their thought, as of Habermas's also, that the process of liberation entails a process of *self-emancipation* [sic] and *self-creation*»²¹. However, in contrast to the founding fathers of critical theory, Habermas takes an optimistic stance towards the emancipatory project of the Enlightenment²². Reason does not necessarily lead to domination: in fact, it has within its own structures the possibilities of freedom. His explication of such emancipatory forms of reason engages

¹⁹ M. HORKHEIMER – T. ADORNO, *The Dialectic of Enlightenment*, xviii.

²⁰ M. HORKHEIMER – T. ADORNO, *The Dialectic of the Enlightenment*, 11.

²¹ D. HELD, *Introduction to Critical Theory*, 25.

²² In recent years, it has led Habermas to defend the project of modernity against so-called post-modern theorists, cf. J. HABERMAS, *The Philosophical Discourse of Modernity*. For an overview, cf. J. BRAATEN, *Habermas's Critical Theory of Society*, 114-139; S. WHITE, *The Recent Work of Jürgen Habermas*, 114-154.

with the social sciences, establishes normative guidelines to philosophical and political legitimacy and embraces German philosophy (Immanuel Kant and G.W.F. Hegel (1770-1831)), other philosophical traditions (primarily Anglo-American pragmatics and linguistic analysis) and developments in moral psychology (in particular, the works of Jean Piaget (1896-1980) and Lawrence Kohlberg (1927-1987)).

The result is a re-orientation of critical theory decisively away from Marxian categories of class-struggle and towards a radical democratic critique of contemporary culture. The central question motivating Habermas echoes that of Rousseau and Kant: how can society be non-coercive, in the sense of non-domineering, in order that emancipation may be achieved, that is, that all may legitimately claim to be truly free and equal?²³ Similarly to Rousseau, he turns to the legitimising role of popular sovereignty. Like Kant, he views norms and consequent rights as necessary principles of an unfettered reason. Unlike the former, Habermas's theory is not open to totalitarian impulses: unlike the latter, his theory attempts to overcome an ahistorical account of pure-reason in order that it may be connected to practical and social issues. He does so by displacing the general will of Rousseau with a procedure of moral justification, called discourse will-formation, which is tied to the reasoned argument of those subjected to the norms or law in question. This is supported by transferring attention away from Kant's lone, self-reflective moral consciousness towards a community of moral and legal subjects in dialogue – or in his own words, communicative action.

Broadly speaking, his own project attempts to retrieve the emancipatory potential of Enlightenment reason, and to instantiate that retrieval at the core of communicative praxis [...] Habermas emphasises a regulative ideal of reason that fosters moral-practical competencies of communicative action. He has produced a theoretically complex and extensive body of work that has had interdisciplinary reverberations²⁴.

The primary texts of his extensive body of work include²⁵: *The Structural Transformation of the Public Sphere* (1962, 1989) which charts the rise and fall of the public discourse; *Theory and Practice* (1963, 1974) which addresses the central concerns of critical theory; *Legitimation Crises* (1973, 1976) which maps the crises of contemporary society

²³ Cf. App. C; Ch. II, Sec. 3.3.1; Ch. II, Sec. 3.4.1.

²⁴ R. KEARNEY – M. RAINWATER, ed, *The Continental Philosophy Reader*, 237.

²⁵ The first date refers to the original German publication and the second to the first English publication. For a bibliography of major works, cf. W. OUTHWAITE, ed., *The Habermas Reader*, 367-368. For a bibliography on the themes raised in this chapter, cf. M. DEFLEM, «Habermas, modernity and law», 151-169.

caused by failing to live to the democratic ideal; *Communication and the Evolution of Society* (1976, 1979) which is a collection of essays concerning communication theory, moral development and social evolution; his *magnum opus*, the two volume, *The Theory of Communicative Action* (1981; 1984 and 1987); *Moral Consciousness and Communicative Action* (1983, 1989) which engages with moral psychology; *Between Facts and Norms* (1992, 1996) which is the application of communicative theory to matters of democracy and law and his central text regarding rights; and *The Inclusion of the Other* (1996, 1998) which applies his model of deliberative democracy to contemporary issues²⁶.

William Outhwaite describes the above work of Habermas as «poised» – that is, poised between «between the critical theory of the earlier Frankfurt School and modern social and political theory, between the critique of modernity and its affirmation as a still valid, indeed inescapable project»²⁷. The notion of poised or in-between characterises much of Habermas's work and is a feature of his argumentation. In focusing on a theme, he highlights an inherent duality and proceeds to show how his own proposals can create a mutual complementarity rather than a contradiction or unsatisfactory tension. Accordingly, this chapter is organised around the central dualities of Habermas's thought. Firstly, it outlines the central themes of Habermas's work, formulated in a theory of communicative action and an associated discourse ethics outlined in *A Theory of Communicative Action* and *Moral Consciousness and Communicative Action*. Secondly, it traces the implications of this theory for a conceptualisation of rights in the social practice of contemporary constitutional democracies presented in *Between Facts and Norms*. It refers to other works to the extent that it facilitates critical exposition – primarily articles from *The Inclusion of the Other* and *The Postnational Constellation*. It is important to note that an exposition of a work as abstract as that of Habermas will result in this chapter becoming quite abstract also²⁸.

²⁶ In order, the German titles are: J. HABERMAS, *Strukturwandel der Öffentlichkeit*; ID., *Theorie und Praxis*; ID., *Legitimationsprobleme in Spätkapitalismus*; ID., *Zur Rekonstruktion des historischen Materialismus*; ID., *Theorie des kommunikativen Handelns*, II; ID., *Moralbewusstsein und kommunikatives Handeln*; ID., *Faktizität und Geltung*; ID., *Die Einbeziehung des Anderen*.

²⁷ W. OUTHWAITE, «Introduction» in ID., ed., *The Habermas Reader*, 3.

²⁸ Such abstraction may be viewed as both a strength and weakness. On one hand, it allows for a model of practical discourse in morality, law and politics that can rise above potentially sectarian models. However, it means that he pays little attention to fostering values of identity that can support his longed for German constitutional-

3. General Theoretical Framework

Between Facts and Norms is not a work on human rights as such. Foremost, it is a study of social integration in modern constitutional democracies. Its primary aim is to reconstruct the internal conceptual relationship between modern law and democracy in order to assert the basic claim that «the rule of law cannot be had or maintained without radical democracy»²⁹. To this end, Habermas proposes a discourse-theoretic conceptualisation of a «system of rights» which acts as a bridge in the mutual legitimising relationship of law and democracy.

The text draws together many themes, some of which have been reformulated, others newly applied³⁰. It examines the public structures of social interaction that allow for the organisation of contemporary societies – the state, the judiciary and legislature, and in particular, law and democracy. Successful social coordination requires norms of behaviour that can be enforced and/or freely accepted to all. Habermas claims modern legitimate law is capable of both. At its most simple, he is justifying the thesis that the law is the primary medium of social integration in a state – and that democratic discourse is the only means by which it can be legitimately and freely accepted by its citizens.

Immediately identified by the title, the central duality that manifests itself in all subsequent dualities is «facticity» (*Fakizität*) and «validity» (*Geltung*). In the domain of social theory, it expresses itself as facts and norms. On one hand, there are historically bound and contextualised facts of social reality that guide behaviour such as enacted laws, written rules and customs. On the other, commonly recognised norms of behaviour have an inherent universal claim of validity, such as the claim that they are just or good or appropriate, which points beyond the concrete fact. The duality is sourced in the inherent dynamic of all language-communication which facilitates and sustains society and individuals. Briefly, language discloses a rationality by which par-

patriotism (*Verfassungspatriotismus*) freed from an ideological past, cf. K. BAYNES, «Deliberative Democracy and the Limits of Liberalism», 15-30.

²⁹ J. HABERMAS, *Between Facts and Norms*, xlii.

³⁰ The central themes that dominate all his work include: the critique of instrumental or positivist reasoning as domination; an interest in the social sciences from an epistemological and methodological stance; and the quality of public debate which enhances the possibilities of emancipation. For instance, a preoccupation with the modes of democracy starts in his earliest work *The Structural Transformation of the Public Sphere* (1962, 1989). The issue of the validity of arguments may be traced from *Knowledge and Human Interests* (1968, 1971) and *Legitimation Crises* (1973, 1976). Finally, his account of the history of law coincides with his earlier account of modernity in *The Philosophical Discourse of Modernity* (1985, 1987).

ticipants are able to question the validity of proposed facts, thereby creating a discourse that ultimately leads to common understanding and an agreement to which all are bound. The central intuition which has come to dominate Habermas's thought is: what is true of communication is true of society.

This means that the tensions between facticity and validity built into language and its use return in the dynamics of integration of socialised, or at least communicatively socialised individuals – and must be worked out by the participants' own efforts³¹.

The intuition marks a watershed in his work, for the Habermasian *oeuvre* falls into «two distinct, though not sharply separated, parts»³². Habermas considers himself to have superseded the work of pre-1976³³. Although there is a change of direction, the later developments in his work may be viewed as a deepening and reformulation of similar key issues. The significant turn is toward the philosophy of language. The essential premise that links the two phases and the many themes is the facilitation of communication, that is, to foster a public discourse free from all forms of coercion.

3.1 *The Communicative Structures of Social Interaction*

The most complete exposition of the turn to language and the resulting general theoretical framework is presented in the two-volume *The Theory of Communicative Action*. In it, social interaction is viewed through the lens of language. It examines the structures of linguistic and non-linguistic communication that allow competent speakers to successfully interact.

At base, or what Habermas refers to as the ideal speech situation, the interaction between two competent speakers reveals two fundamental types of rationality³⁴. The first form of rationality is instrumental or strategic; it operates towards achieving the successful realisation of the private goals of one (or more) of the speaking actors. The resulting instrumental actions are modes of social control that realise the ends or goals of a few³⁵. The second form is communicative rationality; it is the

³¹ J. HABERMAS, *Between Facts and Norms*, 17.

³² T. BOTTOMORE, *The Frankfurt School*, 55.

³³ W. OUTHWAITE, «Introduction» in ID., ed., *The Habermas Reader*, 11.

³⁴ Cf. J. HABERMAS, *The Theory of Communicative Action*, I, 8-42, 286 ff.

³⁵ Habermas identifies instrumental-strategic rationality as the basis of the wider phenomenon of Positivism – a model of rationality, proposed by the Enlightenment, that is based on the deductive, value-free and efficiency methodology of science. Be-

type of reasoning that attempts to reach common agreement between speaking subjects. Consequently, communicative actions are those modes of social engagement co-ordinated in the light of mutual understanding (*Verständigung*) – actions guided by agreement (*Einigung*). He defines it as follows:

The concept of *communicative action* refers to the interaction of at least two subjects capable of speech and action who establish interpersonal relations (whether by verbal or extra-verbal means). The actors seek to reach an understanding about the action situation and their plans of action in order to coordinate their actions by way of agreement. The central concept of *interpretation* refers in the first instance to negotiating definitions of the situation which admit of consensus³⁶.

The *telos* or aim of all communicative action is mutual understanding and agreement³⁷.

Traditional philosophy, by focusing primarily on the individual actor, offered a model of rationality constructed from the mechanics of individual subjective consciousness. Instead, Habermas is proposing that rationality is embedded in language, for all social-coordination claiming to be rational is only possible and effective through language. Defended again in the opening chapters of *Between Facts and Norms*, he asserts that communicative reason differs from classically perceived practical reason because «first and foremost it is no longer ascribed to the individual actor [...] Rather what makes communicative reason possible is the linguistic medium in which interactions are woven together and forms are structured»³⁸. Within his proximate philosophical

ginning with an early work entitled *Knowledge and Human Interests*, Habermas continually attacks a “positivistic self-understanding” of science which claims to be independent of any normative commitment. Such a claim to be value-free in fact hides ideological impulses when transferred to the social sciences. In the political arena, the rationality refers only to the means for carrying out individual and collective ends, and not to the ends themselves. Recall also the rejection of such models of reasoning by Finnis (consequentialism) and Dworkin (utilitarianism); cf. Ch. II, Sec. 4; Ch III, Sec. 5.2. This becomes an important point in a later chapter, cf. Ch. VI, Sec. 4. The desire to reject and so explicate a fuller model of rationality has motivated the full life’s work of Habermas and prioritised by him in the agenda of Critical Theory. Cf. J. HABERMAS, *The Theory of Communicative Action*, II, 374-399.

³⁶ J. HABERMAS, *The Theory of Communicative Action*, I, 86.

³⁷ J. HABERMAS, *The Theory of Communicative Action*, I, 287; ID., *Communication and the Evolution of Society*, 3. He writes, “The goal of coming to an understanding (*Verständigung*) is to bring about an agreement (*Einverständnis*) that terminates in the intersubjective mutuality of reciprocal understanding, shared knowledge, mutual trust, and accord with one another”.

³⁸ J. HABERMAS, *Between Facts and Norms*, 5.

tradition, this linguistic turn marks the definitive shift away from Marxian categories and a movement towards an engagement with Anglo-American philosophy. The primary organizing principle in understanding history and society is no longer labour but language³⁹. He draws from the models of language proposed by John Langshaw Austin (1911-1960) and John Searle (1932-) and extracts their wider sociological significance. Entitled «Universal Pragmatics»⁴⁰, Habermas describes a general theory of speech actions at the centre of a theory of communicative action:

A general theory of speech actions would thus describe exactly that fundamental system of rules that adult subjects master to the extent that they can *fulfil the conditions for a happy employment of sentences in utterances*, no matter to which particular language the sentences may belong and in which accidental contexts the utterances may be embedded⁴¹.

The theory is the explication of the necessary suppositions involved in the standard uses of language in social interaction⁴².

Simply put, in an ideal or uncritical communication any sentence may make three types of claims for itself (*Geltungsansprüche*): an objective claim of truth, a normative claim to rightness and an expressive or evaluative claim to truthfulness. The first refers to an objective reality of brute facts, the second refers to the intersubjective social and external reality and the third refers to the inner reality experienced by an individual⁴³. For that communication to be successful it must be accepted as valid by the hearer.

However, each claim is open to question and, being contested, the claim (or fact) requires a justification (or validation) by the speaker – giving rise

³⁹ Cf. J. HABERMAS, *Theory and Practice*, 142-169; S. WHITE, *The Recent Work of Jürgen Habermas*, 44-46.

⁴⁰ Cf. J. HABERMAS, *Communication and the Evolution of Society*, 1-68. The Theory of Communicative action may also be described as a «formal-pragmatic» account for it analyses language in actual social interaction. It differs from a mere semantic investigation that involves the study of unambiguous establishment of meaning in clear grammatical sentences.

⁴¹ J. HABERMAS, *Communication and the Evolution of Society*, 26. Italics in original.

⁴² On the detailed examination of the ideal speech-act, cf. J. HABERMAS, *The Theory of Communicative Action*, I, 273 ff. More detailed preconditions of competent language use or a comprehensible speech-act include: first, the interlocutors must assume that they all mean the same thing; second, they each must be rationally accountable; and third, an acceptable resolution must be based on justifiable arguments. Finally and most importantly and underlying these preconditions, interactive communication always assumes a commitment to truth – the substance of which is defined in the process of justifying reasonable arguments.

⁴³ Cf. J. HABERMAS, *Theory of Communicative Action*, I, 319-328; ID., *Communication and the Evolution of Society*, 68.

to a discourse⁴⁴. The justification, if it is to be accepted in a non-coercive manner, must be accepted by the hearer on the basis of appropriate discussion, leading to a free acceptance of the claim on the basis of a better argument and good reasons. Accordingly, the three types of validity claims will give rise to three types of discourse. In other words, the type of discourse will depend on the factual claim to be validated. Claims of objective truth are validated in reference to objective facts, that is, according to theoretical discourse. Claims of normative rightness are established by legitimating social relations or norms, that is, according to moral-practical discourse. Finally, claims of truthfulness or sincerity are judged by the disclosure of a speaker's subjectivity, that is, according to aesthetic and therapeutic discourses⁴⁵. The very dynamic of discourse, therefore, is dependent on the tension between facticity and validity.

The validity basis of speech therefore underpins all communication and discourse and because communication is «the means of establishing human relationships, the validity basis of speech is also the basis of human relationships»⁴⁶. As the basis of human relationship, it will also mark the mediums by which human society are formed and regulated. The orientation towards reaching mutual understanding regarding validity claims is the constitutive process of social integration because it grounds shared expectations, means of interpreting situations, and modes of behaviour. Habermas asserts that this dynamic and commitment to the validation of factual claims reveals a rational basis for agreement:

I would like, therefore, to defend the following thesis: In the final analysis, the speaker can illocutionary influence the hearer and *visa versa*, because speech-act typical commitments are connected with cognitively testable validity claims – that is, because the reciprocal bonds have a rational basis⁴⁷.

The resulting project is to identify and promote the pre-conditions by which such discourse can be sustained. Therefore, «The task of universal pragmatics is to identify and reconstruct universal conditions of

⁴⁴ On a fuller account of discourse, cf. T. MACCARTHEY, *The Critical Theory of Jürgen Habermas*, 69-90.

⁴⁵ Cf. J. HABERMAS, *The Theory of Communicative Action*, 1, 22-42. The tripartite division parallels Kant's categorisation of the modes of reason presented in his trilogy of central works: *The Critique of Pure Reason* (1787), *The Critique of Practical Reason* (1788) and *The Critique of Judgement* (1790). Modernity, according to Habermas, is characterised by this differentiation of reason and was first explicated by Kant, cf. J. HABERMAS, *Philosophical Discourses on Modernity*, 16 ff.

⁴⁶ J. BRAATEN, *Habermas's Critical Theory of Society*, 62.

⁴⁷ J. HABERMAS, *Communication and the Evolution of Society*, 26. Italics in original.

possible understanding (*Verständigung*)»⁴⁸. In turn, the preconditions of discourse would provide for Habermas the normative guidelines for a critical theory⁴⁹. Critical theory, as a movement, attempts to critique forms of domination and foster modes of emancipation. Critical theory, as a theory of communicative action, is a reconstruction of the preconditions, and hence norms, by which to judge to society⁵⁰. Such standards negatively judge distorted forms of communication which justify and construct social integration into modes of domination and offer standards for the positive construction of a free society.

3.2 Modernity: Rationalisation of the Lifeworld (*Lebenswelt*)

As observed earlier, Habermas's theory of society is based on his theory of speech. The presumptions or idealisations of communicative practice necessarily imply a tension – between claims of facticity and questions of validity. Socially, this is a tension between a localised concrete *de facto* social acceptance (*soziale Geltung*) and the idealisation of universal validity (*Gültigkeit*). In principle, all already agreed claims within a society are open to further question, thereby opening up further discourses. In effect, this threatens the stability of society – exposing it to the «whirlwind of validity claims»⁵¹.

However societies are stable, for most claims are not normally contested. They are an accepted part of the commonly shared background knowledge within which action is co-ordinated. Termed the lifeworld (*Lebenswelt*), it may be loosely associated with culture⁵². Habermas describes the lifeworld as follows:

The fundamental background knowledge that must tacitly supplement our knowledge of the acceptability conditions of linguistically standardized expressions if hearers are to be able to understand their literal meanings, has remarkable features; it is an implicit knowledge that cannot be represented in a finite number of propositions; it is *holistically structured* knowledge,

⁴⁸ J. HABERMAS, *Communication and the Evolution of Society*, 1.

⁴⁹ He concludes, «The theory of communicative action is meant to provide an alternative to the philosophy of history on which earlier critical theory still relied, but which is no longer tenable». J. HABERMAS, *The Theory of Communicative Action*, II, 374-403, 397.

⁵⁰ For an overview of the differing attempts to provide a direction for Critical Theory, cf. S.E. BRONNER, *Of Critical Theory*, 214-258.

⁵¹ J. HABERMAS, *Between Facts and Norms*, 22.

⁵² For a detailed explication of the lifeworld and its application to the Catholic symbolic culture, cf. M. DUFFY, *How Language, Ritual and Sacraments Work*, 91-105, 203-250.

the basic elements of which intrinsically define one another; and it is a knowledge which *does not stand at our disposition*, inasmuch as we cannot make it conscious and place it in doubt as we please⁵³.

The lifeworld is the complete set of convictions within which people live. Based on the already-existing assumptions that allow for communication between individuals to happen, it is composed of the pre-existing consensus of «more or less diffuse, always unproblematic, background convictions»⁵⁴. People are socialised into such a lifeworld, providing for people their cultural values, normative standards of society and personal identities⁵⁵. Correspondingly, three functions of the lifeworld may be identified: first, the lifeworld facilitates the transmission of culture or interpretative schemes by which people understand world; second, it sustains social integration and the legitimate ordering of inter-personal relationships; third, it moulds the personality of competent participants in the lifeworld. As already-existing assumptions that are held by people, they are bracketed-out from the claims that are open to being challenged. As such, they are the claims that fuse facticity and validity, thereby providing the stable expectations that make available the basis for secure social cooperation⁵⁶.

Habermas interprets the development of modern societies as a process of rationalisation of this lifeworld⁵⁷. The commonly accepted convictions in many areas of lifeworld come under increased scrutiny – the validity of the assumed facts are questioned and in response the facts need to be justified or rationalised. Conceptually speaking, facticity and validity are split apart, setting in motion the process of societal rationalisation. He argues that in this process, the members of society are increasingly forced to separate different spheres of validity. For instance, they come to distinguish scientific and technical questions from those of faith and religion; questions of justice and morality are differentiated from issues of the good life and ethics, and so on. Each discourse develops its own scope of facts, internal logic and particular tests of validation.

⁵³ J. HABERMAS, *The Theory of Communicative Action*, I, 336.

⁵⁴ J. HABERMAS, *The Theory of Communicative Action*, I, 70.

⁵⁵ Broadly speaking, each function may be associated with the three domains of reality or three modes of discourse each with its own mode of validity identified in the previous section.

⁵⁶ J. HABERMAS, *Theory of Communicative Action II*, 119-152; cf. ID., *Between Facts and Norms*, 518.

⁵⁷ Cf. J. HABERMAS, *Theory of Communicative Action*, II, 235-282; 338-343. For a fuller account of the dynamic of history, cf. J. HABERMAS, *Communication and the Evolution of Society*.

As society becomes more complex, systems need to be developed in order to facilitate social co-ordination. The two primary systems are capitalist production (economics) and the functioning of bureaucracy (politics)⁵⁸. Significantly, the systems are no longer dependent on communicative reasoning but on instrumental-strategic reasoning which organises according to the achievement of particular goals. Because the systems are based on instrumental reasoning they split off or decoupled from a lifeworld that is maintained by communicative action. The systems take onto themselves the responsibilities of social-coordination previously sustained by communicative action. They function independently of the lifeworld – guided according to the steering mechanisms or medium or influence of money and power. Crucially, the independently functioning systems penetrate back into the lifeworld bringing with them their different rationale, often with grave consequences according to Habermas and in line with the tradition of critical theory. Culture, society and personality, previously sustained by the lifeworld, are no longer sustained by communicative action but are defined and ultimately eroded by the systematic interventions of capitalism and bureaucracy. What was the consensual domain of communicative rationality becomes the exploitable world of instrumental or strategic reasoning⁵⁹. What was in the interests of all becomes focused towards the interests of the few – the business and power elites. In Habermas's terminology it leads to «the colonisation of the lifeworld»⁶⁰. For instance, modern society has seen an increasing «juridification» (*Verrechtlichung*) of social life – that is, the vast amount of legal regulations used to manage and ultimately control society⁶¹.

In response, Habermas is proposing that the systems of social integration in modern societies be conceptually and concretely recon-

⁵⁸ In this, Habermas is drawing together the insights of Karl Marx, that social development was driven by capital production, and Max Weber, who viewed social development from the point of view of public administration and rationalisation. For instance, the process of reification in Marx becomes transposed into the discourse-theoretic term, the colonisation of the lifeworld. Cf. S. WHITE, *The Recent Work of Jürgen Habermas*, 107-8.

⁵⁹ Although a far more complex, *The Theory of Communicative Action* still presents a narrative of decline from a previous better time, identified in his earliest work, *The Structural Transformation of the Public Sphere*, as the eighteenth century.

⁶⁰ Cf. J. HABERMAS, *The Theory of Communicative Action*, II, 332-373.

⁶¹ Even laws and systems that claim to be expanding social rights and welfare seem to create a new sort of dependency between the individual and the system of administration. Cf. J. HABERMAS, *The Theory of Communicative Action*, II, 356-373.

structed in accordance with the pre-conditions that sustain communicative rationality⁶². It replaces coercion with consensus⁶³.

4. Discourse Ethics

As identified earlier, social cooperation may be organised according to two types of contrasting rationality. An instrumental or goal-orientated rationality focuses on the question, «What may we and what may we not do, to satisfy our desires and preferences»? However, a communicative rationality, which involves a more reflective and critical stance, turns on questions such «Are our values acceptable?» and «What collective interests do we have»⁶⁴?

The goals that we pursue are shaped in common. Therefore, reflection or practical discourse on those ends are the identification of genuine common interests that express a common or general will in pursuit of those goals. In the moral argumentation that discerns these ends, evidence is brought forward to defend or redeem a norm or procedure which will reflect people's needs, interests or «consequences and side effects of applying the norm for the fulfilment of accepted needs»⁶⁵.

In an important characteristic of the discursive process according to Habermas, it is possible for all the participants to take the view of the other⁶⁶. This ability facilitates a common critical reflection by which

⁶² In a work entitled *Legitimation Crisis*, Habermas argues that advanced capitalism is being undermined because it is no longer able to sufficiently organise society without reference to modes of domination. Yet, capitalism appears to be widening as testified by contemporary globalisation rather than being eroded. In his later works, such as *Between Facts and Norms*, he seeks a reconstruction of the systems of control rather than their demise. In this later work, the issue becomes the proper relationship between strategic and communicative rationality.

⁶³ This will become an important point in a later chapter, cf. Ch. V, Sec. 6.3. Consensus is the vital undercurrent of all Habermas's work. Thomas MacCarthy observes «It is of decisive importance for Habermas's political theory that he does not answer, by negotiating a compromise. This is not that he rejects bargaining [...] Compromise is, so to speak, a second-best alternative [...] but fails to capture the core of our sense of justice». T. MACCARTHY, «Practical Discourse», 59.

⁶⁴ Cf. J. BRAATEN, *Habermas's Critical Theory of Society*, 30. It is argued by some that there is no such thing as communicative rationality, for that all rationality is ultimately strategic because some goal is always intended. Cf. F. DALLMAYR, *Polis and Praxis*, 214-217, 240.

⁶⁵ J. HABERMAS, *Moral Consciousness and Communicative Action*, 65. For further distinctions and characteristics of moral argument, which are often drawn upon by Habermas, cf. S. TOULMIN, *The Uses of Argument*.

⁶⁶ A paradigm example for Habermas is the way in which psychology works. A client is caught in modes of reasoning in which they are enslaved. By way of a critical

the needs and interests may be identified as genuinely generalisable. Only the most generalisable of interests will appeal to all because only a certain few will be defended by all⁶⁷. Stephen White interprets Habermas's account of cultural interpretation of needs «in a given society will be a function of what that culture defines as necessary to the flourishing of human life»⁶⁸. As acknowledged by all, they motivate all; in other words, the process results in «discursive will formation»⁶⁹. Habermas has in mind both simple common interests such as nourishment and social interests such as individual liberty and social welfare. Moral norms then will act as guides and constraints on social integration that foster generalisable interests while creating parameters for the legitimate pursuit of individual interests⁷⁰. The project of Discourse Ethics is the analyses of how may a society agree on its common and social interests and the means by which to achieve them while allowing for the individual freedom of each to pursue their own interests; in other words, it responds to the question, «What constitutes the moral basis of social cooperation»⁷¹?

To return to an earlier distinction in the ideal speech situation which underpins his theory: performative statements in communicative practices may make a claim to either a factual truth, normative rightness or to sincerity. The assertion «iron is magnetic» differs from «murder is wrong» or «I feel tired». Each belongs to a different referential domain and are validated or justified in different ways. The first is a claim of objective truth attending to brute outer reality; it may be true or false. The second is a claim of normative rightness addressing an intersubjective social reality; it may be right or wrong. The third is a sincere expression of subjective feelings; it may be honest or dishonest.

However, in the general communicative practice normative and theoretical statements intertwine⁷²: they are not only intended by the

reflection that happens through a discourse with a therapist, the client is capable of seeing through the eyes of another and so emancipates herself into a new form of reasoning. Cf. J. HABERMAS, *Moral Consciousness and Communicative Action*, 116-194. This characteristic becomes important in a later chapter; cf. Ch. VI, Sec. 6.4.

⁶⁷ J. HABERMAS, *Moral Consciousness and Communicative Action*, 104. Not all norms need to be universally valid – or generalisable – eg professionalism, custom, club rules etc. Such norms are vindicated by a group with no claim to applicable to all.

⁶⁸ S. WHITE, *The Recent Work of Jürgen Habermas*, 70.

⁶⁹ Cf. J. HABERMAS, *Moral Consciousness and Communicative Action*, 67-68.

⁷⁰ J. HABERMAS, «A Postscript to Knowledge and Human Interests», 177.

⁷¹ W. REHG, *Insight and Solidarity*, 1

⁷² Normative and descriptive statements intertwine: normative statements are not to be considered true or false in the same way descriptive statements are. But they are

speaker to be valid for both interlocutors but for all. The moral assertion, such as «you ought not to kill», is meant to be valid not only for those to whom it is addressed but for all; it claims the objective status of theoretical assertions. Habermas is arguing that there is an implicit assumption in the proposition of a moral norm that it is valid for all people. A moral norm is perceived to be somewhat independent of the moment of utterance or the individual making the claim⁷³. In other words, the justification of a particular moral norm, although bound to a particular context as a social fact, assumes validity beyond a specific community or time.

The assertions of morality therefore, as all language, are shot through with the tension between facticity and validity. Consequently, as Habermas's general framework argues that all communication presumes and aims towards understanding and, in the process, reveals the preconditions that facilitate a successful outcome, so he makes the same argument for morality or the communicative practices that organise behaviour or make normative claims. He believes, therefore, that there is a central core of preconditions that may be discerned at the heart of all moral-practical discourse.

In fact, I am defending an outrageously strong claim in the present context of philosophical discussion: namely that there is a universal core of moral intuition in all times and in all societies. I don't say that this intuition is spelt out the same way in all societies at all times. What I do say is that these intuitions have the same origin. In the last analysis, they stem from the conditions of symmetry and reciprocal recognition which are unavoidable presuppositions of communicative action⁷⁴.

To this end, discourse ethics attempts to unearth the conditions that facilitate the validation or acceptance of normative claims within the wider context of all communicative action. For instance, the ideal speech act, and therefore communicative rationality and discourse ethics, presumes freedom and equality. Firstly, freedom is assumed. In a specific moral-practical discourse in order to establish a norm or procedure, acceptance of the proposed norms or procedures by the participants is on the basis of best arguments. By accepting the best argument then, they are rationally motivated, that is, they are moved to act in free and uncoerced manner. Secondly, equality is assumed. In engaging in

alike in that they can both be right or wrong and stand in need justification; «for a normative statement a claim to validity is only analogous to a truth claim». J. HABERMAS, *Moral Consciousness and Communicative Action*, 31.

⁷³ J. HABERMAS, *Moral Consciousness and Communicative Action*, 60.

⁷⁴ J. HABERMAS, *Autonomy and Solidarity*, 9.

an unfettered discourse, it is assumed that all participants will have an equal voice in the discussion. The outcome of mutual understanding, then, will result in consensus or agreement by all – or at least those affected by the norm or procedure⁷⁵.

In *Moral Consciousness and Communicative Action*, Habermas defines the above assumptions into rules of discourse or «presuppositions that are adopted implicitly and intuitively»⁷⁶. He lists the following three preconditions: one, any and every speaking subject may participate in the discourse; two, any participant may question a validity claim or offer her own; three, no participant may be prevented «by internal or external coercion, from exercising their rights as laid down»⁷⁷ in the previous two. Upon these presuppositions, an unfettered moral discourse will orientate itself to mutual agreement and consensus. Habermas is claiming that a consensus in a practical discourse cannot hold «Unless all affected can *freely* accept the consequences and the side effects that the *general* observance of a controversial norm can be expected to have for the satisfaction of the interests of *each individual*»⁷⁸.

This he refines and reformulates into the following principle.

(U) For a norm to be valid, the consequences and side effects that its general observance can be expected to have for the satisfaction of the particular interests of each person affected must be such that all affected can accept them freely⁷⁹.

Termed the universalisation principle (U), it is the underlying principle of morality. As a result, he claims that anyone who acknowledges the rules of discourse must implicitly acknowledge the universalisation principle. It captures, according to Habermas, a central intuition of all moral philosophy – the generalisability of maxims (that is, the norm is valid for all). It is contained in Kant's formulation of the categorical imperative, from which Habermas takes his point of departure. Indeed, Habermas presents «a theory of justification for ethical norms that stands solidly in the Kantian tradition»⁸⁰. But he differs in an important way. The theory of communicative action is necessarily intersubjective.

⁷⁵ The principles were initially outlined by Robert Alexy. Cf. R. ALEXY, «A Theory of Practical Discourse», 151-190; J. HABERMAS, *Justice and Solidarity*, 6.

⁷⁶ J. HABERMAS, *Moral Consciousness and Communicative Action*, 91.

⁷⁷ J. HABERMAS, *Moral Consciousness and Communicative Action*, 89.

⁷⁸ J. HABERMAS, *Moral Consciousness and Communicative Action*, 93.

⁷⁹ J. HABERMAS, *Moral Consciousness and Communicative Action*, 120, 65.

⁸⁰ Cf. Ch. II, Sec. 3.4; J. BRAATEN, *Habermas's Critical Theory of Society*, 30; T. MCCARTHY, «Introduction» in J. HABERMAS, *Moral Consciousness and Communicative Action*, vii.

It starkly contrasts to the lone individual willing the universal law of Kant⁸¹. Without the relational element, the categorical imperative – and many other such formulations – relies on a false philosophy of the subject. In comparison to the intersubjectivity and dialogue presupposed in the ideal speech situation, Habermas accuses such rationality of being monological and ultimately non-consensual. Modes of practical reasoning that are monological or based on the will of the individual are open to the distortions of instrumental-strategic reasoning which manipulates states of affairs and the wills of others according to the desires and will of the primary actors.

Applied into the terminology of discourse, the reformulated principle of universalisation becomes the D principle.

(D) Only those norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity *as participants in a practical discourse*⁸².

U presupposes D⁸³. In effect, the principle of universalisation entails or requires the discourse principle in order that it may be worked through by the participants of the discourse. The discourse principle is that which guides all norms and procedures by which social cooperation is enacted. Originally formulated as an aspect of his moral theory, it has been broadened out to include all action norms, in particular law. The key characteristic of the U and D principle is impartiality. It captures the essential feature of a postconventional intuition for solving moral argumentation and conflict⁸⁴.

In the main, Habermas desists from applying the principle. It is for the active engagement of the participants within a discourse to substantiate the norms by which they coordinate social action. Dis-

⁸¹ Cf. J. HABERMAS, *Moral Consciousness and Communicative Action*, 65-67. Gordon Finlayson observes, «The kind of impartiality aimed at by discourse ethics, unlike that of Kant or Rawls, does not require participants to abstract away from their own interests [...] For in discourse ethics impartiality results from a process in which every participant of the discourse empathetically attempts to occupy the standpoint of all». It therefore avoids the critique of atomism and individualism levelled at such theories. G. FINLAYSON, «Does Hegel's critique of Kant's moral theory apply to discourse ethics?», 34.

⁸² J. HABERMAS, *Moral Consciousness and Communicative Action*, 66.

⁸³ Cf. J. HABERMAS, *Moral Consciousness and Communicative Action*, 197 ff.

⁸⁴ The notion of a post-conventional morality is borrowed from the work on developmental psychology by Lawrence Kohlberg. The model of Kohlberg proposed that it is the last stage in the moral development of an individual. In short, Habermas applies the same model to societal development. A morally mature society would exhibit the same features as a morally mature individual.

course Ethics is uniquely procedural. Habermas is maintaining that if the conditions of communicative action or rationality are followed, then the participants will be able, in principle, to reach a rational consensus on moral issues. The only apparent norm suggestive in his work that pre-exists the actual workings of the discourse is freedom of communication: re-phrased negatively, no-one is allowed to refuse someone the right to participate in the discussion. As procedural, it makes no presupposing claims whatsoever to any conception to human good, for such assertions would pre-empt the discourse and therefore distort its presuppositions⁸⁵. In *The Tanner Lectures*, Habermas writes,

Ethics orientated to conceptions of the good or to specific value hierarchies single out particular normative contents. Their premises are too strong to serve as the foundation for universally binding decisions in a modern society characterised by the pluralism of gods and demons. Only theories of morality and justice developed in the Kantian tradition hold out the promise of an impartial procedure for the justification and assessment of principles⁸⁶.

The differentiation of ethics and morality is the result of the rationalisation of the lifeworld. Habermas is claiming that as different discourses, they are structurally different. Substantive ethics (*Sittlichkeit*) concerns values or goods or appropriateness for particular groups or individuals; morality (*Moralität*) concerns norms that transcend the particularity of contexts and are concerned with universal norms of justice⁸⁷. To be sure, the former provides substantive material for practical discourse. But only the latter can respond to the modern social integration. Ultimately, questions of justice, understood as procedural by discourse ethics, allow for free spaces (*Freiräume*) needed for the pluralism of conceptions concerning «gods and demons» and fulfilling life, while at the same time facilitating successful and free social integration.

⁸⁵ This becomes an important point in a later chapter; cf. Ch. VI, Sec. 6.4.

⁸⁶ J. HABERMAS, *The Tanner Lectures*, 241.

⁸⁷ Cf. J. HABERMAS, *Moral Consciousness and Communicative Action*, 98-109; ID., *Justification and Application*, 1-18. It is important to note a point of translation. In general, English tends to consider the phrase ethics to be of wider significance than morality. He admits in later texts that he ought to call discourse ethics «the discourse theory of morality». Cf. J. HABERMAS, *Justification and Application*, 2. However, this chapter shall continue to use the more common phrase of discourse ethics.

4.1 *Justice and the Good*

The strong distinction between justice and the good is a key characteristic of the liberal tradition⁸⁸. Habermas, however, is claiming that a model of society based on the intersubjective premises of communicative action does not fall prey to the accusations of radical individualism and social atomism levelled at the theorists of this tradition. Indeed, as a critical theorist he joins in condemning such tendencies in modern society; they are products of instrumentalist-strategic reasoning that justify forms of social domination.

However, Habermas is not immune from the criticism that such a distinction is either possible or desirable. Charles Taylor argues that a distinction of domains is in fact impossible⁸⁹. In a critique of modern moral philosophy as a whole, Taylor argues that an evaluative framework is always present in every judgment made in a moral discourse. Moral evaluation is based on an ordering of perceived goods organised according to a constitutive good, or what he calls a hyper-good. The goods are those aims and purposes that provide moral motivation and justification⁹⁰. Without them, we cannot answer the question, why be moral⁹¹? Human goods are identified in the course of asking such a question – disclosing a self-identity. In the terminology of Habermas, Taylor argues that the moral domain must be bound to, or even subordinated, to the ethical question of the self-identity of the individual or group.

The charge is that, despite claims to the contrary, a procedural conception of morality which claims to be independent of the good actually depends on an unarticulated prior constitutive good. William Rehg, in *Insight and Solidarity*, argues that the Discourse Ethics of Habermas is capable of recognising a constitutive hyper-good – rational cooperation – without damaging its own premises. The central intuitive point for Habermas is that «reaching understanding is the inherent *telos* of human speech»⁹², for reaching understanding is the means by which people may live in rational cooperation. Rehg proposes,

⁸⁸ Cf. Ch. II, Sec. 3.4.1; Ch. III, Sec. 3.1;

⁸⁹ C. TAYLOR, «Language and Society»; ID., «Cross-Purposes»; ID., *Sources of the Self*; ID., *Ethics of Authenticity*.

⁹⁰ Recall the approach of Finnis; cf. Ch. II, Sec. 3 ff.

⁹¹ C. TAYLOR, «Language and Society», 31. More specifically, Habermas is not able to satisfactorily answer «why it is I attach a value to rational understanding so great that it should be preferred to all other purposes?».

⁹² J. HABERMAS, *The Theory of Communicative Action*, I, 287. Recall the self-disclosure of Habermas in the introduction to this chapter: his motivation is to «en-

it would seem that the acceptance of that procedure rests on the acceptance of argued agreement as a good [...] a vision of cooperation among autonomous individuals, stands behind this idea. I shall refer to this as the good or rational or autonomous cooperation. If one did not value such cooperation and the rational agreement upon which it rests, one would probably reject discourse ethics altogether⁹³.

Others accuse Habermas's universal moral principle of being too abstract and therefore neglecting concrete moral experiences⁹⁴. It is part of the constructive critique offered by Seyla Benhabib. In *Critique, Norm and Utopia*, she argues that the rules, designed to include everyone in the discursive process, in fact, excludes some. The rules – and, indeed, the theory as a whole – are based upon competent speakers. As a result,

By the very way in which it defines those excluded, these rules prejudice the content of moral theory. For example, those who cannot speak – children, fools, and animals – have no place in this theory, yet would we really want to deny that our relationship to these beings is an essential aspect of morality in general? This exclusion limits the core of communicative ethics to questions of *justice*, namely to relations between responsible, equal, adult participants⁹⁵.

As the paragraph above attests, the theory equates questions of justice to relations between adults. But this involves further exclusions. In *a Different Voice*, by Carol Gilligan, is a critique of the model of moral psychological development which links the apex of moral maturity with the capacity to take the impartial moral point of view. She argues that this is to assume as universal what is in fact a feature of male moral experience. Women, however, tend to take a perspective of care, that is they will make mature moral decisions

deavour to improve the deplorable discursive level of public debates», which is an endeavour demanded of all intellectuals.

⁹³ W. REHG, *Solidarity and Insight*, 135-138.

⁹⁴ Cf. I MAIUS «Liberties and Popular Sovereignty», 89-128.

⁹⁵ S. BENHABIB, *Critique, Norm, and Utopia*, 188. In the later article, Benhabib argues that the distinction between the good and the just becomes the distinction between the private and public. By reducing some values, interests and actions to the private sphere, it justifies discrimination. She writes, «Why is this a serious problem? [...] In the tradition of Western political thought and down to our own days, these distinctions have served to confine women and typically female spheres of activity like housework; reproduction; nurture and care for the young, the sick and elderly to the “private” domain. These issues have often been considered matters of the good life, of values, of nongeneralisable interests». S. BENHABIB, «Models of Public Space», 73-98, 90.

according to the concrete attachments existing between individuals. She writes,

When one begins with the study of women and derives developmental constructs from their lives, the outline of a moral conception different from that described by Freud, Piaget, or Kohlberg begins to emerge and informs a different description of development. [...] This conception of morality as concerned with the activity of care centres moral development around the understanding of responsibility and relationships, just as the conception of morality as fairness ties moral development to the understanding of rights and rules⁹⁶.

Not unlike Taylor and so-called communitarians, she and others in feminist philosophy question the prioritisation of justice over the good and abstract impartiality⁹⁷.

Habermas defends the distinction because of the universal and formal demands of a post-conventional morality⁹⁸. The principles of discourse ethics which are universal and formal are revealed as the preconditions of moral argumentation aimed towards rational consensus. They are always part of the real everyday activity of interactive relationships and the pursuit of personal goals. Therefore, they are universal, because we have no alternative but to use them. As rules of argumentation, they are formal. But the actual «content that is tested by a moral principle is generated not by the philosopher but by real life»⁹⁹. It is not for moral philosophy alone to provide unique insight¹⁰⁰. The responsibility is for everyone – in acknowledgement of their need to rationally cooperate. According to Habermas, the possibility of a philosophically defensible model of a particular way of life as generally fulfilling – and therefore appealing to all – is at best unlikely, if not impossible.

Yet he argues that justice and good do not form a polarity; to create one is to misperceive the basic moral phenomenon. That basic moral

⁹⁶ C. GILLIGAN, *In a Different Voice*, 19.

⁹⁷ Cf. M. COOKE, «Habermas, Feminism», 178-211.

⁹⁸ Cf. A. HELLER, «Habermas and Marxism», 21-41; J. HABERMAS, *Justification and Application*, 87-92, 104-105.

⁹⁹ J. HABERMAS, *Moral Consciousness and Communicative Action*, 204.

¹⁰⁰ J. HABERMAS, *Moral Consciousness and Communicative Action*, 98. He writes «moral philosophy [need not] maintain the claim to ultimate justification because of its presumed relevance for the life-world. The moral intuitions of everyday life are not in need of clarification of the philosopher». For Habermas's proposals on the role of the philosopher, cf. J. HABERMAS, «Philosophy as Stand-In», 296-315. Universalistic claims about the shape of the good life attempt to settle for once and for all what must be left open to the all voices in the discourse, including those that may not yet be evident.

phenomenon is the recognition and empathy towards «the specific vulnerability of the human species, which individuates itself through sociation»¹⁰¹. Morality is not simply abstract justice but a justice always bound to solidarity with others. Both are connected because they are always presumed in all communicative interaction.

These two aspects – the autonomy of inalienable individuals and their embeddedness in an intersubjectively shared web of relations – are internally connected, and it is this link that the procedure of discursive decision making takes into account¹⁰².

Discourse is, in fact, impossible without either aspect. To Habermas, the distinction is overstated.

To cite an example, human rights obviously embody generalisable interests. As such they can be morally grounded in terms of what all could will. And yet nobody would argue that these rights, which represent the moral substance of our legal system, are irrelevant for the ethics (*Sittlichkeit*) of modern life¹⁰³.

It is to his account of human rights that I now turn.

5. Modern Law: Between Facts and Norms

To return to *Between Facts and Norms*: Habermas argues that the tension between facticity and validity is inherent to the interaction between communicatively competent actors. Language is essential to the organisation of society. Therefore, the presuppositions implicit in language are «enlisted for the coordination of the action of different actors»¹⁰⁴. The tensions that result will manifest themselves in the modes by which society organises itself¹⁰⁵. Law, then, which according to Habermas is the primary medium through which modern society organises itself, will be characterised by this duality. William Rehg introduces Habermas's theory:

If law is essentially constituted by a tension between facticity and validity – between its factual generation, administration, and enforcement in social institutions on one hand, its claim to deserve general recognition on the

¹⁰¹ J. HABERMAS, *Moral Consciousness and Communicative Action*, 200.

¹⁰² J. HABERMAS, *Moral Consciousness and Communicative Action*, 202.

¹⁰³ J. HABERMAS, *Moral Consciousness and Communicative Action*, 205.

¹⁰⁴ J. HABERMAS, *Between Facts and Norms*, 27.

¹⁰⁵ By manifesting in the ways that society is organised, the duality will occur and reoccur. It gives the impression of repetition as Habermas turns to the various aspects of the modern constitutional state. This chapter, as exposition, will also reflect such repetition.

other – then a theory that situates the idealising character of validity claims in concrete social contexts recommends itself for the analysis of law¹⁰⁶.

Law has taken on the role of managing social interaction in response to three complex features of modern society. Firstly, a modern society is pluralistic. The lifeworld of commonly held assumptions, or in Habermas's pithy phrase the «*always already familiar*»¹⁰⁷, becomes undermined by the variety of diverse groups and sub-cultures, each of differing traditions, values and world-views. Secondly, the pluralism of modernity has undermined the overarching structure of religious and metaphysical systems which informed the lifeworld. Societal institutions, such as family, kinship, taboo and religion, manifest the «complex of interpenetrating cultural traditions, social order, and personal identities»¹⁰⁸. They provided an unquestioned authority and homogeneous world view, thereby fusing facticity and validity. However, in the process of societal rationalisation in modern society, outlined earlier, facticity and validity became split apart. On one hand, it allowed for greater critical appraisal as more was called into question. On the other, it became more difficult to justify previously accepted norms of behaviour and social orders of the lifeworld. Without this shared basis to stabilise behaviour expectations, conflicts arise demanding ever more explicit agreement and justification for norms of behaviour. Thirdly, due to the rationalisation of society, structural systems have split from the lifeworld which require the facilitation of strategic action¹⁰⁹. For example, capitalism orders social society, not on agreement, but through the mechanisms that allow for the strategic fulfilment of personal advantage. Such systems have taken on greater importance in managing social integration.

Modern law is attempting to solve issues of social cooperation in the context of a diminished lifeworld on one hand, due to pluralisation which limits areas of common consensus, and the demands of the systems on the other that presuppose large areas of freedom for individuals to pursue their own goals. According to Habermas,

The solution to the puzzle is found in the system of rights that lends to individual liberties the coercive force of law. We can then see, from a historical perspective, that the core of modern law consists of private rights that

¹⁰⁶ W. REHG, «Translator's Introduction» in J. HABERMAS, *Between Facts and Norms*, xii.

¹⁰⁷ J. HABERMAS, *Between Facts and Norms*, 22.

¹⁰⁸ J. HABERMAS, *Between Facts and Norms*, 23

¹⁰⁹ Cf. J. HABERMAS, *The Theory of Communicative Action*, II, 153-197.

mark out the legitimate scope of individual liberties and are thus tailored to the strategic pursuit of private interests¹¹⁰.

Modern law aims towards two things at once, exhibiting a dual character. On one hand, the law must provide a stable social environment (facticity) to allow for the pluralism of world-views and the strategic calculative actions of individuals. On the other, the law must be acceptable to all as legitimate (validity), that is, it must be capable of being rationally agreeable. In the face of conditions eroding the fusion of facticity and validity, modern law is burdened with the problem of trying to intertwine them. For Habermas «the only way out of this predicament is for the actors themselves to *reach an understanding* about the *normative regulation of strategic interactions*»¹¹¹.

According to Habermas, the mutual necessity of facticity and validity or legality and legitimacy requires the mutual necessity of both philosophy and sociology – or as previously mentioned a «poised» theory. On one hand, he attempts to map the relationship between law and normative standards without equating the law with morality; on the other, he is trying trace the necessity of law for social integration without simply equating law with a means of social domination. The former is the association between law and justice; the latter links law and power. According to Habermas, a true account of law will pay regard to both. It is from this standpoint that Habermas criticises both exclusively normative theories and strongly sociological theories of law. Of the former, Habermas critiques John Rawls's *Theory of Justice* for failing to take account of contemporary social facticity – that is, the sociological evidence of societal power structures and their potential undermining posed by multicultural pluralism, bureaucratisation, powerful corporate interests, an apathetic citizenry and so forth¹¹². Of the latter, he rejects the systems theory of Niklas Luhmann for lacking a normative content and therefore proposing law in a positivist manner or as a manifestation of power¹¹³.

6. Human Rights and Popular Sovereignty

The central assumption is that the law is suited to bearing the weight of social integration, for it can facilitate agreement between conflicting lifeworlds on one hand and, on the other, provide for the functional re-

¹¹⁰ J. HABERMAS, *Between Facts and Norms*, 27.

¹¹¹ J. HABERMAS, *Between Facts and Norms*, 26-27.

¹¹² This may also be said of Finnis and Dworkin; cf. Ch. VI, Sec. 5.3.

¹¹³ Cf. J. HABERMAS, *Between Facts and Norms*, 42-81.

quirements of capitalist economics which entail strategic actions or «decentralised decisions of self-interested individuals in morally neutralised spheres of action»¹¹⁴. In discourse theoretic terms, the law must intertwine a demarcated social space for strategic action and, at the same time, facilitate the practices of communicative action.

In order to stabilise a social integration that accounts for both, the law must facilitate the validation of the norms that it proposes. According to Habermas, this can only take place through the process of mutual understanding between communicatively acting subjects. The legal structure, therefore, is obliged to provide a consensual validation process that is capable of providing validity or, in politico-legal terms, legitimacy. The essential duality of facticity and validity becomes in a socially integrative legal system the tension of legality and legitimacy. In the vocabulary of political theory, related to the former are subjective liberties and to the latter rights of participation in the political process: in other words, private autonomy and public autonomy, or human rights and popular sovereignty.

Contemporary democratic regimes justify the rule of law by way of the rhetoric of rights. Binding the notion of human rights to that of private autonomy (and, therefore, the social space to pursue one's own private goals), Habermas sums up the modern conception of rights as,

the concept of liberty or individual freedom of action: rights («subjective rights» in German) fix the limits within which a subject is entitled to freely exercise her will. More specifically, they define the same liberties for all individuals or legal persons understood as bearers of rights¹¹⁵.

Essentially, rights refer to a sphere of freedom of choice for an individual that can be delineated in and through the law so as to be compatible with the freedom-to-act of others. The resulting issue then, referred to in a similar manner a number of times during the course of the relevant chapter in *Between Facts and Norms* is the discernment of «the rights citizens must accord one another if they want to legitimately regulate their common life by means of positive law»¹¹⁶.

The issue is framed in light of the duality of private and public autonomy. Subjective rights maintain legal and normative parameters within which a person is entitled to exercise her freedom and pursue her own goals and «leave open the motives for conforming to norms»¹¹⁷. She may

¹¹⁴ J. HABERMAS, *Between Facts and Norms*, 83.

¹¹⁵ J. HABERMAS, *Between Facts and Norms*, 82.

¹¹⁶ Cf. J. HABERMAS, *Between Facts and Norms*, 118; 112; 129.

¹¹⁷ J. HABERMAS, *Between Facts and Norms*, 83-84.

simply follow the law because she forced to do so, her behaviour being regulated by the punitive enforcement of positive law. But alone, the fact of the law and its consequent power cannot grant legitimacy to the rule of law. It must make a normative claim for itself. It must provide, with justification, a means by which she may follow the law out of respect. She views the law as a set of standards or norms by which people ought to live, that is, a reflection of the internal ought felt by individuals. He writes,

modern law can stabilise behaviour expectations in a complex society with structurally differentiated lifeworlds and functionally independent subsystems only if law, as regent for a «societal community» that has transformed itself into civil society, can maintain the inherited claim to solidarity in the abstract form of a believable claim to legitimacy¹¹⁸.

As disclosed in communicative practices, the best argument is proposed and agreed to justify a particular action. This in turn creates a rational obligation on all the participants. The same process is also true of the law. In the practice of its own justification, the law demands obedience.

6.1 *Between Liberalism and Republicanism*

The development of the above distinction between private and public autonomy is associated by Habermas with the modern era. In pre-modern societies, reflected in the classical Aristotelian and Christian Natural Law traditions, private and political autonomy (facticity and validity) were considered one and the same. However, as previously charted, «in the rationalisation of the lifeworld, this clamp sprang open»¹¹⁹. One result was a division among discourses.

The modern ideas of *self-realisation* and *self-determination* signalled not only different issues but two different kinds of discourse tailored to the logics of *ethical* and *moral* questions. The respective logics peculiar to these two types of questions were in turn manifested in philosophical developments that began in the late eighteenth century¹²⁰.

As noted earlier, the two discourses distinguished two spheres of reflection: issues of what is good for the individual became separate from that which is just in society. Ethics took upon itself a new subjectivistic sense concerned with issues of self-realisation; which, in turn has fostered an individualism in pursuit of personal life projects and a plural-

¹¹⁸ J. HABERMAS, *Between Facts and Norms*, 76.

¹¹⁹ J. HABERMAS, *Between Facts and Norms*, 95.

¹²⁰ J. HABERMAS, *Between Facts and Norms*, 95.

ism of different collective identities. Morality, on the other hand, referred to issues of justice, free from all personal perspectives and based on the equal respect for all. It is orientated towards self-determination or participation in the creation of a just society. In so far as moral and ethical questions have been distinguished, he writes «the discursively filtered substance of norms finds expression in the two dimensions of self-determination and self-realisation»¹²¹.

Habermas does not claim that there is strict parallel between human rights and self-realisation on one hand and popular sovereignty and self-determination on the other. However, he does identify a certain affinity reflected in contemporary political theory. He equates the «liberal» tradition as that which conceives human rights as the expression of moral self-determination and «civic republicanism» as that tradition which interprets popular sovereignty as the expression of ethical self-realisation. On one hand, the liberals fear a «tyranny of the majority» and therefore appeal to the priority of human rights in order to guarantee freedom¹²². They view rights to be a moral given, imposing themselves on our moral insight and an impersonal law that protects the liberty of all. On the other hand, «civic republicanism» highlights the binding character of a political community that gives expression to an historical tradition. This gives precedence to participation in the body-politic in order to give authentic expression to the goods in which the person ultimately finds fulfilment. In terminology of moral and ethical discourse, «in the one case, the moral-cognitive moment predominates, in the other, the ethical-volitional»¹²³. The two approaches, liberal and republican, tend to stress one or other form autonomy as the basis of legitimacy for law. The first grounds legitimacy in the protection of individual liberty or private autonomy, specified in terms of rights. The second grounds it in public autonomy or the sovereignty of the people.

In the history of political theory, Thomas Hobbes assumed the validity of law promulgated by the sovereign authority. By contrast, Rousseau and Kant maintained that the law must be legitimate if it is to be asserted and accepted obedience over society¹²⁴. Habermas leans towards the second tradition: «enacted law cannot secure the basis of its

¹²¹ J. HABERMAS, *Between Facts and Norms*, 99.

¹²² This will become an important point in a later chapter; cf. Ch. VI, Sec. 5.2-5.4.

¹²³ J. HABERMAS, *Between Facts and Norms*, 100.

¹²⁴ Some commentators argue that Habermas presents a highly stylised caricature of the positions of both Rousseau and Kant, without appreciating the full complexity of their positions, cf. I. MAIUS, «Liberties and Popular Sovereignty», 89-128.

legitimacy simply through legality, which leaves attitudes and motives up to the addressees»¹²⁵. The law, or the normative regulation of strategic actions, must be based on a common understanding and a common will built between the subjects of the law.

In the Hobbesian model and subsequent liberal tradition, rights are held prior to the entry into society, based on the private autonomy of each individual¹²⁶. Based on such presumptions, the social contract justified the system of rights according to an enlightened self-interest in protecting subjective liberties. But such a model, according to Habermas, was appropriated from private contract law which regulates exchange relationships between independent individuals¹²⁷. In the act of creating such a contract «the subjects make their decisions from the perspective of the first-person singular»¹²⁸. However, a line of the modern tradition, critical of the early liberal tradition and represented by Kant and Rousseau, resisted the derivation of rights solely from subjective rights¹²⁹. Instead and for them, the social contract is structurally different from an economic contract for it necessarily implies that the participants

have at their disposal the social perspective of a practical reason that tests laws. On the basis of this reason, they have *moral* – and not just prudential [enlightened self-interest] – grounds for their move out of the conditions of unprotected freedom [that is, the state of nature]¹³⁰.

Habermas is asserting that the preconditions of communicative action reveal exactly this – that rationality is necessarily intersubjective or social or other-orientated. The liberal and republican traditions

miss the legitimising force of a discursive process of opinion- and will-formation, in which the illocutionary binding forces of a use of language orientated to mutual understanding serve to bring reason and will together –

¹²⁵ J. HABERMAS, *Between Facts and Norms*, 33. The same question is rephrased by David Rasmussen, «Or in the terms that Rousseau and Kant framed the issue, ‘the claim to legitimacy on the part of a legal order built on rights can only be redeemed through the socially integrative force of the “concurring and united free will of all free and equal citizens”’. The discourse-theoretic reading of the place of the law seeks to take up the classical problematic». D.M. RASMUSSEN, «How is valid law possible?», 25.

¹²⁶ Cf. Ch. II, Sec. 2.2.1.

¹²⁷ Recall also the reflections on the social contract and the hypothetical schemes for teasing out the implications of equality by Dworkin; cf. Ch. III, Sec. 4; Ch. III, Sec. 7.

¹²⁸ J. HABERMAS, *Between Facts and Norms*, 91.

¹²⁹ Cf. App. C; Ch. II, Sec. 2.

¹³⁰ J. HABERMAS, *Between Facts and Norms*, 93. Parenthesis added.

and lead to convincing positions to which all individuals can agree without coercion¹³¹.

Conceptually, Habermas is denying that rights and sovereignty may be hierarchically ordered, one over the other. He writes,

On the contrary, as elements of the legal order they presuppose collaboration among subjects who recognize one another, in their reciprocally related rights and duties, as free and equal citizens. The mutual recognition is constitutive for a legal order from which actionable rights are derived. In this sense «subjective» rights emerge co-originally with «objective» law [...] ¹³².

To Habermas, they are co-original. They require each other: the legitimate rule of law and democracy, according to his theoretical theory, are explicitly circular¹³³.

The central intuition, similar to Rousseau and Kant, is that legitimacy derives from self-legislation. Communicative practices that aim towards mutual understanding place an obligation on the participants to follow the commonly justified norms. The norms are freely followed because they are the result of a common endeavour – that is, a discursive will formation. The norms that demarcate private autonomy result from the active enterprise of citizens or the exercise of public autonomy. Importantly, the practices that make communicative action politically realisable (popular sovereignty or democracy) are possible only by way of the law. Public autonomy requires the medium of law – for only the law is able to guarantee a stable social interaction which is the basis of public autonomy. Yet as we have seen, in modern societies the law successfully functions as a medium of integration because it is able to protect subjective liberties. Private and public autonomy or human rights and popular sovereignty, therefore, mutually constitute one another.

¹³¹ J. HABERMAS, *Between Facts and Norms*, 103. «On the whole, Kant suggests more of a liberal reading of public autonomy, Rousseau a republican reading».

¹³² J. HABERMAS, *Between Facts and Norms*, 88-89. Parenthesis added.

¹³³ For comment on the circularity of Habermas's argument, cf. I. MAIUS, «Liberties and Popular Sovereignty», 89-128. «Justifications for such an interlinkage [of law and democracy] can only be circular in nature [...] In other words, according to a well-known saying, it is not a matter of avoiding the circle but of entering it at the right place». For Rousseau and Kant, the point of entry were innate human rights which acted as a precondition for democracy. For Habermas, he continues «the point of entry is not the discourse principle; [...] giving rise to “equiprimordially” (on both sides of the circular process) to the principle of democracy, on one hand, and individual private rights that are identical legal code, on the other». I. MAIUS, «Liberties and Popular Sovereignty», 97. The rest of this chapter is an explication of this mutual constitution of rights and democracy.

So the sought-for internal connection between popular sovereignty and human rights lies in the normative content of the *very mode of exercising political autonomy*, a mode that is not secured simply through the grammatical form of general laws but only through the communicative form of discursive processes of opinion- and will-formation¹³⁴.

The very act of political autonomy presupposes a normative content. Presupposed in the act of political autonomy, it is the recognition of the other as a genuine person and not a means to a strategic end. Communicative rationality presupposes and acknowledges the dignity, freedom and equality of the other, that is the subjective liberty of the other. The act of political autonomy is also the active concrete recognition of subjective liberties; and the active demarcation of the parameters to protect such subjective liberties that make up specific human rights. Modern law, understood as a system of rights, is the institutional recognition of such preconditions.

Consequently the sought-for internal relation between popular sovereignty and human rights consists in the fact that the system of rights states precisely the conditions under which the forms of communication necessary for the genesis of legitimate law can be legally institutionalised [...] The substance of human rights then resides in the formal conditions for the legal institutionalisation of those discursive processes of opinion and will formation in which the sovereignty of the people assumes a binding character¹³⁵.

The system of rights is not an actual listing of particular rights. There are no pre-givens or natural rights prior to the self-determination of the citizens. Rights are necessarily social or political from the beginning. They are not held by individuals prior to social interaction. Rather they are recognised as the presuppositions of the intersubjective relations of citizens who are regulating their common life by way of positive law. In sum: the system of rights is an implication – a statement in legal form of the conditions of communicative rationality. As a result, it supports the process by which validity or legitimacy is bestowed on the law. It is for the process of popular sovereignty and the process of law to give shape to the system of rights, thereby creating actual positive rights or giving them legal factual status. Validity and facticity, therefore, come together in the modern law by way of a system of rights that

¹³⁴ J. HABERMAS, *Between Facts and Norms*, 103.

¹³⁵ J. HABERMAS, *Between Facts and Norms*, 104. On this point, D.M. Rasmussen comments, «In other words, the assumptions of mutual respect and equal application are written into the very discursive shape of the process of reaching an understanding which derives autonomy intersubjectively». D.M. RASMUSSEN, «How is valid law possible?», 29.

institutionalises and thereby guarantees communicative rationality in complex societies.

6.2 *Between Law and Morality*

As outlined earlier, the rationalisation of the society has created various distinct forms of discourse¹³⁶. Discussion of the law, then, may pass through a number of the different discourses, each with its own form of validation. For instance, apart from the previously mentioned moral and ethical discourses, pragmatic discourses are those which weigh up the merits of alternative strategies for achieving particular goals. Much of the law may be justified at this level¹³⁷.

In the process of the differentiation of discourses, modernity has distinguished between moral and legal discourses in which «legal and moral rules are *simultaneously* differentiated from traditional ethical life and appear *side by side* as two different but mutually complementary kinds of action norms»¹³⁸. At one level, moral and legal discourses refer to similar issues: how interpersonal relationships can be ordered legitimately and conflicts are resolved according to justified norms. But at another level they differ, for they refer to such problems in different ways. Legal norms, therefore, are not to be taken as simple copies of moral norms.

Hence we must not understand basic rights or *Grundrechte*, which take the shape of constitutional norms, as mere imitations of moral rights, and we must not take political autonomy as a mere copy of moral autonomy. Rather, norms of action *branch out* into moral and legal rules¹³⁹.

All legitimate norms of action are those resulting from common practical reasoning – or communicative rationality concerning claims of rightness. As previously explained, the discourse principle is the test of the validity of those norms because it embodies the post-conventional requirement of justification, specifically the requirement of impartiality¹⁴⁰. In *Between Facts and Norms*, Habermas offers a slightly different formulation of the discourse principle: «D: Just those action norms are valid to which all possibly affected persons could agree as participants in

¹³⁶ Cf. Ch. V, Sec. 3.2; J. HABERMAS, *Between Facts and Norms*, 95-99, 108-109; ID, *Justification and Application*, 10-16.

¹³⁷ Recall similar observations by Finnis and Dworkin; cf. Ch. III, Sec. 4; Ch. IV, Sec. 3.1

¹³⁸ J. HABERMAS, *Between Facts and Norms*, 105.

¹³⁹ J. HABERMAS, *Between Facts and Norms*, 107.

¹⁴⁰ Cf. Ch. V, Sec. 4.

rational discourses»¹⁴¹. The discourse principle is neither specific to morality or ethics or law – it undercuts all. It refers to procedure rather than content. As an impartial justification of norms in general, it is conceptually prior to either morality or law. The discourse principle which guides all norms of action branches out into moral and legal norms. «We might say that these various rules of argumentation are so many ways of operationalising the discourse principle»¹⁴². Moral and legal discourses are separate in that they relate to differing questions at issue, internal logic and the scope of justification.

On one hand, in the justification of moral norms, the discourse principle is articulated in the form of an impartial universalisation principle. On the other, in the domain of the law-making, the operation of the discourse principle becomes what Habermas calls the democratic principle. It states: «only those statutes may claim legitimacy that can meet with the assent (*Zustimmung*) of all citizens in a discursive process of legislation that in turn has been legally constituted»¹⁴³. Based on discursive practices, the former principle measures the validity of moral norms and the latter measures the legitimacy of positive law. In effect, Habermas has transposed the relationship between morality and law into the discourse-theoretic relationship between the principle of universalisation and the principle of democracy – mediated by the system of rights.

On the premise that rational political opinion- and will- formation is at all possible, the principle of democracy only tells us how this can be institutionalised, namely, through a system of rights that secures for each person an equal participation in a process of legislation whose communicative practices are guaranteed to begin with¹⁴⁴.

Habermas further outlines of the relationship between morality and law in a sociological manner. He maps their inter-relationship according to how they function in modern society. Modern societies are marked by a pluralism that no longer provides a common ethos which supports a binding morality. A post-traditional morality cannot meet all the requirements in regulating and organising highly complex societies, which demand high levels of strategic freedom. As a result, the functioning of moral norms is incapable of fostering the necessary modes of behaviour to stabilise social expectations. Habermas, therefore, de-

¹⁴¹ J. HABERMAS, *Between Facts and Norms*, 107.

¹⁴² J. HABERMAS, *Between Facts and Norms*, 109.

¹⁴³ J. HABERMAS, *Between Facts and Norms*, 110.

¹⁴⁴ J. HABERMAS, *Between Facts and Norms*, 110.

scribes the law's complementary relationship to morality in terms to the latter's functional limitations. In effect, he is describing how the law supplements morality. In order to facilitate social integration, weaknesses in the post-conventional morality are supplemented by modern law in three functionally necessary ways, which in turn identify the three essential formal features of law¹⁴⁵.

The three basic weaknesses of morality are cognitive indeterminacy, motivational uncertainty and accountability. Correspondingly, the form of law is positive, coercive and reflexive. Firstly, the law is positively enacted and as such augments a cognitive indeterminacy. Modern societies face highly complex issues that require justification and application according to very abstract principles, creating difficulties for individuals in deciding which norms are appropriate. The law provides firmness. Secondly, the law is coercive and as such counteracts a motivational uncertainty with regard to morality. Individuals may not be motivated to follow moral norms. The enforcement of the law adds a coercive element which allows for the stabilisation of behavioural expectations. Thirdly, the law is reflexive and as such creates a system of accountabilities. Moral responses to complex issues in contemporary society require institutional organisation beyond the capacity of any individual. The system of rules that create an organisation to fulfil moral needs may in turn be reflexively applied to itself. The law, then, can create a system of accountabilities by which to judge its actions and meet its goals. Earlier, the legal medium was identified by its ability demarcate parameters of strategic freedom. To this basic assumption that the legal medium acknowledges general subjective liberties, Habermas adds the above characteristics. The legal medium then, involves the recognition of subjective liberties, positivity, coerciveness and accountability.

It is the interaction of this legal medium (law) with the discourse principle (morality) that constructs the system of rights¹⁴⁶.

6.3 *The System of Basic Rights*

In light of the sociological pressures of pluralism, the central question of social integration is: in a post-traditional society, how can people be free to pursue their own goals and yet still be bound to

¹⁴⁵ Cf. J. HABERMAS, *Between Facts and Norms*, 111-118.

¹⁴⁶ That rights involve an interaction between law and morality will become an important point in a later chapter; cf. Ch. VI, Sec. 4.2; Recall also that this position is emphasised by Finnis and Dworkin; cf. Ch. III, Sec. 3; Sec. IV, Sec. 3.2.

common norms that oblige certain modes of behaviour? How can society act as one and allow each to act alone? Transferred to discourse-theoretic terms: what is the potential structure that successfully allows for both strategic action and communicative rationality under law?

According to the procedure of discourse ethics, in order to discern the required principles – or legal code – there may be no appeal to anything beyond the actual working through of issues by the people themselves. As competent speakers, this implies the discourse principle: as citizens who are proposing legal norms, it implies the legal medium. Therefore, nothing can be given prior to «the citizen's practice of self-determination other than the discourse principle, which is built into the conditions of communicative association in general, and the legal medium as such»¹⁴⁷. These two aspects are indispensable because successful social cooperation in a post-traditional society necessarily requires both. People have no choice but to use them.

Firstly, to take the legal medium: it presupposes a general right to liberties in so far as it demarcates «the freedom of choice of typical social actors; that is, they define liberties that are granted conditionally»¹⁴⁸. Recognising subjective liberties of each, the law seeks to establish and protect parameters of individual freedom of choice. Actors are free to act according to their own goals, irrespective of the wider common goals of society. In discourse-theoretic terms, it frees the individual from demands or obligations of justification in discourse; «Communicative action involves obligations that are *suspended* by legally protected liberties»¹⁴⁹. Communicative action necessarily presupposes that the participants are willing to commit themselves to coordinating action on the basis of a consensus arising from the justification and acceptance of validity claims. But actors are free not to do so – actions may be justified according to individual reasons without reference to acceptance by others. According to Habermas's framework, therefore, private autonomy is essentially the ability to act without giving publicly acceptable reasons for those actions.

Legally granted liberties entitle one to drop out of communicative action, to refuse illocutionary obligations; they ground a privacy freed from the bur-

¹⁴⁷ J. HABERMAS, *Between Facts and Norms*, 128.

¹⁴⁸ J. HABERMAS, *Between Facts and Norms*, 119.

¹⁴⁹ J. HABERMAS, *Between Facts and Norms*, 119.

den of reciprocally acknowledged and mutually expected communicative freedoms¹⁵⁰.

The creation of a legal code then is, in part, the provision and enactment of those rights that shelter legal subjects from the demands of communicative practices.

Secondly, to take the citizen's practice of self-determination or self-legislation: it is the common regulation of social life and in so far as it conforms to the pre-conditions of communicative action, it regulates freely. People enter into discursive practices from which arise norms of behaviour. The discursive practice, in turn, places obligations on the participants in a process of discursive will formation. In a post-traditional society these norms of behaviour may be tested according to the discourse principle which is a principle of impartiality testing the validity of all action norms. When it is institutionalised into the sphere of law making, it becomes operational as the democratic principle.

Finally, to take the two aspects together: their interaction is the milieu out of which rights are constructed. In his own words,

The key idea is that the principle of democracy derives from the interpenetration of the discourse principle and the legal form. I understand this interpenetration as a *logical genesis of rights*, which one can reconstruct in a stepwise fashion¹⁵¹.

The interaction firms and gives shape to the right to general liberties posited by the legal form (legality, facticity) and the process of self-legislation which presupposes the discourse principle, and thereby confers validation to norms (legitimacy, validity). Therefore, «The logical genesis of rights comprises of a circular process in which the legal code, or legal form, and the mechanism for producing legitimate law – hence the democratic principle – are *co-originally* constituted»¹⁵². By co-originally constituted, Habermas is referring not so much to an actual historical process as to the theoretical reconstruction of modern law (based on sociological insights) that allow for private and public autonomy. As argued earlier, private and public autonomy mutually constitute each other. There can be no demarcation of a social sphere for strategic action without the medium of law. Equally, there can be no communicative action in modern society without the medium of law. In complex western societies citizens are not free in the medium by which

¹⁵⁰ J. HABERMAS, *Between Facts and Norms*, 120.

¹⁵¹ J. HABERMAS, *Between Facts and Norms*, 121.

¹⁵² J. HABERMAS, *Between Facts and Norms*, 121.

they actualise that autonomy. «The idea of self-legislation must be realised in the medium of law itself»¹⁵³. The genesis of rights therefore is in the justifications and applications of a «legitimate» law, in which the legal medium is tested according to the democratic principle. In effect, rights provide the necessary conditions for institutionalising (legal form) the democratic process (discourse principle) in law and politics. The reconstruction is the application of the discourse principle, based on impartiality, to the legal form, that is, to the assumption of general subjective liberties and the necessary functional qualities of positivity, coercion and reflexivity. The latter provides factual status; the former provides the test for normative validity.

Based on the four characteristics of the legal medium, the interpenetration implies four broad categories. A further fifth is implied¹⁵⁴.

Firstly, the medium of law presupposes subjective liberties and implies that each is entitled to the greatest possible measure of equal liberties. But the legal form, of itself, cannot judge which liberties are legitimate. It is only in light of the discourse principle that people can accept what is owed to each. So only those norms which are compatible with the equal rights of all are legitimate. These are the so-called classical liberal rights: rights to personal dignity; to life, liberty, and bodily integrity; to freedom of movement; to freedom in the choice of one's vocation, and to property.

Secondly, the medium of law is positive. Therefore, it is necessarily concrete and factual and so limited to a particular historical moment and social space. It must therefore determine a particular scope of citizens. By testing impartiality, the discourse principle will imply that this legal form becomes rights of membership; rights to protection from unilateral deprivation of rights, and right to renounce membership of a particular state.

¹⁵³ J. HABERMAS, *Between Facts and Norms*, 126.

¹⁵⁴ He defines the basic categories as follows; «Basic rights that result from the politically autonomous elaboration of *the right to the greatest possible measure of equal individual liberties*.

Basic rights that result from the politically autonomous elaboration of the status of member in a voluntary association of consociates under law

Basic rights that result immediately from the actionability of rights and from the political autonomous elaboration of individual legal protection.

Basic rights to equal opportunities to participate in the processes of opinion- and will-formation in which citizens exercise their political autonomy and through which they generate legitimate law.

Basic rights to the provision of living conditions that are socially, technologically, and ecologically safeguarded, insofar as the current circumstances make this necessary if citizens are to have equal opportunities to utilise the civil rights listed in (1) through (4)». Cf. J. HABERMAS, *Between Facts and Norms*, 122-131.

Thirdly, the medium of law is coercive. This implies that there must be remedies available to those who feel that their subjective liberties have been violated. In this context, the discourse principle, which imposes a test of impartiality, will justify the basic rights of due process: the rights to equal legal protection; equal protection before the law; double jeopardy and *ad hoc* courts.

These three categories protect private autonomy. The first three categories are the basic negative rights, membership rights, and due process rights: together they guarantee private autonomy or the individual freedom of choice to pursue their own goals. They are not to be understood as liberal rights against the state (*Abwehrrechte*) for the system is based on what would be granted by citizens to each other – they firstly imply a horizontal relationship than a hierarchical one. Of them, Habermas writes,

In summary, we can say that the general right to equal liberties, along with the correlative membership rights and guaranteed legal remedies, establishes the legal code as such. In a word, there is no legitimate law without these rights¹⁵⁵.

Fourthly, the medium of the law is reflexive or accountable. It implies that the law is open to critical and moral evaluation by the citizens themselves. The law itself, therefore, must make room for the discursive practices in which critical and moral evaluation may take place. The law must facilitate the discourse principle – in practice, the citizens must self-legislate. The law must protect the processes by which this can take place. These are the basic rights to participation and guarantee public autonomy or communicative freedom. In modern society, social institutions that conform to communicative practices, which are legally institutionalised as democratic procedures, will enjoy a presumption of legitimacy. This final category enjoys a certain status for Habermas, and the Critical Tradition, for it is the expression of these rights that help underpin all other categories of rights¹⁵⁶.

¹⁵⁵ J. HABERMAS, *Between Facts and Norms*, 125.

¹⁵⁶ Cf. App. C; Ch. II, Sec. 3.3.2. The emphasis on full participation in the legitimation of law, and therefore all rights, raises an interesting hypothetical issue. Is it possible for an authoritarian government to provide and protect for (some) rights? For instance, many rights may be maintained while a national government is maintained in an extended war and need for national defence. Although hypothetical, the issue «shows that we have reason to value rights and liberties somewhat independently of their connection with democracy». Cf. B. PETERS, «On reconstructive legal and political theory», 115. Recall that the issue of the relationship between rights and democracy arose for Dworkin; cf. Ch. III, Sec. 5.3.

The fifth concerns the material conditions required for the ability to sustain the first four. They are the basic social and economic rights required in so far as the previous categories of civil and political rights depend on basic social and material conditions being fulfilled.

Together, the five categories that make up the system of rights, therefore, may be seen as place-holders or legal principles that guide the framers of law.

6.4 *The Duality of Human Rights*

Habermas's system of rights results from the theoretical interpenetration of the legal medium with the discourse principle. Correspondingly, actual human rights will have both the structure of the legal form and the justifications provided in discursive practices – particularly the moral discourse that aims towards justice. In an article entitled «Kant's Idea of Perpetual Peace», Habermas identifies human rights as Janus-faced, «looking simultaneously toward morality and law»¹⁵⁷.

There is an inherent duality to human rights. On the one hand, human rights, in common with moral norms, claim universal validity; they refer to all human beings rather than simply localised citizens. But more importantly, both human rights and moral norms are justified according to moral discourse and its principles of justice. The same arguments for moral norms are also used to justify basic rights. Legal norms may be justified according to ethical or pragmatic considerations but only basic rights are justified by moral arguments. They are «equipped with a universal validity claim because they can be justified exclusively from a moral point of view»¹⁵⁸. Basic rights are not simply consistent with self-understanding or set aside by pragmatic considerations. Rather, they,

regulate matters of such generality that moral arguments are sufficient for their justification. These arguments show why the implementation of such rules is in the equal interest of all persons qua persons, and thus why they are equally good for everybody¹⁵⁹.

Rights are legal norms proposed and justified in the form of moral arguments – that is, their implementation is in the interest of all.

¹⁵⁷ J. HABERMAS, «Remarks on Legitimation through Human Rights», 118.

¹⁵⁸ J. HABERMAS, «Kant's Idea of Perpetual Peace», 191. Janus was an ancient Roman God, depicted with two faces, with the capability of looking forward and backward at once.

¹⁵⁹ J. HABERMAS, «Kant's Idea of Perpetual Peace», 191.

On the other hand, human rights are not simply moral rights, for they belong structurally to the legal order and therefore share its characteristics as positive, coercive and accountable and in their recognition of general subjective liberties¹⁶⁰. They do not have sole «origins in morality, but rather bear the imprint of the modern concept of individual liberties, hence of a specifically juridical concept»¹⁶¹. Rather, it is a functional compliment to morality in a modern pluralist and systems-bound society.

Human rights are established and identified by its legal structure and the moral justifications which are brought to bear. Neither law nor morality can constitute a right on its own. It requires a morally valid claim within a legal framework of legal recognition. The basic constitutional rights, such as the Basic Law of Germany or the Bill of Rights in the United States are the only rights that fully realise the duality. Beyond this level, human rights «remain only a weak force in international law and still await institutionalisation within the framework of a cosmopolitan order that is only now beginning to take shape»¹⁶².

The emphasis on legality does not make Habermas's theory one of legal positivism, for morality necessarily enters in the legal system in order that it may gain legitimacy and therefore acceptance. Moral arguments cannot but be made if the law is to be able to claim validity. It is, therefore, an absolute requirement in the logical genesis of the system of rights. However, as a procedural principle of universalisation it does not presuppose any particular pre-legal moral rights.

Of course, they cannot produce basic rights *in abstracto* but only particular rights with a concrete content [...] Only when they are confronted, we say, with the intolerable consequences of the use of physical violence do they recognise the necessity of elementary rights to bodily integrity or freedom of movement¹⁶³.

Yet without the law, human rights suffer from the same weaknesses outlined in the sociological evaluation of morality. It is only in and through law (and the discursive practices bearing on the law) that rights may be said to have force.

7. Deliberative Democracy and Law

The system of rights expresses in institutional form a reconstruction of the mutual requirements of private and public autonomy. *Between*

¹⁶⁰ J. HABERMAS, «Kant's Idea of Perpetual Peace», 192.

¹⁶¹ J. HABERMAS, «Kant's Idea of Perpetual Peace», 191.

¹⁶² J. HABERMAS, «Kant's Idea of Perpetual Peace», 192.

¹⁶³ J. HABERMAS, «Constitutional Democracy», 778.

Facts and Norms proposes a deliberative paradigm of the law which can take account of both aspects. It is proposed in the context of a contemporary legitimisation crisis, arising from the tension between a liberal paradigm and a social-welfare paradigm of the law. «Here «paradigm» refers to the basic assumptions about society that inform efforts to realize constitutional-democratic ideals»¹⁶⁴. The failure of a paradigm is due to its failure to explain. According to Habermas, this is particularly urgent for the law because it needs rational explanation or justification if it is to claim legitimacy. There is a legitimisation crisis because «Both views lost sight of the internal connection between private and civic autonomy, and thus lose sight of the democratic meaning of a legal community's self-organisation»¹⁶⁵.

Habermas views a legitimate legal system – legislature, judiciary, enforcement, and so forth – as an institutionalisation of an unfettered discourse. Law, then, is «the medium for transforming communicative power into administrative power»¹⁶⁶. Legitimate law, therefore, will share the features of those communicative practices that lead to mutual understanding and rational cooperation. It will, as first outlined in his discourse ethics, recognise the freedom and equality of the other, be universal and be formal. In legal form, it is transformed into a proceduralist presentation of law and democracy characterised by an intersubjective dialogical method of legal argumentation; a priority of deontologically conceived basic rights in contrast to other values; and a non-paternalistic understanding of the role of the Supreme Court in safeguarding legislative decision making¹⁶⁷.

The deliberative paradigm proposes that law, as necessary for social integration, becomes illegitimate by being an unresponsive independent system or too subservient to particular interests groups that bypass the democratic process. Therefore, this model places great responsibility on

¹⁶⁴ J. HABERMAS, *Between Facts and Norms*, 388-446. The liberal paradigm of a “bourgeois formal law” arising from the nineteenth century, prioritises individual freedom, minimal government, equality before the law and legal certainty. However, social events of the twentieth century, such as unrestrained capitalism and corruption of the political process have led to an instrumentalisation of the law to substantive social utility ends. This he calls the welfare paradigm of “materialised law” because of its emphasis on using law for the realisation of substantive social goals and values. This has led to problems of unchecked administration and welfare bureaucracies.

¹⁶⁵ J. HABERMAS, *Between Facts and Norms*, 390.

¹⁶⁶ J. HABERMAS, *Between Facts and Norms*, 169.

¹⁶⁷ J. HABERMAS, *Between Facts and Norms*, 194-286. Habermas engages with many of the theories of jurisprudence, such as those of legal realism, legal hermeneutics, positivism and Ronald Dworkin – the last of which will be considered in a later chapter; cf. Ch. VI, Sec. 6.4.

the polity, or the social movements and associations that facilitate the democratic process and the communicative aspects of social integration¹⁶⁸.

8. Religion

In the spirit of open and free argumentation that lies at the heart of discourse theory, Habermas regularly responds to the invitations and challenges of philosophers and sociologists¹⁶⁹. Rarely, however, does he engage with theologians. Instead, he maintains, «A silence on the grounds of embarrassment would [...] be justified, for I am not really familiar with the theological discussion, and only reluctantly move about in an insufficiently reconnoitred terrain»¹⁷⁰. On the other side of the dialogue, many theologians have been able to appropriate and in turn critique many of the insights of Habermas¹⁷¹.

Introducing a selection of Habermas's writings on religion and religious belief, Eduardo Medieta argues that Habermas may be interpreted in a complimentary manner as a sociologist of religion and a philosopher of religion. Accordingly, he reconstructs Habermas's account of the «rise and transformation of religion but not the demise of religion [...] in order to dispel the misconception of an unambiguous Habermasian rejection of religion»¹⁷².

The misconception that Habermas forthrightly rejects religion is, perhaps, due to a simplistic reading of his sociological account of mod-

¹⁶⁸ He gives an example of the women's struggle for equality. It captures both aspects and requires both in order to attain equal status and position. The proceduralist paradigm allows for the active participation of women themselves, thereby "imparting a dynamic quality to the idea of equal rights". For an overview and critical comment on Habermas's models of democracy, cf. K. BAYNES, «Democracy and the *Rectsstaat*», 200-220; M. ROSENFELD, «Law as discourse», 31-56. W. SCHEUERMANN, «Between Radicalism and Resignation», 153-177. It appears however that he is too trusting in the redeeming power of social movements. I would argue that they have limited capacity in holding the decision-making process to account. Furthermore, the identity and formation of many such movements are more likely to be based on discourses of ethics rather than of morality.

¹⁶⁹ For instance, cf. C. CALHOUN, ed., *Habermas and the Public Sphere*, 421-461.

¹⁷⁰ J. HABERMAS, «Transcendence from Within», 226.

¹⁷¹ Cf. E. ARENS, ed., *Habermas und die Theologie*; ID., ed., *Kommunikatives Handeln und christlicher Glaube*; H. PEUKERT, *Science, Action, and Fundamental Theology*. The following works are extended applications of Habermas's theories to theology: P. LAKELAND, *Theology and Critical Theory*; J. GLEBE-MOLLER, *A Political Dogmatic*; G. M. SIMPSON, *Critical Social Theory*.

¹⁷² For instance, cf. C. CALHOUN, ed., *Habermas and the Public Sphere*, 421-461.

ernisation in *The Theory of Communicative Action*¹⁷³. To recall: the rationalisation of the lifeworld that underlies the dynamic of societal development is the differentiation of the domains of reason – objective, social and subjective domains of discourse and their corresponding propositional, normative and expressive claims. In pre-modern societies, religious and/or metaphysical world views provided a means by which all domains were intertwined and mutually supported each other in the lifeworld, thereby creating social solidarity¹⁷⁴. In such societies, the sacred symbols that constitute a religious group are continually assimilated and ultimately transformed by the communicative practices of the group.

The disenchantment and disempowering of the domain of the sacred takes place by way of a linguistification of the ritually secured, basic normative agreement; going along with this release of the rationality potential in communicative action. The aura of rapture and terror that emanates from the sacred, the *spellbinding* power of the holy, is sublimated into the *binding/bonding* force of criticisable validity claims and at the same time truned into an everyday practice¹⁷⁵.

On one hand, the development of religion is a historical source of communicative practices: theological discourses created a space that allowed for the questioning and justification of social norms and personal identities¹⁷⁶. On the other hand, communicative practices decoupled from religious world views creating a new public domain of consensually validated norms that now bears the burden of social integration once borne by religion and sacred authority. This is only possible by way of common moral effort, for «neither science nor art can inherit the mantle of religion; only a morality, set communicatively a flow and developed into a discourse ethics, can replace the authority of the sacred»¹⁷⁷. In turn, religious experience, belief and religiously grounded norms develop into an aspect of the private expressive world of self- and group-identity¹⁷⁸.

¹⁷³ For examples of counter-acting the simplistic view, cf. D. BROWNING – F. SCHLUSSER-FIORENZA, ed., *Habermas, Modernity, and Public Theology*: A. FORTIN-MELEKVIK, «The Reciprocal Exclusiveness».

¹⁷⁴ J. HABERMAS, *The Theory of Communicative Action*, II, 56-62.

¹⁷⁵ J. HABERMAS, *The Theory of Communicative Action*, II, 77.

¹⁷⁶ Habermas writes, «Inasmuch as religion itself is ritualised, and then made part of tradition, which is then reflexively appropriated and rendered accessible to criticism, religion itself compels subjects themselves to adopt universalising and critical attitudes towards its own myths and theologemes».

¹⁷⁷ J. HABERMAS, *The Theory of Communicative Action*, II, 92.

¹⁷⁸ J. HABERMAS, *The Theory of Communicative Action*, II, 54.

Modernisation, then, is a process of secularisation. However, Habermas is not proposing an end of religion. He characterises his general theoretical framework as involving a «methodological atheism»¹⁷⁹. The supposition of God is not required; it is neither presumed nor denied. As a philosopher of religion, Habermas acknowledges the continuing role of religion in providing sources of symbols, concepts, norms and personal identities. It too is capable of transformation in light of rational self-critique and continual justification¹⁸⁰. Indeed it must do so, if it is not to succumb to modes of domination. Habermas recognises and praises such a dynamic in the work of Johannes Baptist Metz and others. A theology that remembers and is moved by the «eschatological drive to save those who suffer unjustly connects up with those impulses towards freedom which have characterised modern European history»¹⁸¹.

In *Legitimation Crisis*, he acknowledges that a discourse ethics may provide norms but that it is incapable of solely providing existential meaning – on the basis of discourse alone, we must face the world disconsolately¹⁸². In this regard, he concedes in *Postmetaphysical Thinking* that as long as religion can say something that philosophy cannot then it cannot be replaced or repressed¹⁸³.

9. Conclusion: Some Observations

To finish with some significant points:

Firstly, implied by the argument of this thesis is the contention that traditions of enquiry respond to both socio-economic and political contexts and to the challenges of other traditions, while attempting to remain consistent with the resources and models of reasoning which are normative within that tradition¹⁸⁴. I contended in Chapter II that its initial sources are found in the criticism of modernity, by using many of

¹⁷⁹ J. HABERMAS, «Israel or Athens», 129.

¹⁸⁰ However, Habermas too readily views religion as regulated to the discourse of private expression of authenticity with reference to the subjective world.

¹⁸¹ J. HABERMAS, «Israel or Athens», 129.

¹⁸² J. HABERMAS, *Legitimation Crisis*, 118 ff.

¹⁸³ J. HABERMAS, *Postmetaphysical Thinking*, 60. He writes, «As long as religious language bears with itself inspiring, indeed, unrelinquishable semantic contents which elude (for the moment?) the expressive power of a philosophical language and still await translation into a discourse that gives reasons for its positions, philosophy, even in its postmetaphysical form, will neither be able to replace nor to repress religion».

¹⁸⁴ Cf. Ch. VII, Sec. 2; Ch VII, Sec. 7.

the conceptual categories of modernity¹⁸⁵. Habermas represents a contemporary moment in that dynamic. He desires to defend modernity but also wishes to stand in critical relation to it in order that it may not succumb to some its negative impulses.

Secondly, while Habermas is an explicit defender of modernity, he is also wary of its totalitarian impulses. Such power may be by way of the mechanisms that organise society (such as economics and bureaucracy) or the modes of reasoning that support it (such as utilitarianism or positivism). In response, he wishes to emphasise other elements of modernity such as the commitment to a principled universal justice, the rule of law and, most of all, democratic procedures – all of which intertwine in an effective rights-regime. Of his proposals, I wish to accept and respond to the intimate connection between the acceptance of rights-language and the fostering of democracy as normative for state power¹⁸⁶.

Fourthly, secularisation is a distinctive feature of modernity. In the discourse analysis of Habermas, it is marked by a priority of discourses that respond to questions of justice over questions of the good. The former is associated with the widest civil and public forum and the latter is reduced to either private or group convictions. The next chapter will challenge this distinction, for it marginalises crucial answers (to questions concerning the good) from the wider public discourse. It is my contention that such a distinction empties moral reasoning of the reasons that, in fact, inform discourse¹⁸⁷. However, the later considerations are also critical of the proceduralism of Habermas¹⁸⁸. As Dworkin placed his faith in the integrity of the law, so Habermas lays his faith in people. Although very conscious of the abuses of power, he presumes that if the procedures are free, inclusive and fair, then people will come to a reasonable and agreeable conclusion. The emphasis, therefore, is on procedures rather than on substantive outcomes.

Fifthly, the sociological analysis of Habermas reveals crucial forces in contemporary society that act against the commonly shared «life-world» that stabilises behaviour. The challenge therefore is to provide a means of controlling behaviour to the benefit of all without resorting to naked coercion. His response is to propose a legal system, made legitimate by being infused with rights and informed by democracy. The

¹⁸⁵ Cf. Ch. II, Sec. 3.3.2.

¹⁸⁶ Cf. Ch. VI, Sec. 8.1.

¹⁸⁷ Cf. Ch. VI, Sec. 7.4.

¹⁸⁸ Cf. Ch. VI, Sec. 7.4. Neither do I wish to approve of some of his specific ethical stances, such as the legislation of abortion.

same sociological challenges are also present for theology and discourses of the good. It too must develop awareness and sociological models of guiding human behaviour without resorting to inappropriate coercion.

Sixthly, Habermas, as the previous theorists, wishest to re-establish the connection of law and justice by way of rights. Rights are «janus-faced» looking to both law and justice, that is, a universal morality. It is in response to the general tendency of modernity to positivism, including legal positivism, and so to modes of domination. In order to aid the forthcoming comparative study, I wish to briefly outline Habermas's understanding of the central ideas of the «lattice-work» – justice, freedom, law and state-society. The deontological model of Habermas (and modernity) requires that terms be defined according to principles that are independent of ends or goals. His primary motivating idea is to establish those principles that allow for everyone to partake in the ongoing functioning of the political order, so that all members of society may come to agree on the freedoms they equally recognise in each other. Accordingly, the terms may be described as follows: first, justice is marked by inclusion – particularly of those over whom particular norms will be binding. There is a priority therefore of the rights of participation. Second and as a result, freedom is primarily a political autonomy that in turn protects the personal autonomy to make personal choices about one's own good. Third, law is only legitimate, and so just, if it arises out of and adheres to democratic deliberation. Finally, I would argue that in line with his tradition, Habermas views the state quite ambiguously. While it may be a positive force in binding society, it is also vulnerable and continuously open to becoming an instrument of domination. Rights and particularly participatory rights are the means to protect the individual from the abuse of power – similarly to the other theorists.

Seventhly, it was proposed in concluding Chapter II that a defining feature of the critical tradition is «participation». For Habermas, it is fundamental. To exclude people from participating in the common deliberation towards agreement is to distort the system in such a way that it can too easily become domineering. Primarily, it is a response to the abuse of power. It holds the powerful and the systems that allow them to be powerful to account, by insisting on inclusion. It is this aspect of modernity that needs to be taken into account.

I now turn to the next stage of this thesis – a comparative study. It begins by identifying point convergence before charting paths of divergence. Its goal is to facilitate a dialogue, dialectic or encounter between the traditions and theorists.

PART THREE

DIALECTIC

CHAPTER VI

A Comparative Study

1. Introduction

Up to this point, this study has been primarily expository and analytical. It concentrated on presenting a clear and critical account of three traditions of enquiry and their representative theorists. It focused on John Finnis, Ronald Dworkin and Jürgen Habermas, each offering a justificatory framework for human rights and representative respectively of a Natural Law tradition, a Liberal tradition and a Critical tradition.

Finnis, Dworkin and Habermas all seek to identify the essential nature of a human right but do not limit themselves to a descriptive analysis that identifies its distinguishing conceptual characteristics within the workings of the legal system. Instead, they try to explain rights within the wider context of the normative principles that are already inherent within the successful rule of law. At the most basic level, they share a common purpose: to defend the principles of justice and political morality, which are consistent with the rule of law and capable of providing a sure foundation and an effective means of employing human rights. Of course, they remain in disagreement over the means by which human rights may be justified.

To recall a methodological distinction outlined in the introduction: moral reflection may be categorised as normative or meta-ethical¹. Normative questions concerning a term, such as a «right», may be described

¹ Cf. Intro, Sec. 1.

as guiding and justificatory. Meta-ethical questions may be described as conceptual. The distinction is not sharp; nor can it be sustained. From an appraisal of the normative frameworks in which rights have meaning, the course of this present chapter moves to higher levels of abstraction and so towards a meta-ethical level, «in that it seeks to explore our very ability to arrive at ethical judgements using the category of human rights»².

The previous two parts of this thesis, namely History (Chapter I-II) and Interpretation (Chapter III-IV), are two methodological categories of Bernard Lonergan's exposition of method. The subsequent category, which concerns the process of comparison and evaluation, and is the present part of this thesis, is Dialectic³. It is the purpose of this section to explore points of convergence and paths of divergence by way of a comparative study between the theoretical frameworks, and thereby provide an evaluation of their proposals.

2. A Comparative Study

The categories of History and Interpretation were presented respectively as expositions of traditions and theories. The scope of each tradition and theorist – issues of concern, means of justification, standards of justice, accepted authorities, conceptions of the person and its good, and so on – may be termed «the horizon». Lonergan writes:

As our field of vision, so too the scope of our knowledge, and the range of our interests are bounded [...] In this sense what lies beyond one's horizon is simply outside the range of one's knowledge and interests: one neither knows nor cares. But what lies within one's horizon is in some measure, great or small, an object of interest and of knowledge⁴.

A horizon at once encapsulates the resources of interests and knowledge attained by a person or community and also indicates the boundaries that limit those interests and knowledge. Such resources are structured by past achievements. However, knowledge gained may also be put to innovative use in response to new needs: «All learning is not mere addition to previous learning but rather an organic growth out of it»⁵.

Traditions act as community horizons. In brief, traditions act as guiding patterns⁶. Edward Shils observes:

² M. MCKEEVER, «The Use of Human Rights Discourse», 105.

³ Cf. Intro, Sec. 4.3.

⁴ B. LONERGAN, *Method in Theology*, 236; cf. ID., *Insight*, 268 ff.

⁵ B. LONERGAN, *Method in Theology*, 237.

⁶ E. SHILS, *Tradition*, 32 ff.

Constellations of symbols, clusters of images, are received and modified [...] As a temporal chain, a tradition is a sequence of variations on received and transmitted themes. The connectedness of the variations may consist in common themes, in the contiguity of presentation and departure, and in descent from a common origin⁷.

They provide normative patterns, either implicitly or explicitly, of thought and social interaction⁸. Theories may be described as individual moments in the reception and transmission of such a tradition. Theories therefore capture, but may often change, the connectedness of the guiding pattern.

Horizons of traditions and theories may differ, as testified to by the traditions and theories outlined thus far. Lonergan maintains that such differences in knowledge may be complementary, genetic, or dialectical⁹. Differences of the first two may be bridged. Dialectic however concerns conflict. The full process of mapping horizons therefore recognises both points of convergence and paths of divergence, each based on the appropriate material and assembly of apt points. The process aims towards the development of positions and the repudiation of counter-positions. Ultimately, however, the dialectic may reveal a divergence so great it requires nothing less than conversion in order to be bridged¹⁰.

The comparative study of this chapter is a dialectical encounter between the three central theorists. On one hand, it highlights by way of reduction, classification and selection, the similarities and differences, convergence and divergence, between the selected theories. On the other, it attempts to move beyond a mere listing of the pros and cons. A dialectical study that identifies positions and counter-positions should not be considered a final breakdown of contradictory approaches. Instead, «They must be understood con-

⁷ E. SHILS, *Tradition*, 13.

⁸ L.J. MUNOZ, «The Rationality of Tradition», 203 ff.

⁹ First, different horizons may be complementary to each other: for example the resources of knowledge of different professions – engineers, doctors, workers – are different and some ways self-sufficient; yet they are also in need of each other, particularly for successful social integration. Second, horizons may differ genetically: knowledge may deepen and widen leading to new horizons, which include rather than deny earlier horizons. Finally, horizons may be opposed dialectically: what is considered intelligible, true or good for one may be considered unintelligible, false or bad for another.

¹⁰ Conversions may be intellectual, moral or religious. The movement to a new horizon dialectically opposed to a previous one involves an «about-face and new beginning».

cretely as opposed moments in an ongoing process»¹¹. This thesis, then, may be viewed as a contribution to the ongoing process towards clearer understanding.

3. Situating the Present Discussion

3.1 *Social Context*

The latter half of the twentieth century, as outlined at the closing stages of Part One, witnessed a proliferation of rights-rhetoric into many areas of public discourse¹². Today, the process of continued propagation of rights-declarations, international institution-building based on rights, and the proliferation of advocacy groups persists, and indeed, prospers¹³. Undoubtedly, its near exponential expansion is motivated by moral outrage to extensive human wrongs, such as genocide, sexual discrimination, economic exploitation, political oppression and racism.

However, many moral philosophers, jurists, theologians and private citizens are suspicious or critical of this development. Commonly, the proliferation is viewed as analogous to economic inflation which de-values currency. Too many claims to human rights discredit genuine claims.

For instance, Maurice Cranston warns:

A human right is something of which no one may be deprived without a grave affront to justice [...] Thus the effect of a Universal Declaration which is over-loaded with affirmations of so-called human rights which are not human rights at all is to push *all* talk of human rights out of the

¹¹ B. LONERGAN, *Method in Theology*, 252.

¹² For a collection of organisations and bibliographies; cf. L. GEARON, *The Human Rights Handbook*; T.P. FENTON – M.J. HEFFRON, ed., *Human Rights: A Directory of Resources*; M.J. PAUL, ed., *Human Rights: A Topical Bibliography*. The internet also provides a wide variety of forums and advocacy groups. The better websites include: www.ohchr.org (Office of the United Nations Commission for Human Rights); www.amnesty.org (Amnesty International); www.hir.ca (Human Rights Internet); www.hrw.org (Human Rights Watch).

¹³ For instance, there is an explosion of human rights based legal documents ratified by International Governmental Organisations (IGO's). According to Micheline Ishay, in 1909, there were 37 IGO's; by 2004 there were 241 IGO's creating 2, 072 multinational treaties and intergovernmental treaties. There is also a comparable growth of Non Governmental Organisations (NGO's) concerned with human rights. She counts over 200 NGO's in the US, a comparable number in the UK, and an ever-growing number in developing world. M. R. ISHAY, *The History of Human Rights*, 346-347.

clear realm of the morally compelling into the twilight world of utopian aspirations¹⁴.

Others comment that over-dependence on rights-claims have a detrimental effect on society as a whole. Mary Ann Glendon, speaking of the United States, observes a growing aggressive individualism and dependence on legal institutions, with a corresponding weakening of community responsibility, due to the preponderance of thinking through issues in terms of rights¹⁵. She further argues that allowing for ambiguity leaves human rights open to misunderstanding and manipulation¹⁶.

Such an ambiguity was present at the beginning of the latest expansionary period. The initial foundational United Nations documents made no attempt to provide a comprehensive basis for rights-claims beyond a common «faith in fundamental human rights, in the dignity and worth of the human person»¹⁷. Throughout public discourse, many of those asserting the necessity of rights – politicians, lawyers, and advocates – often fail to provide sufficient justificatory reasons for why such rhetoric is appropriate. Indeed, some have thought that providing for the grounds of rights is unnecessary or counter-productive¹⁸.

In common, critics complain that relatively few attempts are made to provide sufficient public justification. In response to the various problems associated with rights, they assert the need for discussion and deliberation¹⁹. This is the commitment shared by the three theorists of this dissertation. They enter into the debate in order to ensure that human rights may be justified and appropriately applied.

3.2 *Political Context*

Finnis, Dworkin and Habermas are citizens of western constitutional democracies. They are moulded, in part, by the ideological struggles of the twentieth century that have shaped these political systems. In par-

¹⁴ M. CRANSTON, «Human Rights, Real and Supposed», 52.

¹⁵ Cf. M.A. GLENDON, *Rights-talk*.

¹⁶ Cf. M.A. GLENDON, «Foundations of Human Rights», 1-14.

¹⁷ Cf. I. BROWNLIE – G. GOODWIN-GILL, ed., *Basic Documents*, 17-23; Ch. II, Sec. 5.3.

¹⁸ Cf. M. IGNATIEFF, *Human Rights as Politics*, 54. He writes, «Foundational claims [...] divide, and these divisions cannot be resolved in the ways humans usually resolve their arguments, by means of discussion and compromise. Far better, I would argue, to forgo these kinds of foundational arguments altogether and seek to build support for human rights on the basis of what rights actually *do* for human beings». Interestingly, his point can be taken on board by the three theorists of this thesis.

¹⁹ Cf. C. WELLMAN, *The Proliferation of Rights*, 178.

particular, they have opposed pressures perceived to threaten constitutional democracy – either from without or from within. Yet, they never offered an unquestioning defence of western political regimes.

Dworkin is the most confident in accepting the philosophical liberalism that has underpinned much of the western constitutional system. However, he is continually and consistently critical of the kind of ideological emphasis on liberty that undermines the equality, and therefore the constitutionally guaranteed rights, of each citizen. Ultimately, he argues, any law or government action that fails to treat all with equal respect and concern leads to the detriment and emasculation of the political order itself. The political and legal order is based on integrity to this very principle concretised as respect for individual rights²⁰.

Finnis and Habermas, who do not associate themselves explicitly with the liberal philosophical tradition, are more critical of many of the underlying assumptions that support the system. Finnis, for example, argues that the nuclear deterrent, admittedly born of a duty to defend the western political order, is morally unjustifiable by the very common morality that supports that order. The nuclear deterrent represents a moral corruption that potentially undercuts that which it aims to protect: «the wickedness of the laws or policies in question [...] undermines the very legitimacy of the state itself – a legitimacy founded on justice, not on calculations of advantage in which the lives of innocents might be directly sacrificed in the interests of others»²¹.

Habermas, in particular, is keenly aware of potential totalitarian impulses within the western political order. He has moved from humanist Marxian categories towards an assertion of the essential role of democracy in legitimising and limiting political and legal power. Legitimacy must be based not only on the protection of individual liberties but on the fostering of participatory rights. Hence, he was critical of how the process of German unification was undertaken, for it lacked a widespread discussion that would foster both civil life and democracy in Eastern Germany²².

²⁰ Cf. R. DWORKIN, «Rights and Terror», 1-34, 3. Of the Bush Administration, he writes, «The government's anti-terrorist policies may be an irreversible ratchet-step to a new and much less liberal state».

²¹ J. FINNIS – J. BOYLE – G. GRISEZ, *Nuclear Deterrence*, 357. By common morality, they do not mean modern liberalism but what they consider to be the deeper and longer roots that are constituted by the Judeo-Christian tradition, Greek philosophy and Roman law.

²² Cf. M. PENSKY, «Jürgen Habermas and the Antinomies of the Intellectual», 211-239. Habermas is critical of any unreflective revival in German nationalism, wishing instead to foster a constitutional patriotism (*Verfassungspatriotismus*).

3.3 *Intellectual Context*

Reflection on rights in the early twentieth century concentrated on clarification of terms, exemplified by theorists such as the previously mentioned W.H. Hohfeld. In the main, the analysis of rights retreated to the field of jurisprudence, without due regard to the wider issues of substantive ethics, political philosophy or theology from whose inter-connection rights-rhetoric first gained impetus. Jurisprudence, as other fields of study, was greatly influenced by the positivist outlook of Bentham and others which sought to bracket out ethical judgements, because they were considered unscientific²³. A scientific reason, it was claimed, cannot make normative statements: it says how things are not how people ought to live. Therefore it remained unconcerned with the justification or foundations of rights.

Belatedly, theoretical reflection has turned to the justification of rights. The near exponential expansion of rights-claims in political discourse, allied with new socio-economic challenges, such as economic globalisation, initially motivated this renewed attention. Intellectually, it has been facilitated by a turn away from meta-ethical reflection and, consequently, towards a greater interdisciplinary approach²⁴. Finnis, Dworkin and Habermas represent this development. Indeed, taken historically, the central texts may be said to mark stages in this ever widening approach. *Taking Rights Seriously* (1977) is primarily a work of legal theory. *Natural Law and Natural Rights* (1981) is principally a moral account of the law. And finally *Between Facts and Norms* (1994) places both the law and ethics within an interdisciplinary sociological study.

4. **The Typology: Justice, Rights and Law**

At the outset of this thesis, a typology of a rights theory was outlined, which was formed of three central components: an objective right or justice, subjective or individual rights, and the law²⁵. Firstly, a rights

²³ Cf. Ch. I, Sec. 4.1.2.

²⁴ M. FREEMAN, *Human Rights*, 77-78. He writes: «Before the 1970's almost all academic work on human rights was done by lawyers, and most articles were published in law journals. A survey of journals published between the early 1970's and the mid 1980's conducted by the UN Economic, Social and Cultural Organisation (UNESCO) found that almost all human rights journals were predominantly legal, and that the social sciences contributed little to other journals that carried articles on human rights [...] Human-rights law has social and political origins, and social and political consequences and legal analysis cannot help us to understand these».

²⁵ Cf. Ch. I, Sec. 1.

theory relates to justice: it focuses on the ordering of social relationships and individual lives in a just manner. Secondly, it emphasises the ability or power of an individual person to make specific claims by virtue of the fact that she is worthy as a person. Finally, it is bound to issues of the law, and associated structures of governance, in its capacity to guide human behaviour.

The history of rights was traced, in part, according to the development of these aspects and their mutual interrelationship. The genesis of the second element is acknowledged by many historians of ideas to be in the medieval era. Others conceive subjective rights to be instrumental in the passing of the medieval era and birth of modernity. Although, differing in the actual moment, commentators often agree to the same dynamic. Before the inception of a rights theory, justice and law were irrevocably bound. They were considered to be analogous aspects of the same normative guide to behaviour²⁶. Afterwards, justice (or morality) and law became disjointed and rights came to play an intermediary role. What resulted in time was that natural rights became the standards of justice to which the law, viewed primarily as the command of authority, had to conform²⁷.

But the tripartite structure was undermined by the sceptical challenges of the Enlightenment Era. Natural rights could not be defended against the scrutiny of a positivist scientific reasoning. The typology broke down, isolating justice and law from one another²⁸. The disjunction between justice (or morality) and the law became a gulf without a bridge. What unites Finnis, Dworkin and Habermas is the common conviction that rights play a crucial role in re-mapping the internal interconnection between law and justice. Partly motivating this is their common abhorrence of the forms of moral reasoning that have supported the distinction between law and morality.

4.1 *Critique of the separation of justice and law*

The decoupling of law and morality was and is supported by two dominant models of legal and moral reasoning, namely legal positivism and utilitarianism. Legal positivism is associated with legal reasoning: its underlying methodological assumption is that a descriptive analysis of the law and legal institutions can be made without reference to the normative concepts of justice and morality. It concerns the description

²⁶ Cf. Ch. I, Sec. 3.3.2; Ch. I, Sec. 6.

²⁷ Cf. Ch. I, Sec. 1; Ch. II, Sec. 2.4.2

²⁸ Cf. Ch. I, Sec. 4.1.2.

of positive law as it is. Utilitarianism is related to issues of justice and morality: its underlying methodological presumption is measurable empirical data for normative proposals can be provided. It concerns the evaluation of positive law as it ought to be. Taken together, the nature of the law is defined as a rule following social behaviour according to enacted positive law supported by the authority of the sovereign. Moral considerations are external to the law. Any moral import is according to the principle of utility which evaluated the law according to its effectiveness in maximising the general welfare of the community.

In contrast, Dworkin most effectively demonstrates that the actual functioning of the law consistently makes use of principles that are never stated in a positivist fashion and continually counters utilitarian proposals. This is because the law exhibits a public morality within its own functioning: the division of law and morality, then, is false²⁹. Logical positivism and utilitarianism, therefore, provide impoverished accounts of how reasoning operates within a legal system that claims to be acting justly.

Finnis agrees: in fact, he goes further. Utilitarianism, for example, is part of a family of theories that may be termed consequentialism³⁰. Characteristic of this form of reasoning is that judgements are made according to that which will bring about the best state of affairs. He argues that this in fact is impossible to ever reason through and measure all the possible consequences³¹.

Of course, consequences or considerations of general utility or welfare have to be considered by individuals and society but they should not be the final and deciding factor. To do so, is to succumb to a form of pseudo-technical reasoning. The critique of a pseudo-technical reasoning has been central to the Frankfurt School and the life's work of Habermas. In an early work, entitled *Knowledge and the Human Sciences*, he links such impoverished reasoning to the wider positivist ten-

²⁹ Cf. R. DWORKIN, *Freedom's Law*, 1-45; Ch. IV, Sec. 3 ff.

³⁰ He writes, «Consequentialism is an approach – or rather, a family of approaches – to moral decision-making. The various versions of utilitarianism are members of the consequentialist family [...] According to a simple, direct form of consequentialism, moral reflection in each situation should guide choice and action toward bringing about the best (or least bad) overall state of affairs that can be realised in that situation». J. FINNIS – J. BOYLE – G. GRISEZ, *Nuclear Deterrence*, 177-178; cf. Ch. III, Sec. 5.2.

³¹ Finnis asserts: «The task of commensurating the goods and bads involved in alternative options – where this commensurating is proposed as governing, not governed by, moral principles and norms of responsibility – is well beyond human reasoning power to encompass». J. FINNIS, *Moral Absolutes*, 42.

dency – evident in legal positivism – in the post Enlightenment Era. Positivism, arising from the optimistic belief in science, portrays itself as based on facts and therefore objective and value-free. However, it actually hides ideological impulses that protect particular interests – for instance, technocrats or those with expertise knowledge reinforcing bureaucracy at a state level and vested interests at a social level³².

Central to the critique of all three theorists is that the pseudo-technical thinking at the heart of utilitarianism and legal positivism is a kind of reasoning that inevitably avoids taking account of the intrinsic value of an individual. It is a form of reductionism, which views the human person as bits of data within the wider social problems that need to be solved. The resulting outcome is a social order that at minimum fails to appreciate the full value of an individual or at worst considers an individual as dispensable to a perceived greater goal³³. Either way, it is an abuse of power and a distortion of society.

4.2 *The necessary relationship of justice and law*

In jurisprudence, the separation translates into a distinction between descriptive and normative analysis of the law. In the functioning of the legal system and institutions of governance, it refers to the distinction between legality and justice. By contrast, Finnis, Dworkin and Habermas are all committed to the necessary relationship between the rule of law and morality. This is so because they recognise no absolute distinction between description or analysis of the law and the evaluation of its meaning and purpose from the critical perspective provided by moral and political philosophy³⁴. In the words of Finnis, they are proposing:

³² Cf. J. HABERMAS, *Knowledge and the Human Sciences*, 63 ff.

³³ The turn away from meta-ethics is characterised by William Edmundson as an opposition to «the utilitarian tradition that had lain, dormant but undisturbed [...] in the snowbank of indifference that had covered substantive moral philosophy». W. EDMUNDSON, *An Introduction to Rights*, 107-118, 109.

³⁴ The previously mentioned A.P. D'Entreves claimed that this necessary relationship – between «the moral sphere and the sphere of law proper» – is the key characteristic of the natural law». A.P. D'ENTREVES, *Natural Law*, 111. But as, pointed out by Lloyd Weinreb, in *Natural Law and Justice*, such a characteristic broadens the definition of natural law to include most of the major schools of moral and legal philosophy except legal positivism and moral nihilism. Natural law, he proposes, may be divided into three categories: first, is an ontological natural law associated with the traditional interpretation of Aquinas; second, is a deontological natural law, which makes no appeal to any metaphysical ontology, but posits fundamental goals and values; third, is a methodological natural law, which is derived from a deontological version but emphasises those procedures which are inherent in, or at least naturally suit-

«the state of affairs in which a legal system is legally in good shape»³⁵. To support this assertion, all three would agree to the following points – but, for brevity, each point is associated with one author.

At a theoretical level, Finnis argues that a methodologically aware jurist must necessarily take account of her own standpoint, for a descriptive analysis is already constructed according to some implicit or explicit claim of a practical or normative viewpoint: «Unless some such claim is justified, analytical jurisprudence in particular and (at least the major part of) all the social sciences in general can have no critically justified criteria for the formation of general concepts»³⁶.

At a legal level, Dworkin argues that the law already functions according to a critical and normative perspective. Legal argument in the process of judicial adjudication turns on a final judgment that rests on the best interpretation of what the legal code is supposed to achieve. In legal practice, what the law is turns on what the law ought to be – the descriptive and the normative then are part of the one process³⁷.

At a social level, Habermas argues that the law plays a vital role in the social integration of modern society. On one hand, the law is coercive: but on the other hand, it requires the free acceptance of people, if it is to remain true to its claim not be oppressive. Legality therefore is intimately bound to legitimacy – which in turn is bound to continual justification of and within the procedures of the legal system. The last line of *Between Facts and Norms* reads «The paradoxical achievement of law thus consists in the fact that it reduces the conflict potential of unleashed individual liberties through norms that can coerce only so long as they are recognised as legitimate on the fragile basis of unleashed communicative liberties»³⁸.

Taking the points together, they hold in common that a purely descriptive account of the law or society negates the critical standpoint of moral and political philosophy, thereby facilitating the abuse of power by means of legal and government structures.

4.3 Human Rights

At this point, two observations with specific regard to rights may be made of the common ground between the three theorists. Firstly, each

able to human freedom. Cf. L. WEINREB, *Natural Law and Justice*, 116-118. Finnis may be identified with the second and Dworkin with the third.

³⁵ J. FINNIS, *Natural Law and Natural Rights*, 270; cf. Ch. III, Sec. 3.

³⁶ J. FINNIS, *Natural Law and Natural Rights*, 18.

³⁷ R. DWORKIN, *Law's Empire*, 49-53; cf. Ch. IV, Sec. 6.2.

³⁸ J. HABERMAS, *Between Facts and Norms*, 462.

holds that rights are principles that act in contra-distinction to forms of pseudo-technical reasoning that neglects the worth of the individual and therefore can justify abuses of power³⁹. Secondly, rights at their broadest may be described as ethico-juridical categories. They exist at the intersection between the practice of law and the requirements of justice. To say this much is to simply make a formal statement about rights: it describes their function and place rather than their grounds or substance.

Dworkin's proposal that rights act as «trumps» is based on the above two observations. «Rights [...] are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole»⁴⁰. To recall: as in a game of cards, they act as any card in the trump suit that takes the trick over every card in the other suits. The analogy captures rights functioning in a political or legal theory. Human rights, or in Dworkin's terminology, «strong sense rights», are distinctive because they protect fundamental human interests against all other considerations in political decision-making and judicial adjudication. They gain their force by being considered above any aggregative calculus of goals, including legitimate ones.

Finnis describes human rights or natural rights as having conclusionary force. They reflect in formulaic fashion the end-results of our reflections on justice. They claim an absolute priority – in the sense of exceptionless – over all other consequences and considerations. The rights law form, «No one shall be subjected to [...]», is the legal expression of the demands of justice, both orientated towards and facilitated by the common good⁴¹.

Habermas analogously refers to human rights as Janus-faced: «simultaneously looking towards morality and the law»⁴². On one hand, they have (or aspire to have) legal form, but on the other, they are justified and validated by moral discourse, that is, according to the universality of justice. The moral discourse includes everyone, thereby countering the strategic reasoning that is at the heart of pseudo-technical reasoning.

What they commonly hold – the two observations at this formal level – may be said to be what is intuitively held by all who use rights language.

³⁹ Pseudo-technical reasoning is categorised by Finnis as consequentialism, Dworkin as utilitarianism and Habermas as strategic reasoning.

⁴⁰ R. DWORKIN, *Taking Rights Seriously*, 92; cf. Ch. IV, Sec. 5.

⁴¹ J. FINNIS, *Natural Law and Natural Rights*, 210; cf. Ch. III, Sec. 5.2.

⁴² J. HABERMAS, «Remarks on Legitimation through Human Rights», 118; cf. Ch. VI, Sec. 6.4.

Taking the two observations together, it may be said that the point of rights in general is to counter abuses of power in the name of justice and with the backing of the law. Human rights refer to the important central core of these rights without which the individual is demeaned or denied. Rights then are not ends in themselves but necessary conditions of a just, and as a consequence a lawful, society. Rights arising from the intersection of law and morality may be analogously described as the intersection between two circles of a Venn diagram, commonly termed «the lens» for it resembles a contact lens for improving sight. Human rights are «the lens between law and morality». They intersect between the spheres of law and morality and provide a means to view the law in the critical terms of morality and morality in the social and positive terms of the law.

Some important nuances are required at this point. The intersection is not meant to point to a strict equation of morality and law. To do so would be to reduce morality to a legal minimalism or use the law to enforce every moral requirement. Equally, the intersection does not capture all that may be termed human rights. For instance, there may be moral rights that are not enshrined in constitutional law and there may be legal rights that are not considered to be of much moral significance. Furthermore, they may contradict one another – a legal right may not have any moral justification or force at all. While outlining these distinctions, Thomas D. Williams concedes, «Despite their essential differences, moral and legal are not two disparate categories but two distinct realms that exert a considerable mutual influence on one another»⁴³.

5. Theoretical Frameworks

The two formal observations above may be characterised as negative and positive. Rights may be negatively defined by their reaction against pseudo-technical reasoning that undermines the value of the human person or positively described as an ethico-juridical category. However, such basic assertions on the meaning of rights are neither conceptually refined nor of sufficient substance. A wider justificatory framework is required, particularly if human rights are to provide a satisfactory means of responding to practical social issues.

Frameworks map the wider «lattice work of language»⁴⁴ or the «conceptual neighbourhood»⁴⁵. Theoretical frameworks are comprised of whole complexes of associated terms. They are interacting networks of

⁴³ T.D. WILLIAMS, *Who is my Neighbour?*, 15-29, 18.

⁴⁴ B. TIERNEY, *The Idea of Natural Rights*, 54; cf. Ch. I, Sec. 1.1.

⁴⁵ W. EDMUNDSON, *An Introduction to Rights*, 87; cf. Ch. I, Sec. 6.

terms and ideas, mutually informing and supporting each other. They hang together – with various degrees of consistency. The terms are structured according to modes of reasoning and congregate around central core values and virtues. A particular term will be delineated and defined by its place within the larger framework, that is, by its correlation or equivalence to other terms. Therefore, to ascertain the reason, justification or rationale of a term requires the charting of the theoretical framework in which the term is employed.

The expository and analytical accounts of traditions and theories in the first two parts of this dissertation were organised, in part, according to the important terms that make up the frameworks. They included the central typology of justice, rights and law and other influential terms, such as nature, authority, legitimacy and property. For the purposes of charting difference, this thesis focuses on justice, freedom, law and society-state⁴⁶. Together, they provide a moral and political anthropology – that is, a vision of the person from the critical standpoint the terms offer.

The patterns are structured, and so the terms described, according to models of reasoning. Each of the theorists proposes detailed normative accounts of moral and legal reasoning which justify their use of terms in particular ways. The models – practical reasonableness of Finnis, constructive interpretation of Dworkin and communicative action and discourse ethics of Habermas – were outlined in their respective chapters. Certain important characteristics may be highlighted by placing the terms of the framework in comparison.

5.1 *Justice/Good*

The two chapters comprising Part One are divided along a fault line in the history of ideas, between the medieval era, which appropriated Greek philosophy and Roman law within an overarching Christian theology, and a secular modern era, inspired by new scientific advances and models. The division between the eras may be illustrated by the priority accorded to «goodness» or «justice» and so, in turn, help chart out the lines of the contemporary debate.

The former, epitomised by Aristotle, Aquinas and Plato, derives an account of justice and rights from a deeper account of what counts as a

⁴⁶ It is conceded that by excluding specific terms, certain elements of the debate may not be given due and full consideration. For example, the full role of economics and how it moulds power, society and the individual is not fully accounted for by the exclusion of property. However, by the inclusion of the major terms in the History and Interpretation Parts of this thesis, the issues are acknowledged.

good or excellent way to live. In the Aristotelian-Thomist tradition, terms and their corresponding reality are identified and described in relation their *telos*, purpose or end to which they orientate themselves. In the so-called human sciences, reasoning begins with an account of goodness, excellence or the kind of life that is worth living. Human behaviour and the social order (moral and political reflection) are evaluated according to the ways in which such a good may be realised in individual lives and the community at large. As outlined in his respective chapter in Part Two, Finnis gives priority to the good⁴⁷. He holds that there are certain objective goods that constitute human flourishing or «integral human fulfilment». Justice in society, therefore, may be evaluated according to its ability to foster such flourishing.

The Liberal tradition and the Critical tradition⁴⁸, by contrast, proposes to establish the principles of appropriate behaviour and social organisation independently of a pre-established model of what a good life may be (thereby prioritising and delineating rights in different ways). Terms are defined according to principles independent of substantial considerations of the good or worthy life. Importantly, they are left to the individual to choose. The principles therefore are bound to the conditions that provide for freedom – that is, the equal freedom of each to pursue their own goals. The latter is exemplified by Hobbes and, in particular, Kant. Priority, then, is given to justice. Dworkin and Habermas also assert the important distinction between questions of justice and questions of the good. For instance, Dworkin argues that the government must remain «neutral on what might be called the question of the good life», claiming that this is the core of liberalism's «constitutive political morality»⁴⁹. Habermas goes further: he considers a commitment to justice, separate from the good, to be a defining characteristic of a modern rational society⁵⁰.

⁴⁷ The Aristotelian-Thomist model may be described as teleological (*telos* meaning goal) and the Liberal and Critical models may be described as deontological (*deos* meaning principle). Finnis denies that his theory is strictly teleological or deontological. He writes, «Similarly, some wonder whether the theory we defend is teleological or deontological. The answer: Neither». G. GRISEZ – J. BOYLE – J. FINNIS, «Practical Principles», 101.

⁴⁸ It was argued that the Critical Tradition is eminently modern for it is a critique of modernity using modern categories; cf. Ch. II, Sec. 3.3.2.

⁴⁹ R. DWORKIN, «Liberalism», 127.

⁵⁰ J. HABERMAS, *The Theory of Communicative Action*, 243 ff; For a fuller outline, cf. W. REHG, *Insight and Solidarity*, 96 ff; Ch. V, Sec. 4.1. This thesis passes over Habermas's account of the psychological developments that lead to post-metaphysical thinking; cf. J. HABERMAS, *Communication and the Evolution of Society*, 69-94; ID., *Moral Consciousness and Communicative Action*, 116-194.

It is important to keep in mind that this distinction – that issues concerning justice and the good can be kept apart – is within morality. Dworkin and Habermas are not neutral on the issue of morality: justice after all is essential to the right functioning of law and governance. They recognise that the law and structures of authority cannot be neutral in how they affect society. The crucial point, rather, is that the structures of society must act, be evaluated and most importantly, be continually and publicly justified in terms of justice rather than the good. For Dworkin, final justification is according to principle: justice is expressed in the principled actions of governments that are acting out of the fundamental principle of equal respect and concern for all. Rights, then, are the ethico-juridical commitments of a principled and just society. According to Habermas, the final justification of actions can only take place with the fullest possible participation and acceptance of the decision by all affected. Justice is procedural, the outcome and protection of sustained practical discourse. Questions of the good do have a necessary role for they help provide the content of the practical discourse⁵¹.

The distinction may be criticised for being either impossible or undesirable (or, indeed, both). The first objection rejects the idea that justice may be considered completely independently from the good, for there will always be some good or fundamental value that motivates the implementation of justice. For instance, the analysis of Habermas noted in Chapter V observed such a critique⁵². The second objection is that the refusal to commit to a conception of the good allows for an unrestricted relativism, leading ultimately to society's moral breakdown. Certainly, Dworkin and Habermas refute the second objection. They do so because the commitment to justice is itself an ethical commitment. They both also reject the first objection. Neither claims that justice and the good are separated by an unbridgeable gulf. They agree that a commitment to justice is motivated by a sense of solidarity or fraternity⁵³. Furthermore, they both base their theoretical frameworks on what they conceive to be centrally important about being a human being – and that society ought to be structured accordingly. What they reject is that

⁵¹ Cf. J. HABERMAS, *Moral Consciousness and Communicative Action*, 103. He writes: «The procedure is not formal in the sense that it abstracts from content. Quite the contrary, in its openness, practical discourse is dependent upon contingent content being fed into it from outside».

⁵² Ch. V. Sec. 4.1.

⁵³ Cf. J. HABERMAS, «Justice and Solidarity», 224-251; R. DWORKIN, *Sovereign Virtue*, 211-237.

a framework that comprises of the principles of justice ought to pre-judge what may be worthy of pursuit, excellence or good. Justice, therefore, may be characterised as a particular scheme of co-operation: one that allows and helps individuals to follow different (and often competing) conceptions of what is good.

This is especially true of Habermas. Indeed, his theory is particularly abstract because it refuses to contemplate or pre-judge conceptions of the good. Instead, his discourse ethics outlines the conditions which allow for rational consensus on the norms by which people coordinate social action and affirm or prohibit human behaviour. Social cooperation in the modern world is the core issue of his sociological studies. And in order that it may be just, it must be based on the ethics inherent in discourse – that is, it must be open to democratic impulses that allow for the people themselves to conceive of their own good, as individuals or a society.

Dworkin does allow for some conception of the good, or what may be described as a thin theory of the good⁵⁴. He claims that it is important that a liberal theory can propose a conception of a life lived worthily. Based on what he calls the two principles of comprehensive liberalism – equality of opportunity and freedom of individual responsibility – he proposes «a challenge model, which supposes that a life is successful insofar as it is an appropriate response to the distinct circumstances in which it is lived»⁵⁵. In order that such a life may be successful, it requires that society be organised to allow for the goods that respect equal opportunity and foster the freedom of individual responsibility. Examples would include open access to education, certain forms of reverse discrimination, a basic social welfare system, freedom of speech etc. However, it is a thin theory of good because it is an articulation of the goods that are required as a condition for successful living without giving any consideration or pre-judging what the appropriate personal objectives for a person may be.

In comparison, Finnis is offering a substantive account of the good that asserts the self-evident goods which comprise the objectives of fulfilling human action. The objective goods are recognised and brought about in the exercise of practical reasonableness, that is, the reasoned judgment and active control over our lives. Furthermore, practical reasoning, and its principled requirements, is guided by the goods. Justice

⁵⁴ It is an idea first given prominence by John Rawls, in which he argues «the theory of good used in arguing for the principles of justice is restricted to bare essentials». J. RAWLS, *A Theory of Justice*, 396.

⁵⁵ R. DWORKIN, *Sovereign Virtue*, 237-284, 240.

– the eighth requirement – concerns the concrete implications of fostering the common good. Justice then is instrumental to the facilitation of all the goods. Finnis recognises the contemporary emphasis placed on the responsibility of each individual in directing their own lives. Justice, therefore, primarily concerns external regulation of the responsibilities and dependencies arising from the kind of common life demanded by the requirements of facilitating the good life for each individual. The structures of society, in the law and state, act justly when they provide a scheme of co-operation in which people can responsibly achieve human fulfilment.

The substantive account of the good is provided through a discernment and deliberation that discloses the basic goods. There is an important manner – unexplored by Finnis – in which all the goods are not basic but instrumental. He inclined to present the basic goods as separate from the person. However, the basic goods are such because they are fundamentally good *for* a person. In some sense, therefore, they are all instrumental to the person herself. At a more fundamental level, the one most basic good of all, is the person.

5.2 *Freedom*

A conception of justice that is not articulated according to an initial account of the good life but allows for the freedom of the person to choose and pursue their own perceived good must turn on an account of freedom. The central problem of the modern era may be described as how to build a schema of justice that allows for the equal free choice of all, without leading to breakdown of society or the exploitation of its members⁵⁶. The response to this central problem has structural elements that are held in common by the theorists of liberal and critical traditions; notwithstanding their wide variety of substantive features. Of the characteristics, the critical elements are the conception of the individual as free and equal and that civil society results from a convention (or social contract) between free and equal individuals⁵⁷.

Although sharing such a schema, the liberal tradition (Hobbes and Locke) and the critical tradition (Rousseau) offer different models by which free people may successfully coexist with one another in a just

⁵⁶ Chapter II charted a number of historical reasons for this new priority: for instance, the breakdown of old conceptions of the good life due to religious wars, new models of reasoning based on scientific advancements, demands for free pursuit self-interest in the new capitalist economic system, among others.

⁵⁷ Cf. Ch. II, Sec. 1.

manner⁵⁸. The former begins from a conception of freedom as the ability to pursue one's own goals without interference from others, described by Isaiah Berlin as negative freedom⁵⁹. Freedom is independence. The principle of non-interference underpins the liberal values of tolerance, pluralism and diversity. The latter begins from a conception of freedom as active in the common creation of society. The principle of political activity underpins the critical tradition's emphasis on the primary value of the participation of all in the creation of society's structures. Such a brief sketch does not capture the full breath and depth of the canon of each tradition. However, it does encapsulate a central normative element of the tradition, which reoccurs in the central theorists.

Dworkin, for instance, may ground his liberalism on the basic principle of equal concern and respect and argues against any general right to liberty as such. However, the principle of equal respect and concern which binds the actions of government and the legal system views the individual as independent, and whose choices regarding the good ought to be respected. To treat citizens as equals, according to Dworkin, is the «same question as the question of what it means for the government to treat all its citizens as free, or as *independent*, or with equal dignity»⁶⁰. At a social level, the centrality of the individual as equal and free requires the government to be «circumstance-insensitive» and «choice-sensitive»⁶¹. Circumstance-insensitive requires the provision of those goods identified by a thin-theory of the good. But a thin theory, as noted above, attempts not to pre-judge the choices of the individual but only to provide for all choices. Therefore, although the principle of equal concern and respect has two corollaries, it is the second that has priority. Government should be guided and limited by the freedom of the individual to pursue their own lives.

Habermas grounds his critical theory on the normative requirements of communicative action. Just social integration, if it is to allow for the freedom and equality of all, must be guided by the principles of unfettered discourse that provide for the conditions that allow for mutual consent to the best argument by all those affected. Transferred to the political level, this prioritises participation, political activity (by which he does simply mean party-political), or deliberative democracy. He argues that in the modern world, it is only by way of political autonomy

⁵⁸ Cf. Ch. II, Sec. 2.4.2; Ch. II, Sec. 3.3.2.

⁵⁹ Cf. I. BERLIN, *Four Essays on Liberty*, 118-172.

⁶⁰ R. DWORKIN, «Liberalism», 127; cf. Ch. IV. Sec. 2. Italics added.

⁶¹ R. DWORKIN, *Sovereign Virtue*, 11-119; cf. Ch. II, Sec. 7.1.

that personal autonomy may be secured. Personal autonomy is the freedom to act in a strategic manner towards one's own chosen goals. It is through common consensus – at least at the level of appropriate procedures of decision making – that the limits of personal autonomy may be accepted by all rather than arbitrarily imposed by authority.

What they hold in common is that rights, in some sense, demarcate and protect the choices of individuals. Rights demarcate spheres of freedom. Habermas defines modern rights as follows: «Fix the limits [...] within which a subject is entitled to freely exercise her will. More specifically, they define the same liberties for individuals or legal persons understood as the bearer of rights»⁶². Dworkin argues that a strong sense right is a sphere of action protected from undue interference from others, and particularly the government. Rights are justified by functioning to protect and foster individual autonomy⁶³.

Such a conception of freedom underpins the «Choice» or «Will» conceptualisation of rights. Based on the point that rights recognise and respect an individual's choice, balanced against the choices of others, the model prioritises elements of Hohfeld's taxonomy: rights act either negatively by not interfering (liberty) or by giving legal status and moral backing to it (claim-right or power)⁶⁴.

As outlined in the respective expository chapter, Finnis explicitly rejects this model in favour of the «Benefit» or «Interest» Model⁶⁵. Beginning with a thorough account of the good of the individual, justice turns not on neutrality with regard to the good (and hence the freedom of each to pursue their own conceived good) but on a proper ordering of social relationships, in order to allow for the human flourishing of each (or the common good). Rights are the claims made in support of the good of each individual – or what is in their fundamental interest. Finnis is not claiming a simple relation between rights and goods⁶⁶. Rather, right-holders are the beneficiaries of what is owed in justice allowing for the full complexity of realising common good. Rights assert the implications of a just relationship from the «the viewpoint of the 'other(s)' to whom something (including, *inter alia*, freedom of choice) is owed or due, and who would be wronged if denied that something»⁶⁷.

⁶² J. HABERMAS, *Between Facts and Norms*, 82.

⁶³ It provides the basis for his justification of socially active government policy. Such policies provide the conditions in which individuals may truly be said to be free.

⁶⁴ Cf. W.H. HOHFELD, *Fundamental Legal Conceptions*, 23-64; Ch II, Sec. 5.2.

⁶⁵ Cf. Ch. III, Sec. 5.1.

⁶⁶ For instance, one could not say that I have a right to a particular friendship although friendship is a basic good or element of human fulfilment.

⁶⁷ J. FINNIS, *Natural Law and Natural Rights*, 205.

Finnis is claiming that the interest model can allow for freedom of choice. Indeed, freedom to deliberate, choose and stay committed to that choice is fundamental to practical reasoning. In turn, practical reasoning is itself a basic good, experienced as authenticity, integrity and personal commitment. According to this model, freedom is purposive. Free choices aim towards particular goods and in achieving those particular goods, a person, in a sense, becomes freer. Inability to achieve the goods limits a person's attainment of fulfilment, and therefore limits the person herself and her freedom.

The benefit theory preserves the rights of individuals to control their lives only to the extent that it is deemed to be a fundamental good. The Benefit Model of itself, therefore, does not provide a way to demarcate the lines of freedom of choice independent of the deemed goods. To take an example: something may be deemed good for Jack such that he has a right to it. Jill may therefore consider herself duty bound to ensure that Jack receives what he perceived to be entitled to, even though Jack does not want it, or, more importantly, conceives it not to be in his own good. As Peter Jones argues, it opens a way to the creation of a model of the human condition, «which can be imposed upon people in the name of their rights [...] The doctrine of human rights could then become a vehicle for the imposition of a highly authoritarian, paternalist and dogmatic ideology»⁶⁸.

In response, a goods-based justification of rights can provide a stronger foundation for those rights that are accepted. In contrast to Dworkin, Finnis argues that there are inalienable rights that may never be overridden in certain circumstances. The exception-less quality of these rights protect the individual against any other ideological justification – for instance, the right not to be tortured, even in a perceived national emergency. As observed by N.E. Simmonds:

To think of a division between «liberal» and «non-liberal» theories can be dangerous, if it is taken to suggest that theories of the latter type are necessarily oppressive in their implications or fundamentally hostile to individual liberty. Whether they are so oppressive or hostile is a matter for substantive debate and is not to be settled in advance by an appeal to convenient labels that are inevitably crude and indiscriminating⁶⁹.

The issue is further linked to conceptions of the law and society.

⁶⁸ P. JONES, *Rights*, 115.

⁶⁹ S.E. SIMMONDS, *Central Issues in Jurisprudence*, 11.

5.3 *Law/Legitimacy*

The three theorists are united on certain basic contentions regarding law. Firstly, and to state the obvious, they assert the necessity of law. Secondly, and as noted above, they agree that there is a necessary relationship between law and political morality or justice. Thirdly, they agree that law, informed by justice, is an essential element in the successful functioning of society. Finnis and Dworkin chart this connection by way of jurisprudence.

Uniquely among them, Habermas offers a sociological analysis of the law in a modern western society. In summary: modern society requires a means of social integration because of what may be described as centrifugal forces acting against it. Pre-modern societies were homogenous, sharing a common lifeworld of shared assumptions. Modernity, however, contends with three forces acting against this source of social solidarity. Firstly, the shared assumptions, such as religions or metaphysical ideas, have been called into question and are no longer secure. Secondly, the homogeneity has been broken into a pluralism of often competing communities of diverging shared assumptions (or lifeworlds). Finally, modern society is marked by the demands of social systems, such as capitalism and bureaucracy, which act as means of social integration but in a manner often destructive of social solidarity and leading to forms of domination⁷⁰. Allowing for these developments, how may modern society solve issues of social co-operation while respecting the equal freedom of each? Essentially, Habermas is providing a sociological account of the same question identified above as the central problem of modernity.

He answers: in modern society the law is the primary means of social integration, in the face of the breakdown of the common ethos that supported a binding morality. The functional characteristics of the law – coerciveness, positivity and accountability – provide a complimentary support to the weaknesses inherent in the binding force of modern morality⁷¹. The law therefore carries the burden of social integration while also allowing space for pluralism with regard to the good and strategic actions of self-interest.

Although Habermas laments the lack of interpenetration between sociology and jurisprudence, both Finnis and Dworkin also contend that

⁷⁰ Cf. Ch. V, Sec. 3.2.

⁷¹ Cf. Ch. V, Sec. 6.2.

the law functions as a means of social co-ordination⁷². In practice, the law is the means by which authority is exercised in guiding social co-operation. Authority then is also justified by necessity. But in common they argue that the actions of authority by means of the law are in need of constant justification. Neither the mere fact of authority or legality, nor the brute force of power provide for its own legitimacy. Authority, and the law, must make a normative claim for itself. In other words, if authority and law are not to become arbitrary, they need to be reasoned through in a public manner and therefore be open to being held to account.

In the discourse-theoretic terms of Habermas, the factual demands of the law require validation, that is, the strategic operations of the law and institutions of authority require communicative discourse that facilitate common consensus. In the terms of Dworkin, legislative and adjudicative practices entail a procedure of constructive interpretation in which every decision, guided by integrity, is justified by aiming towards coherence between statutes, precedence and public morality. In the Thomist terms of Finnis, the law is justified according to the means by which it brings about the common good, which itself is discerned by the common exercise of practical reasoning.

It is only by justification(s), that the law will be accepted by free people as binding on their behaviour, and therefore acceptable in its claim of obligation. It is in this process that law and authority are bestowed with legitimacy. Legitimate law therefore is primarily based on reason and not on the will of the sovereign (as maintained by legal positivism). Furthermore, by insisting on the continual process of deliberation and justification, albeit according to differing models, they share a dynamic view of the law. Basic, strong sense or natural rights play a key role in the process of legitimising law; for they are embedded and share the structural strengths of the law and yet they are expressions of moral reasoning that provide the legitimacy to the law.

5.4 *Society/State*

In contrast to the moderns, a different question guides the thinking of a just schema in the classical era: what is required to live a happy, good or fulfilled life⁷³? The resulting problem is to construct the condi-

⁷² Cf. J. FINNIS, «Is Natural Law Theory Compatible with Limited Government?», 4; Ch. III, Sec. 4; R. DWORKIN, *Law's Empire*, 209; Ch. IV, Sec. 6.4.

⁷³ The issue may be summarised by the question proposed by Aristotle: «Would not knowing it [the highest good] have a great influence on our way of living. *Would*

tions or social order that facilitates the good life. Again, the response has structural elements that are shared by the theorists of this tradition. The important common characteristic that cuts across the elements is the importance of the social relationships⁷⁴. In a striking contrast to the self-sufficient independence of natural man as described by the early modern theorists, the natural condition is to be social. According to this tradition, the individual is constituted by social relationships and finds its fulfilment in and through the perfect association, that is, civil society and the public state.

Finnis follows the latter line of reasoning. On one hand, the basic good of sociability or friendship is fulfilled by way of relationships: on the other, attaining all the other basic goods that contribute to integral fulfilment requires harmonious and common life. The community's purpose, therefore, is to facilitate the good of each of its members or the common good. In the complex relationships of a society, it is the state or the political and legal institutions that are best able to provide the conditions that allow for each citizen to realise themselves. The state, then, is a natural necessity in accordance with practical reasoning. Indeed, the state is the sphere in which the principles of practical reasoning, which aims at the proper ordering and facilitation of the goods for all, are required most of all. The state, therefore, is an extension of the moral living of a society ordered towards the good and gains legitimacy from the extent to which it is facilitated.

The last point can be made of Dworkin. He too considers a legitimate state to be an extension of a moral community. The principled political morality that informs a legal system and state governance will be derived from society's own perception of itself as well as the functioning of the system. A genuine political community or state will respect both aspects and their principles; thereby, creating the conditions for what he describes as moral membership of a community. To respect the sets of principles is to allow for opportunities to participate in collective decision making and treatment with equal concern and respect. The former creates a part in the running of society; the latter creates a stake in it for its members. However, he asserts one final condition – the importance of moral independence. In commitment to liberal values (and the distinction between justice and the good),

A genuine political community must [...] be a community of independent moral agents. It must not dictate what its citizens think about matters of po-

we not be better at doing what we should, like archers with a target to aim at?». ARISTOTLE, *Nicomachean Ethics*, 1.2. Italics added.

⁷⁴ Cf. Ch. II, Sec. 1.

litical or moral or ethical judgement, but must, on the contrary, provide circumstances that encourage them to arrive at beliefs on these matters through their own reflective and finally individual conviction⁷⁵.

Accordingly, the moral community, in tolerance, allows for the divisions within it. Dworkin argues that rights are imminently suitable in a society that is divided: «The concept of rights, and particularly the concept of rights against the Government, has its most natural use when a political society is divided, and appeals to co-operation or a common goal are pointless»⁷⁶. His account corresponds to the sociological diagnosis outlined by Habermas. Dworkin emphasises the rights that are held *against* government and state because he argues that an appeal to a common good, that may order just relationships between people, is no longer possible. The burden then is placed on the state and its institutions to provide for justice. But it does create a distance between state and society. Many criticise this division for producing an atomistic society that may leave the individual cut adrift⁷⁷. Although Finnis's theory does make room for sociology, his model does presume quite a homogenous society.

Finnis and Dworkin may be said to represent a wider debate concerning the place of the individual in society. Broadly speaking, Communitarians view the human person as primarily comprised by the community and its received traditions and the Liberals view the human person as constituted somewhat by their independence⁷⁸. Habermas claims that the theory of communicative action overcomes this division. The conditions of discourse show that the person is primarily social and created by the social practice of communication. However, the practice of discourse necessarily respects the otherness of the individual – the social and the individual mutually constitute each other.

⁷⁵ R. DWORKIN, *Freedom's Law*, 2; cf., ID., *Law's Empire*. The centrality of tolerance is a guiding idea in the liberal tradition; cf. Ch. II, Sec. 6.

⁷⁶ R. DWORKIN, *Taking Rights Seriously*, 184.

⁷⁷ To give but one example: Cornelius Murphy writes, «It is admirable to interpret social life in terms of enclaves of private choice. But it cannot longer be persuasively argued that the net result is an overall good. Psychologist and sociologists draw different conclusions from the available data. Their perceptions are not of self-sufficient moral persons working out rational life plans, but of isolated individuals in various stages of debilitating narcissism. The persuasive sense of private well-being, the primacy of personal goals, symbolises a deeper refusal to integrate the self within the wider community. C. MURPHY, «Liberalism and Political Society», 155.

⁷⁸ Cf. S. AVINERI – A. DE-SHALIT, ed., *Communitarianism and Individualism*.

At a social-state level, the concerns that motivate the distinctions between justice and the good, and conceptions of freedom (between benefit and choice theories of rights), may be described as paternalism. Liberals fear that models derived from substantial accounts of the good may justify domination. Yet the question remains: if the state, and the institutions of the law, has a critical role in the just ordering of a society of free people, to what extent can it actively guide individual lives? Joel Feinberg, in a collection of essays entitled *Social Philosophy*, distinguishes between strong and weak paternalism.

According to the strong version of legal paternalism, that state is justified in protecting a person, against his will, from the harmful consequences even of his fully voluntary choices and understandings [...] According to the weaker version of legal paternalism, a man can rightly be prevented from harming himself (when other interests are not directly involved) only if his intended action is substantially non-voluntary or can be presumed to be so in the absence of evidence to the contrary⁷⁹.

Paternalism concerns the extent of authority. Limits are placed on authority, primarily by rights in the liberal tradition and participation in the critical tradition.

Habermas would argue that, in ideal conditions, a radical democracy would diminish paternalism altogether. Dworkin argues that rights, conceived as demarcations of spheres of freedom, necessarily entail a weak paternalism; a government may only interfere to the extent that it follows and fosters the principle of equal concern. Outlined in the expository chapter, he distinguishes between «having rights» to «doing what is right». Ordinarily, they do not contradict each other. But sometimes they do. For instance, Jack and Jill may have the right to free speech, but Jack may say many things that are morally reprehensible such as spreading of false or spurious information. The question then may be rephrased: does one have the right to do wrong? According to Dworkin, a government based on rights will not interfere with a strong sense right in order to force the person do what is right⁸⁰.

The model proposed by Finnis, on one hand, may encourage a strong paternalism. In *Natural Law and Natural Rights*, he comments:

‘I wish someone had stopped me from ...’; if this can rationally be said (as it can), it follows necessarily that even the most extensive and excessive

⁷⁹ J. FEINBERG, *Social Philosophy*, 129.

⁸⁰ Except, of course, in cases of national emergency or extreme need.

programme of paternalism might be instituted without denial of equal concern and respect to anybody⁸¹.

But on the other, authority is necessarily circumscribed by the moral principles and norms that «can well be articulated in the relatively modern language of truly inviolable rights[...]»⁸². Furthermore, authority may be limited by the principle of subsidiarity in which collective decision making ought to be kept to the lowest level. If authority is to be legitimised by the common good, it must be guided by the requirements of the common good. Finnis, and the New Natural Law Theory, consider the common good to be an instrumental good⁸³. Accordingly, the state is at the service of creating the conditions for personal fulfilment. Its main concern is matters of justice. It should legislate for «legal arrangements supervising not the truly private conduct of adults but the *public realm or environment*»⁸⁴.

The above frameworks may be described as the outlines of different ethico-political anthropologies – that is, they provide different visions of the human person from the standpoint which the terms offer.

6. Specifying Rights

The appeal to human rights functions as an important means of justifying positions in contemporary moral debates and the resulting political and legal decisions. As proposed by Habermas, power in the contemporary Western democratic and legal order claims legitimacy and so loyalty because of these rights⁸⁵. However, theoretical cautions apart, much of the social and democratic debate regarding rights revolves little around the existence of rights as a whole. Instead, it concentrates on which specific rights are applicable. As pointed out by Dworkin, the often passionate disputes that are associated with hard cases, hinge on which specific rights are applicable in particular concrete situations – and why? ⁸⁶ For example, the abortion issue is commonly presented as a conflict between the right to life and the right to choose.

Because rights are ethico-juridical categories⁸⁷, their specification will necessarily depend on both law and morality. As further outlined by Habermas, the law provides a technical precision backed by coer-

⁸¹ J. FINNIS, *Natural Law and Natural Rights*, 222-223.

⁸² J. FINNIS, «Natural Law Theory and Limited Government», 2.

⁸³ Cf. Ch. III, Sec. 4.

⁸⁴ J. FINNIS, «Natural Law Theory and Limited Government», 17.

⁸⁵ Cf. J. HABERMAS, *Between Facts and Norms*, 95 ff; cf. Ch. V, Sec. 6 ff.

⁸⁶ Cf. R. DWORKIN, *Taking Rights Seriously*, 197 ff.

⁸⁷ Cf. Ch. VI, Sec. 4.3.

cion that is lacking in contemporary morality and morality, in turn, provides an acceptable and so legitimatising justification for law's authority⁸⁸. The specification of rights involves both aspects. Otherwise, rights may be only legal (and so potentially coercive) or they may be only moral (and so potentially ineffective).

This thesis primarily focuses on normative models rather than specific rights, as outlined in the Introduction⁸⁹. Yet each model argues in a particular direction in the process of specifying rights. It is at this level that the paths of divergence between theorists become most apparent. Each theorist has taken public stances in many particular ethical debates that involve human rights. At the heart of such heated discussions on which specific rights apply, lie two challenges – both of which are capable of threatening rights themselves.

6.1 *The Authentication of Rights*

As noted previously, the contemporary era has witnessed a proliferation of rights that may be compared to inflation in the economy. Hyperinflation dangerously cheapens the value of money. Similarly, the proliferation of rights may devalue, and so threaten, a set of core human rights⁹⁰. Restraining the indiscriminate application of rights-language in the public forum requires a means of imposing a limitation or a distinction between what is authentic and what is erroneous – while allowing for legitimate growth and adaptation.

A moral theory may be divided into base and superstructure. The base of a moral theory consists of its fundamental principles and the superstructure contains all the elements (further norms, rules, codes of conduct, policies) that may be derived from those basic principles. A moral theory concerning rights will be able to authenticate all and only those rights that can be derived from its basic principles. In other words, the basic principles act as the litmus test, delineating between genuine and ingenuous claims to a specific right. In this way, a check

⁸⁸ Cf. J. HABERMAS, *Between Facts and Norms*, 111-118; Ch. V, Sec. 6.2.

⁸⁹ Cf. Intro, Sec. 5.

⁹⁰ Cf. C. WELLMAN, *The Proliferation of Rights*. Wellman offers an appraisal of the ever-widening use of rights in the areas of Civil Rights, Women's Rights, Animal Rights and Medical Rights. One could add to the list by mentioning Children's rights, Language Rights, Rights of the Environment among others. Mary Ann Glendon observes, «The prevailing consensus about the goodness of rights, widespread thought it may be, is thin and brittle. In truth, there is very little agreement regarding *which* needs, goods, interests, or values should be characterised as rights». M.A. GLENDON, *Rights Talk*, 16.

on the proliferation of rights can be maintained. Two sorts of control are possible – external or internal⁹¹.

Firstly, rights may be externally controlled if the assessment of authenticity is by way of basic principles which are not themselves rights. According to this rationale, rights are a derivative, rather than a basic moral category. To be authentic, a right must be consistent with a further base principle. The natural law method of Finnis matches this profile⁹². Human rights articulate, protect and facilitate the basic human goods. The litmus test of authenticity, therefore, is whether a particular right-claim can be consistent with the basic human goods and their realisation as proposed by the requirements of practical reasonableness.

The specific ethical positions taken by Finnis follow this model quite strictly. In particular, he emphasises the seventh requirement of practical reasonableness which demands that every basic good should be respected in every act – or negatively worded, do not intentionally act against any of the basic goods⁹³. For instance, he disallows certain rights to homosexual partnerships on the basis that it counters the good of marriage and family⁹⁴. His rejection of abortion and contraception turns on their assertion that such acts intentionally denying of the good of life. However, such issues need not be considered with reference to rights because the model provides reference to other more basic principles or values⁹⁵.

Secondly, rights may be internally controlled if the appraisal of authenticity is by way of consistency to the functioning of rights themselves. In this situation, rights constitute both a derivative and a basic moral category. Dworkin corresponds to this approach. Core rights are accepted: the application or specification of such a core right into other rights must be consistent with the original intent of the core right⁹⁶. To impose a strict limitation or generate a hyper-inflation of a right creates

⁹¹ L.W. SUMNER, *The Moral Foundation of Rights*, 124.

⁹² The presentation of Germain Grisez is very explicit on this matter and perhaps pushes the the matter further than Finnis would prefer. Rights, he asserts, are «consequences, not principles, of justice». G. GRISEZ, *The Way of the Lord Jesus*, II, 329.

⁹³ Michael Perry identifies this particular requirement as the defining one for Finnis (and other members of the New Natural Law). It does appear to trump other requirements of practical reasoning; thereby giving Finnis's ethical stances on specific issues a very conservative tone. Cf. M.J. PERRY, *The Idea of Human Rights*, 95-99.

⁹⁴ J. FINNIS, «Law, Morality and “Sexual Orientation”», 313-328.

⁹⁵ J. FINNIS, «Rights and Wrongs of Abortion», 129-152. The article begins, «Fortunately, for the arguments for and against abortion need not be expressed in terms of rights».

⁹⁶ R. DWORKIN, *Taking Rights Seriously*, 197-205; cf. Ch. IV, Sec. 5.4.

a sham, fraud or deception of the original right and is therefore inauthentic. As a result, Dworkin must appeal to the commitment and sincerity of society and government. He can only appeal that we take them *seriously*⁹⁷. Indeed, his later theory of law-as-integrity and a principled community is an attempt to unpack the requirements of such gravity.

To take a practical ethical stance defended by Dworkin. Similarly to Finnis, he argues that a clash of rights is not the true source of the controversy regarding abortion⁹⁸. Rather, he argues it is due to two responses to the sacredness of life. As I argued in the expository chapter, his final stance in allowing abortion is based on a consistency or integrity to the right to liberty (or core right) based on the liberal tradition's priority of tolerance and non-interference by the state in matters of faith – including a kind of secular faith in the sacredness of life – central to the American Constitution⁹⁹.

The model proposed by Habermas fits less easily. The litmus test for the validity of proposed norms – such as rights – is a consensus arising from a free and rational deliberation that includes all interested parties (in turn, based on the ideal speech situation). The principles of discourse that underlie such a deliberation provide the criteria for the identification of both the primary principle of justice and democratically legitimised law¹⁰⁰. Such a litmus test may be said to be external and internal. Theoretically, the principles may be proposed as an external standard by which to classify and specify rights. However and practically, such criteria are actually a part of, and so internal to, the common project of identifying and delineating rights.

In a collection of articles, entitled *The Future of Human Nature*, Habermas considers some specific ethical issues in biotechnology. In particular, he rejects genetic engineering on the basis that it cannot comply with the central intuition of discourse ethics, namely that there is an inherent reciprocity in communication that respects the freedom and equality of the other, which ought to be respected. He writes,

⁹⁷ R. DWORKIN, *Taking Rights Seriously*, 200. He writes, «To do so, rights becomes “a promise” that it [authority] intends to keep only until it becomes inconvenient».

⁹⁸ Cf. R. DWORKIN, *Life's Dominion*, 30-67.

⁹⁹ Cf. Ch. IV, Sec. 8. It is the commitment to this core-right that provides the tone for Dworkin's liberalism. Although marked by an egalitarian commitment, it motivates much of his ethical stances including recent passionate defences of civil liberties, perceived to be curtailed as a result of the war on terror; cf. www.nybooks.com

¹⁰⁰ The Discourse principle branches out into both the principle of Universalisation in moral discourse and the Democratic principle in the domain of law. Cf. Ch. V, Sec. 4; Ch. V, Sec. 6.2.

With genetic programming [...] a relationship emerges that is asymmetrical in more than one respect – a specific type of paternalism [...] The program designer carries out a one-sided act for which there can be no well-founded assumption of consent, disposing over the genetic factors of another in the *paternalistic intention of setting the course, in relevant respects, of the life history of the dependent person*. The latter [the person genetically programmed] may interpret, but not revise or undo this intention. The consequences are irreversible because the paternalistic intention is laid down in a disarming genetic program instead of being communicatively mediated by a socialising practice which can be subjected to reappraisal by the person «raised»¹⁰¹.

In other words, there is no possibility of communicatively establishing moral norms or, in a democratic legal order, legitimate mutually conferred rights. The desire to reject forms of paternalism, which may justify the abuse of power, motivates his argument (and much of the Critical tradition). However, the freedom that he wishes to protect is quite close to the model of freedom as self-determination free from interference that is quite close to the liberal tradition¹⁰².

6.2 *The Conflict of Rights*

The second challenge around the specification of rights is the conflict that arises between two accepted authentic rights. The historical experience of these apparent dilemmas has supported a cynicism that may threaten rights. Such scepticism may be either conceptual or normative¹⁰³. Conceptual scepticism doubts the veracity of an idea or term, while normative scepticism is suspicious its social function-

¹⁰¹ J. HABERMAS, *The Future of Human Nature*, 63-64. Italics and Parenthesis added.

¹⁰² It may be argued that the same principle denies all interference with future generations, including, most drastically, ruling out abortion.

However at base for Habermas, the individual is to be protected from un-agreed interventions in order to allow for the widest possible self-determination. It is this aspect, associated with the liberal tradition, which allows him to bracket out the issue of abortion. The case above, he argues, differs “from abortion in relevant aspects. In refusing an unwanted pregnancy, the women’s right to self-determination collides with the embryo’s needs for protection. In the other case, the conflict is between the protection of the life of the unborn child and a weighing of the goods by the parents who, while wanting a child, would abstain from implantation if the embryo is found to be deficient with respect to certain health standards [...] This type of deliberate quality control brings in a new aspect – the instrumentalisation of conditionally created human life according to preferences and value orientations of third parties. J. HABERMAS, *The Future of Human Nature*, 30.

¹⁰³ K. CRONIN, *Rights and Christian Ethics*, 57-80; 81-114.

ing¹⁰⁴. Of the former, Judith Wagner DeCew notices, «The problem of rights conflicts and the inability to rank rights have led many theorists in philosophy and law to reject the notion of “absolute rights”, or rights which must be upheld under and circumstances»¹⁰⁵. Of the latter, Martin McKeever observes,

In contemporary cultures the lobbies, which represent the interests of various groups, have become very important in the political and legislative process. In view of this, there is a real danger that a new version of the classical political dynamic of might is right will prevail: those who have the strongest lobby will be able to claim rights which weaker lobbies are not in a position to claim¹⁰⁶.

One manner of overcoming such a conflict is to deny the status of one or other claim to be a true right. Therefore, «the conflicts between them are to be resolved by determining which is really a right, and which are not rights at all in the conflict situation»¹⁰⁷. A resolution, therefore, turns on the previous challenge to specify authentic rights. However, in what Dworkin identifies as hard cases, situations often arise in which accepted authentic rights collide¹⁰⁸. In these circumstances, the reality of one or other right cannot be simply denied. To do so is to deny the basis of all rights.

Conflicts between accepted rights may be placed in two categories: «*intra*-right conflicts, that is, conflicts between different instances of the same right; and *inter*-right conflicts, that is, conflicts between particular instances of different rights»¹⁰⁹. An example of an *intra*-right conflict is the clash of many people asserting the same right-claim to medical treatment in a situation of scarce resources. Expanding the example reveals an *inter*-right conflict – the more that is spent on hospitals to meet the right to medical treatment, the less that can be spent on the police in protecting the right to personal security.

Society is continually involved in a working through issues like these. Indeed, as recognised by the theorists, authority and law, and so the State, are necessary in order to manage complex situations that arise from common life. Yet, as Jeremy Waldron writes,

¹⁰⁴ This distinction shall be drawn upon again in a later chapter; cf. Ch. VII, Sec. 3.1.

¹⁰⁵ J. WAGNER DECEW, «Moral Rights», 70.

¹⁰⁶ M. MCKEEVER, «The use of Human Rights Discourse», 11.

¹⁰⁷ H.J. MCKLOSKEY, «Rights», 110.

¹⁰⁸ R. DWORKIN, *Taking Rights Seriously*, 75 ff; cf. Ch IV, Sec. 3.2.

¹⁰⁹ J. WALDRON, «Rights in Conflict», 513.

When hard choices arise, it is less easy to see how they should be resolved. The idea that all rights should be put on a par seems implausible. Though we may think that any rights should have precedence over considerations of ordinary utility, we may think also that some rights are more important than others. Maybe the right to life is more important than the right to free speech, which is more important, in turn than the right to privacy, and so on¹¹⁰.

Inevitably, there are losses and gains – each to be traded off against one another. But do rights, therefore, re-enter the market place to be also traded, one against the other? If one right is measured, weighed and calculated against another to create the greatest possible advantage for any many people as possible, does the ghost of utilitarianism return (in spite of the fact that rights counter such reasoning¹¹¹)?

While they all accept that consequentialist (Finnis), policy (Dworkin), and strategic (Habermas) considerations must be taken into account, the three theorists refute such a charge. They each assert that human rights must be take precedence over a crude consideration of the greatest happiness for the greatest amount of people. However, they each lack criteria by which to lexically order and so judge between conflicting rights – in fact, they refuse to provide them.

Finnis, for example, maintains that the basic goods are incommensurable. They cannot be measured one against the other in creating a hierarchy of values. In turn, the rights that facilitate and protect the basic goods must also be incommensurable. Instead, he can only point to the constant reflection on human experience in the light of practical reasonableness guided towards integral human fulfilment¹¹². Dworkin's definition of rights is formal and so lacks any real criteria. Wagner Decew criticises his formal definition of rights for failing to «answer substantive questions about what rights we do have (or the specification of rights). Dworkin is well aware of this. He also admits that he gives no explanation of how to deal with rights conflicts»¹¹³. His later reflections on law-as-integrity may be seen as an attempt to deal with this issue by asserting the necessity to be consistent with certain core and paradigmatic rights. Finally, Habermas desists from providing a lexical order-

¹¹⁰ J. WALDRON, «Rights in Conflict», 514.

¹¹¹ Cf. VI, Sec. 4.1.

¹¹² J. FINNIS, *Natural Law and Natural Rights*, 219-220. He writes, «There is no alternative but to hold in one's mind's eye some pattern, or range of patterns, of human character, conduct, and interaction in community, and then to choose such specification of rights as tends to favour that pattern, or range of patterns».

¹¹³ J. WAGNER DECEW, «Moral Rights», 66. Parenthesis added.

ing of rights for issues in which conflict occurs can only be legitimately resolved by a free and equal deliberation by the participants themselves¹¹⁴.

Does this lacuna present a serious problem? At one level, it points to a problem of effective application. At another level and in the defence of the three theorists, the reasoning for not providing a thorough lexical ordering of rights is born of the desire not to impose a particular and strict model on society. To do so is to justify an overly authoritarian model that restricts the responsible freedom of the members of society¹¹⁵. The lack of a preset list, in turn, motivates their emphasis on the role of authority. Instead of a final list, they each provide general criteria for judgment or adjudication.

7. Encounter between Theorists and Traditions

Above is a sketch of affinities and differences between theoretical frameworks. Although according to Lonergan, history and interpretation «make data available, they clarify what was meant, they narrate what occurred. Encounter is more. [...] encounter is the one way in which self-understanding and horizon can be put to the test»¹¹⁶. This part of the thesis develops this encounter in order to test horizons, that is, the frameworks of knowledge – either explicit to a theory or implicit within a tradition – within which a vocabulary of rights are justified. An encounter is a meeting of horizons in order to challenge and be challenged, to defend and to refute, to question and to respond to difficulties on the basis of resources within their own horizon. The encounter is made of the challenges made by the selected theorist to the other; and the ability of each to respond out of and in faithfulness to the resources of their own theory and tradition¹¹⁷.

¹¹⁴ There is a sense, however, that each of the three models argue in a manner that prioritises social rights, liberty rights and participatory rights. This point will be made in a later chapter; cf. Ch. VII, Sec. 8.3.

¹¹⁵ This point shall be drawn upon again later in this chapter; cf. Ch. VII, Sec. 5 ff; Ch. VII, Sec. 8ff.

¹¹⁶ B. LONERGAN, *Method in Theology*, 247. He continues, «It is meeting persons, appreciating the values they represent, criticising their defects, and allowing one's living to be challenged at its very roots by their words and by their deeds».

¹¹⁷ An encounter between theorists may be intra-traditional or inter-traditional. Critiques of defects and challenges may occur between theorists who each acknowledge the same tradition. Such intra-traditional differences and challenges were outlined in the exposition of each theorist. Cf. Ch. III, Sec. 2; Ch. III, Sec. 5; Ch. IV, Sec. 2; Ch. V, Sec. 2. The dialectic of this chapter, however, is inter-traditional.

Evaluation requires criteria of judgement. A comparative study of theories within the one tradition is easier for the protagonists will share similar criteria: for instance, the theoretical methods, the priority of some values over others, common authorities and so forth. However, evaluation between traditions is deeply problematic because the criteria of judgment may be radically different. For instance, what is valued by one may be rendered insignificant or even dangerous by another, or methods are drastically different. Some argue that this necessarily leads to a situation of incommensurability – without criteria, measurement and therefore judgment of one over another is impossible. In response, H.P. Glenn argues that the proponents of incommensurability «would ultimately have to establish is the impossibility of human communication, radical untranslatability, and this is denied by all human experience, and possibly by the very idea of being human»¹¹⁸. But Glenn goes on to argue that all criteria of judgement must be necessarily tradition bound. Therefore, «There is no view from nowhere, no possibility of judgement from without a tradition, [...] We compare them with criteria drawn from themselves, with internal criteria. This is where the action is. There is no *tertio comparationis* [...]»¹¹⁹.

This section turns to consider internal criteria by which to consider the three theorists.

7.1 *The Need for Reasons*

Rights are clearly contentious. There are sceptical challenges from without and intransigent disagreements within. Such problems demand measured theoretical responses. To the question «Why Theory?», Michael Freeman writes,

We need reasons to support our human-rights actions, both because it is often not clear which actions human-rights principles require and because opponents of human rights can support their opposition with reasons. We must understand whether our reasons are superior, and, if so, why¹²⁰.

Freeman's appeal to the necessity of reasons is in critical reaction to the position of Richard Rorty. Rorty argues that because there is no theoretical foundation for any belief, there can be no theoretical foundation for human rights. Indeed, he insists that it is not necessary for

¹¹⁸ H.P. GLENN, *Legal Traditions*, 43. For a selection of articles on the issue; cf. R. CHANG, ed., *Incommensurability, incomparability and practical reason*. It includes one consideration by Finnis; cf. J. FINNIS, «Commensuration», 215-233.

¹¹⁹ H.P. GLENN, *Legal Traditions*, 43.

¹²⁰ M. FREEMAN, *Human Rights*, 56.

their success. Rather, what is required is a form of education that creates a sympathy that would motivate the moral outrage which underpins the successful implementation of human rights¹²¹. In response, Freeman charges Rorty of confusing motivation and justification. One may be motivated to act in sympathy but whether a particular action is justified depends on the reasons for the action. In turn, reasons require an evaluation, that is a mode of reasoning and final judgement as to which is the appropriate course of action¹²².

7.2 *Internal Structures of Deliberation*

To take rights seriously is to take reasons and reasoning seriously. This is the most striking similarity between the central theorists¹²³. In common, it motivates their practical contributions to public discourse on specific issues. But it is also the primary shared feature of their theoretical reflections: they each are trying to explicate the internal structure of deliberation towards decision making and action at a social level. They are claiming that the internal structure of deliberation provides the normative guide to right-decision making and therefore right-action. In particular, they are concerned with public deliberation in civil society and the authoritative and legal structures through which public decisions are made and enforced. To recall:

Finnis's account of the natural law is an account of practical reasoning or «thinking about what (one ought) to do»¹²⁴. In pursuing courses of action, a person (or community) invokes reasons for those actions. Further reflection, in response to the question «What for?», discloses basic values at the heart of those reasons and the means by which they can be attained. But among all the possible reasons, «Can one, in truth, identify really good reasons for action»¹²⁵? Finnis be-

¹²¹ R. RORTY, «Human Rights, Rationality», 167-185; cf. ID., *Contingency, Solidarity and Irony*.

¹²² This distinction shall be drawn upon again in a later chapter; cf. Ch. VII, Sec. 4.

¹²³ All three theorists exhibit a deep confidence in the power of reason in the face of the apparent breakdown of such trust celebrated by the so-called post-modernist theorists of the contemporary era. For an overview of rights and post-modernism, cf. C. DOUNZINAS, *The End of Human Rights*, 297-380.

¹²⁴ J. FINNIS, *Natural Law and Natural Rights*, 12.

¹²⁵ J. FINNIS, *Aquinas*, 42. He continues «The reasons which, as a clear-headed theorist, one counts as good when considering human affairs in reflective social theory – even the theory intended primarily as explanatory description – are the very reasons one counts as good reasons when considering what to do». Speaking of Finnis's text *Aquinas*, Teresa Iglesias-Rozas comments: «The work, in terms of its approach

believes so. The very thrust of practical reasoning itself, or the process of deliberation in the lived experience of ordinary lives, reveals the ultimate or objective reasons for choice and action and how they may be achieved; namely, the basic goods and so requirements of practical reasonableness. At a social level, the actions of state and law find justification in these basic reasons.

Dworkin's legal theory turns on the actual procedures of judicial adjudication: the ways in which a judge (and the legal system) deliberates towards a decision. In hard cases, they justify their decision by arguing and asserting matters of principle, which they claim to be inherent in the law itself. Legal reasoning is to be «continually involved in debating its point and meaning, that is, its relation to justice or political morality»¹²⁶. Reasons for action are deliberated. It is in a process of constructive interpretation, that good reasons are developed. Good reasons provide a coherent rationale between legal materials (statutes, precedence etc), society needs and inherent principles. In other words, they place the law in its best moral light.

Habermas's theory of communicative action is a theory of rationality or the process by which two people come to mutual understanding in an ideal speech situation. It provides an account of the necessary structure of intersubjective deliberation. In the sphere of social integration, his model of discourse ethics outlines the necessary preconditions by which mutual understanding and agreement may be made on norms of behaviour. The central core, then, is that moral norms should be established through common deliberation or a process of argumentation. The best argument will be accepted; thereby, rationally motivating the participants. By gaining the approval by all or common consensus, the best arguments are universal. Applied to social institutions, it creates a model of deliberative democracy¹²⁷.

Anthony Lisska describes this common element as «the “good-reasons” approach to moral language and argument»¹²⁸. What is crucial is that a justification be provided for moral-decision making, beyond the fact of the decision itself. At a social level, justification is required other than the mere fact or coercion of authority or positive law. In common, the theorists argue that the recognition of good reasons arises

and core conceptual moral and political concerns, could also be entitled Reasons for Action». T. IGLESIAS-ROZAS, «Reasons for Action», 239.

¹²⁶ R. DWORKIN, *Law's Empire*, 45-46.

¹²⁷ J. HABERMAS, *Between Facts and Norms*, 287 ff.

¹²⁸ A. LISSKA, *Aquinas's Theory of Natural law*, 65. In an outline of twentieth century meta-ethical theory, he presents this approach as a «rejoinder» to the previously dominant non-cognitive theories.

from the practical lived experience and the process of theory construction itself, that is, the actual dynamic of moral and legal reflection and discourse. By doing so, they claim the process itself reveals its own conditions and standards. The proposal and acceptance of reasons, in the practice of deliberation, provides the markings of a rationally justified theory. A good-reasons approach will disqualify bad reasons as an inappropriate justification. For instance, their common critique of utilitarianism and legal positivism is that they are inappropriate accounts of the process of moral and legal reasoning. They provide bad reasons for decision-making, being «impoverished», «impossible», «domineering», or all three.

7.3 Adequately Justified Reasons

What, therefore, constitutes an adequately justified reason? Lisska proposes that «Rational justification through consistency is the central feature indicating a good reason»¹²⁹. Consistency is a necessary element but, as testified in the expository chapters, it does little to capture the complex theories of rational justification of the central theorists. Rather, there are more specific characteristics of a rational justification – namely, objectivity for Finnis, coherence for Dworkin and consensus for Habermas. Finnis identifies good reasons as those that are irreducible and so self-evident. They are objectively good as they provide the universal set of reasons that underpin all reasons and reasoning. Dworkin identifies good reasons as those that provide coherence in the elements of legal reasoning and judicial adjudication. The resulting right answer is the one that exhibits integrity to the central principles that express a «single and comprehensive vision of justice»¹³⁰. For Habermas, the better argument is the one accepted as valid by all under ideal conditions. Good reasons therefore are those that build consensus.

The theoretical framework of each theorist is based on the explication of the internal structures of deliberation. In common, they hold that appropriate reasons are those which are consistent to the structures of the actual dynamic of moral and legal reasoning and deliberation. However (and to state the obvious), the characteristics of what counts as an appropriate reason differ because each theorist explicates the internal structure of deliberation differently. Previously, the theoretical frameworks or the lattice-works were compared according the claimed distinction between questions of justice and questions of the good.

¹²⁹ A. LISSKA, *Aquinas's Theory of Natural law*, 65.

¹³⁰ R. DWORKIN, *Law's Empire*, 134.

Critically, the distinction influences what reasons matter in the modern society's common deliberation towards just organisation.

For instance, a comparison may be made between the rejection of utilitarianism and legal positivism with the dismissal of substantive theories of the good life. For both Dworkin and Habermas, the reasons proposed for decision-making by the former set of theories are strongly refuted. However, reasons that are offered according to particular visions of a good life are simply bracketed out. Granted, Dworkin and Habermas do provide reasons for why they insist that strong visions of the good life need to be restricted in the public sphere: most notable is the desire to protect the freedom of the individual from the imposition of an ideal of the human condition. But this confines the well-spring of reasons, as it were, that may be offered. In effect, what happens is that they narrow the reasons for common action. By doing so, they are thinning and ultimately emptying deliberation of the concrete reasons that actually do occur.

As explications of the structures of deliberation, all three theories are procedural. However, the greater the assertion on the distinction and so bracketing out reasons, the more the theory becomes dependent on procedure. The procedural emphasis is explicitly maintained by Habermas who scrupulously avoids prejudging what is involved in living a worthy or good life for what is proposed as necessary for the good life must be left to the participants of the discourse¹³¹. In Dworkin's work, it is a strong element, albeit implicitly, for he recognises a thin theory of the good¹³². The less willing to engage with the concrete reasons actually used by people, the more they are obliged to depend more on explicating procedure.

Practical reasoning is procedural according to Finnis. But he begins from the very concrete reasons that people make, as individuals and as a society, to justify their actions. All reasons are to be considered: many to be refuted in light of the discussion and the experience of life. It is by way of the deliberation on actual and real reasons in lived experience that the ultimate reasons or basic goods come to light. Not tak-

¹³¹ Cf. J. HABERMAS, *Moral Consciousness and Communicative Action*, 103. He writes: «The principle of discourse ethics (D) makes referent to a procedure, namely the discursive redemption of normative claims to validity. To that extent discourse ethics can be characterised as formal, for it provides no substantive guidelines but only a procedure: practical discourse. Practical discourse is not a procedure for generating justified norms but a procedure for testing the validity of norms that are being proposed and hypothetically considered for adoption».

¹³² Cf. J. WALDRON, «The Rule of Law», 319-335; R. DWORKIN, «Ronald Dworkin Replies», 339-395.

ing reasons seriously enough is the common critique he holds against both Dworkin and Habermas – and by extension to much modern moral reflection.

7.4 *Taking Reasons Seriously*

Finnis agrees with both Dworkin and Habermas that deliberation or argumentation is constitutive of social action and the phenomenon of law. They concur that the process discloses an internal structure of norms or principles by which it may be guided. Finally, they agree on taking justification, that is, the provision of reasons, seriously. Finnis writes:

For jurisprudence has progressed mainly by attending, not merely to the externals of structure, practices, or even feelings, but rather to the characteristic *reasons* people have for acting in the ways that go to constitutive distinctive social phenomena, such as law and the various sorts of legal rule, standard, and institution. Jurisprudence attends to types of justifications for decision¹³³.

But he disagrees with both on a number of moral and legal issues and underlying the path of divergence is Finnis's insistence on the transparency of reasons. Practical reason, or the structure of deliberation that ends in action, offers

expressions and recognitions of the directive claims that our intelligence makes upon us *because of the goods (and other truths) which intelligence makes evident and thus available to us*. What I have emphasised at the end of the preceding sentence is the transparency of reason¹³⁴.

Transparency concerns the topic, content or subject of assertions made in the process of argumentation and deliberation towards deciding what to do. In deliberation, the to-and-fro of discourse, a person or people will make assertions of the type, «I think that [...] (is true or good)» or «I believe we should [...] (undertake a particular course of action)». An external observer may distinguish between the person who is making the statement and the statement itself. However, and most importantly, the person herself does not. From the internal perspective of the person who makes the assertion, «I think that [...]», she is not thinking of herself but of the content of the assertion. Finnis concludes:

¹³³ J. FINNIS, «A Bill of Rights for Britain?», 309.

¹³⁴ J. FINNIS, *Fundamentals of Ethics*, 71. Although only mentioned three places, he claims that transparency is the constant theme of the lectures that make up the book. «quote»

«Thus the “I think” in assertions for the former kind is transparent for the real subject-matter of the assertion; my thinking is not part of that subject matter at all; it is simply not the topic»¹³⁵. In other words, when people deliberate, they are discussing the content of their arguments or the claims that there is truth in what they say. The implication of this transparency is «that in making any affirmation, reaching any conclusion, answering any question one is “relying at the deepest level on what [one oneself] believes”»¹³⁶.

Transparency allows for practical reason to fade to the background and facilitates the basic reasons that motivate action to come to the foreground. In *Fundamentals of Ethics*, the failure to account for this basic feature of practical reasoning underlies Finnis’s critique of Kant, and by extension, much of Kantian influenced morality, including Dworkin and Habermas. The criticism is that by not appreciating the transparency of reasoning it has led to the exaggerated and undue concentration on the structures of deliberation to the detriment of the intelligible reasons that inform them.

Of Kant, he observes that such an account is impoverished to the extent that his «understanding of understanding (reason) overlooks the intelligible goods [...] and seeks to make do with the reason’s ‘a priori’ power of universalising»¹³⁷ and exaggerated to the extent that «he makes practical reasonableness not only an intrinsic ‘good in itself’, but the ‘condition of every other good’, but also ‘the supreme good’»¹³⁸.

Of Dworkin¹³⁹, Finnis acknowledges and commends the aspect of constructive interpretation that continually deliberates on the purpose of law. As such, it exhibits the essential aspect of Finnis’s own model of practical reasoning, «lending power and illumination to his account of the interpretative attitude and its role in relation to the law»¹⁴⁰. But Dworkin fails to appreciate the transparency of the arguments that are actually held by those involved in real deliberation: «the fact of one’s

¹³⁵ J. FINNIS, *Fundamentals of Ethics*, 71. There is an exception. «Of course, it can be made, to some extent, a topic, as perhaps when someone says «A penny for your thoughts», and you reply «I am thinking about the fact that p [...]».

¹³⁶ J. FINNIS, «On Reason and Authority in Law’s Empire», 365.

¹³⁷ J. FINNIS, *Fundamentals of Ethics*, 74.

¹³⁸ J. FINNIS, *Fundamentals of Ethics*, 74.

¹³⁹ Finnis and Dworkin debated on the issue of euthanasia at the Loyola Law School, Los Angeles in 1996, later published as L. SOLUM, «Fritz B. Burns Lecture», *Loyola of Los Angeles Law Review* 31 (1998), 1115-1122. Finnis further earlier challenged Dworkin, cf. J. FINNIS, «The “value of human life” and “the right to death”», 559-571.

¹⁴⁰ J. FINNIS, «On Reason and Authority in Law’s Empire», 362.

agreement with an assertion is no ground for agreeing. In the logic of argumentation, only the *content* of my knowledge or beliefs is relevant, not the fact that I possess them»¹⁴¹. By failing to seriously take account of the content of arguments, beliefs or preferences, Dworkin creates an overly formal account of constructive interpretation that misconstrues actual discourses. For instance, Dworkin's definition of rights turns on judicial principle drawn from political morality that is capable of trumping decisions made by government policy or majority preference. However, it does not account of the fact that principle (the beliefs, convictions etc), to a large extent, informs policy and the preferences held by majorities. In actual discourses, rights may not trump simply because there is a majority of preferences to be trumped. The characterisation made by Dworkin makes for a distinction between the courts as a forum of principle and the legislatures and democracy as forums of policy or power. But constructive interpretation, Finnis argues, is too limited to judicial practices without attending to the wider issues of «formally or structurally good law-making»¹⁴². It does not take seriously the reasons that are offered, deliberated, rejected and accepted in the public arena, outside the judiciary. «Arguments from principle are the very stuff of many arguments proposed to and in legislatures, especially on the matters indicated in bill of rights»¹⁴³. Finnis, therefore, concludes that there is no division.

Interestingly, Habermas comes to the same conclusion about Dworkin. In *Between Facts and Norms*, Habermas also recommends aspects of Dworkin's theory¹⁴⁴. But he too argues that the process of constructive interpretation is overly dependent on the judiciary, creating a solipsistic or monological theory of law¹⁴⁵. In such a theory, it is for the judge alone, albeit guided by integrity, to assert the purpose of the law. In response, Habermas proposes that the ideal structure of de-

¹⁴¹ J. FINNIS, «On Reason and Authority in Law's Empire», 364.

¹⁴² J. FINNIS, «On Reason and Authority in Law's Empire», 362-363. He writes: «there is an irreducible passivity or derivativeness about the concept of interpretation [...] Interpretation resists being taken for the whole of practical reasoning [...] Adjudication and juristic interpretation resist being taken for the constitutive and legislative moments in the life of the law».

¹⁴³ J. FINNIS, «A Bill of Rights for Britain», 311.

¹⁴⁴ J. HABERMAS, *Between Facts and Norms*, 203-237; 204. «Dworkin's theory of rights is premised on the claim that moral arguments play a role in adjudication because positive law has unavoidably absorbed a moral content. This premise harbours no surprise for a discourse theory starting with the assumption that moral reasons enter into law via the democratic procedure of legislation (and through the fairness conditions of compromise formation)».

¹⁴⁵ J. HABERMAS, *Between Facts and Norms*, 225.

liberation – or in discourse-theoretic terms, the conditions of communicative rationality – is necessarily intersubjective and therefore takes the perspective of all involved.

Anyone serious about participating in a practice of argumentation cannot avoid pragmatic presuppositions that require an ideal role taking, that is, presuppositions that require one to interpret and evaluate all contributions from the perspective of every other potential participant¹⁴⁶.

The guarantor of right decision making is not primarily the Herculean efforts of the judge but the strict adherence to discursive practices throughout the legal process¹⁴⁷. The successful rule of law in modern society is to be placed within the wider discursive practices of a democratic and civil society.

Of Habermas, Finnis's criticisms also turn on the failure to appreciate the transparency of practical reasoning. Although he never uses the term, the thrust of his critique is that Habermas does not fully attend to the intelligible reasons that inform actual discourses or «truth seeking dialogue, discussion or discourse, and meditation or reflective deliberation»¹⁴⁸. To recall, Habermas argues that one may distinguish between moral and ethical discourses or between questions of justice and questions of the good. Finnis sources this distinction in the failure of Kant outlined above: it is, he notes, «a curious relic, as it seems, of Kant's oversight of the basic *reasons* for action»¹⁴⁹. Habermas asserts that social integration in a pluralist situation requires that contentious issues be deliberated at the level of the moral rather than the ethical. In other words, each must transcend the view of what I or we may consider my or our good and take «the perspective of every other potential participant»¹⁵⁰. By doing so, they move to a more abstract level on which they can attain consensus. It requires, therefore, that some reasons in public discourse be put to one side, as merely our or my perspective. In effect, this is not to engage but rather to bracket out some reasons. But in the actual discourse on both sides of a contentious issue, the reasons that are offered are not considered by the participants to be what is «for my or our good»¹⁵¹. Rather, all propose what they believe to be true or right

¹⁴⁶ J. HABERMAS, *Between Facts and Norms*, 230.

¹⁴⁷ J. HABERMAS, *Between Facts and Norms*, 228.

¹⁴⁸ J. FINNIS, «Natural Law and Discourse Ethics», 354. In the article, the same point is made against Rawls.

¹⁴⁹ J. FINNIS, «Natural Law and Discourse Ethics», 367.

¹⁵⁰ Cf. Ch. V, Sec. 4.

¹⁵¹ He writes: «When Peter Singer and I discoursed publicly on these matters [abortion and euthanasia] at the Philosophy Society in Oxford in May 1998, it did not

on the basis on concrete reasons considered important independent of the person proposing them. It

turns out to be not merely a kind of category mistake [...] he cuts himself off from the very meaning of the discourse of his partners in discourse, or at least so radically misconceives their views that civil conversation with them is substantially obstructed¹⁵².

The distinction in fact misconstrues concrete deliberation or discourse. Habermas ends up actually limiting the discourse that he himself so earnestly wishes to expand and protect – thereby contradicting the central proposed principles of Discourse Ethics.

With regard to contentious issues, Finnis further argues that it is in fact impossible or «incoherent» to rise to a higher level of discourse that takes the perspective of all because the conditions of discourse ethics are not in fact widespread. The principles of discourse ethics – most notably reciprocal perspective taking – are idealised apart from actual discourses. But «Many of the participants in *actual* discourse-communities, not least (and not most) in wealthy democracies, do not meet those conditions»¹⁵³. In actual discourses, there are many perspectives that are held uncritically or in the interests of the powerful. And,

Perspectives such as these should, not be adopted but rather rejected, for the sake of discourse (not demagoguery), truth (not mendacious or myth-ridden propaganda), friendship (not self-seeking flattery), and the *real* interests of all (including those wrongly interested in adhering to and acting upon their immoral perspectives)¹⁵⁴.

Of Dworkin and Habermas and in sum: Finnis argues that what they hold to be the identifying characteristic of rational justification (or a right-answer or better argument) is merely the mark of the truth, rather than the proper criterion of the moral truth. Abstract coherence in the adjudication of the law, as proposed by Dworkin, and consensus arising from public discourse, as proposed by Habermas, may be outcomes of common deliberation; but on their own, they cannot provide the verification or guarantee that the moral truth has been arrived at. He agrees that moral truth can only be arrived at through question and answer and

for a moment occur to us or, I dare say, to any of the many philosophers in the room that either of us was discussing what is «respectively best for me/my group from my/my group's point of view» or what preserves or damages «my integrity» conceived [...] as separable from justice». J. FINNIS, «Natural Law and Discourse Ethics», 369.

¹⁵² J. FINNIS, «Natural Law and Discourse Ethics», 367-368.

¹⁵³ J. FINNIS, «Natural Law and Discourse Ethics», 356.

¹⁵⁴ J. FINNIS, «Natural Law and Discourse Ethics», 357.

coherent and consistent reflection and not otherwise, but and crucially, such reasoning is content-filled. The process is filled and guided by intelligible reasons for action. Given sustained attention in proper conditions, he maintains irreducible or basic reasons and consequent moral truths are disclosed. To Finnis, Dworkin and Habermas do not take reasons seriously enough.

8. The Natural Law Response

The purpose of this thesis is to offer an investigative study of human rights in relation to three theorists and their respective traditions. Accordingly, it traces the history of each tradition of enquiry, proposing their distinguishing characteristics and core values. It provides a close and critical reading of a leading contemporary representative of each tradition. By way of a comparative study, points of convergence and paths of divergence between them are identified; contending that the paths of divergence could be marked out according to the attention paid by each author to the fundamental question of the good or worthwhile life.

By implication, this thesis is marked by a judgement in favour of the importance and value of this very criterion. The precedence allocated to the question indicates my commitment to a particular tradition of enquiry – namely, the Aristotelian-Thomist account of the Natural Law. For, as observed earlier, there are no neutral standpoints outside of a tradition of enquiry that offer independent criteria of evaluation¹⁵⁵. In the words of Alasdair MacIntyre:

There is no standing ground, no place for enquiry, no way to engage in the practices of advancing, evaluating, accepting, and rejecting reasoned argument apart from what which is provided by some particular tradition or other¹⁵⁶.

Indeed, to attempt to provide one is to succumb to the positivist temptations of the Enlightenment to search for value free judgments, so vigorously challenged by the three central theorists¹⁵⁷.

Part One – History – outlined the embryonic growth of subjective rights within the natural law tradition of the medieval era. Despite the

¹⁵⁵ Cf. Ch. V, Sec. 6.

¹⁵⁶ A. MACINTYRE, *Whose Justice? Which Rationality?* 350; cf. ID. «Moral Relativism, Truth and Justification», 6-24. This thesis does not commit to the radical incommensurability between the traditions as proposed by MacIntyre. On a response to MacIntyre by those of the New Natural Law school, cf. J. BOYLE, «Natural Law and Ethics of Traditions», 3-30.

¹⁵⁷ Cf. Ch. VI, 4.1.

protestations of many that rights are a later innovation, «it is difficult to deny some connection between the scholastic concept of natural law and modern doctrines of human rights»¹⁵⁸. The natural law tradition of the medieval era, including the specifically Thomist interpretation, proved itself adaptable to the exigencies of the time. Rights were neither foreign nor incompatible with this tradition. Finnis represents a contemporary moment in the dynamic of the natural law tradition and theory: albeit, after centuries of disregard.

A theory which more than one generation of thinkers had dismissed as an ancient and exploded fallacy kept alive only as the theological dogmatics of an authoritarian Church was rescued from a whole complex of misunderstandings and misrepresentations. At the same time, it was exhibited as thoroughly challenging account of the law, fully capable of standing up to the theories which were regarded as having refuted and superseded it, while taking into account and accepting into its own setting some of the main insights or discoveries of these theories¹⁵⁹.

Neil MacCormick is commenting upon Finnis's re-articulation of the central principles and the model of reasoning that make up the natural law. They are, at once, true to the tradition and yet critically and constructively responsive to other traditions and theories. My basic argument of this thesis is that rights illuminate this point.

Finnis is responding to the challenge as posed by Ralph McInerny: «If there is to be any conjunction of the natural law tradition and natural or human rights, the latter are going to have to be grounded in the same things as the former: the way it is – with the world, with man, with his destiny»¹⁶⁰. Finnis is claiming that «the way it is» is disclosed in the intelligible reasons that people offer for their actions. Presuming the free choice of individuals, actions are done for the sake of something or for a purpose. Reflection and deliberation on such purposes reveal the basic goods or basic reasons why such purposes are worthwhile in pursuing. The destiny of the person is, therefore, discernable – integral human fulfilment. Such a destiny is part of the «way it is» because the goods that make for a worthwhile or fulfilled life are objective or self-evident, not as mere intuitions, but as confirmed by (but not

¹⁵⁸ J. PORTER, *Natural and Divine Law*, 268.

¹⁵⁹ N. MACCORMICK, «Natural Law», 105.

¹⁶⁰ R. MCINERNY, «Natural Law and Human Rights», 13-14. Although, McInerny thinks that he has failed. He concludes, «To the degree that the concept of human rights can be accommodated to the natural law tradition in which St. Thomas moves, the phrase «human rights» will be equivocal as between Thomists and most of their contemporaries».

derived from) the results of considered attention to the natural dispositions of a person, theoretical and practical wisdom and experience¹⁶¹. Moral norms then, are the requirements essential to achieve a person's objective destiny.

The theory turns, as noted above, on the reflecting deliberating person. To this extent, it is broadly marked by the turn to the subject commonly associated as the primary characteristic of modernity¹⁶². However, Finnis and his collaborators acknowledge two specific and influential adaptations of the Aristotelian-Thomist tradition. Crucially, it is my central contention for this thesis that these innovations provide the basis for the natural law's response to the challenges of other traditions of enquiry: namely, to account for the possibility to freely choose one's own good within a framework of justice (Dworkin and liberalism) and to account for participation in the deliberation of the norms of justice (Habermas and Critical Theory).

8.1 *Natural Law and Liberty Rights*

Firstly,

The centrality of free choice in moral theory explains not only why our account of practical and moral principles diverges from some contemporary views, but also why it departs in some respects from classical models to which it is in other ways indebted. [...] the reality of free choice in incompatible with the supposition – for instance, of Aristotle – that there is a single natural end of human life¹⁶³.

As previously detailed, they maintain that there is no one single end to life. Rather, there is a plurality of goods that facilitate human flourishing. The objective goods are the irreducible basic reasons for action: they may not even be reduced to one another. Instead, they are incommensurable – no one particular good way of life can be said to be measurably better than another. Significantly, the assertion of the incommensurability of the goods is the affirmation of the experience and significance of free choice. «Free choice is understood by reflection on the experience of deciding between two *intelligible* goods»¹⁶⁴. Of course, moral choices are not arbitrary, for

¹⁶¹ G. GRISEZ – J. BOYLE – J. FINNIS, «Practical Principles», 108-110.

¹⁶² Cf. Ch. II, Sec. 1 ff; Ch. III, Sec. 3.4.

¹⁶³ G. GRISEZ – J. BOYLE – J. FINNIS, «Practical Principles», 101.

¹⁶⁴ J. FINNIS, *The Fundamentals of Ethics*, 138. He continues: «say, the good of obtaining and seriously studying a worthwhile book on ethics, at the cost of \$20, and the good of giving that \$20 to a genuine charity». Cf. Ch. II, Sec. 3.1.

basic values can be identified by intelligence, and as thus identified provide the principles of all choices however, basic. Basic commitments shape our response to, our participation in, basic values – in the form of choices of career, of marriage, of forms of education, of preference for wealth as against leisure or liturgy, or for speed of communication as against safety¹⁶⁵.

It is by way of actual acted-out choices that people achieve their intelligible advantages or purposes. In committing themselves to particular courses of actions, they allow themselves to be guided by their values or what they perceive to be good for them. By instantiating the objective goods – and not merely perceived goods – that are discerned through rational reflection, they achieve their final purpose of integral human fulfilment. Choices, therefore, constitute the human person¹⁶⁶. It is by choosing to act in certain ways that life is fulfilled, and a person's character developed; by choosing otherwise is to limit or hinder one's own potential for a happy or worthwhile life¹⁶⁷. Practical reasoning, which bears itself on one's choices, is itself a basic good. It shapes the character and future of a person by guiding the choice to affirm or limit the basic goods. It is experienced as order, inner peace, authenticity or self determination.

The objective goods that comprise human fulfilment are recognised and instantiated or brought about in the exercise of practical reasonableness, that is, the reasoned judgment and active control over our lives. As a basic good, the self-determination of each person ought to be respected in the ordering of the common good in society. Human fulfilment cannot be imposed – it can only be disclosed and freely chosen. Rights, Finnis claims, are the sketches that outline the common good. Therefore, they will also acknowledge, include and protect the freedom to choose, albeit within moral parameters¹⁶⁸. In turn, the structures of society in the law and state act justly when they provide a scheme of co-operation in which people

¹⁶⁵ J. FINNIS, *Fundamentals of Ethics*, 91.

¹⁶⁶ J. FINNIS, *The Fundamentals of Ethics*, 136-144. Cf. G. GRISEZ – J. BOYLE – O. TOLLEFSEN, *Free Choice*.

¹⁶⁷ J. FINNIS, *The Fundamentals of Ethics*, 139. «Choices last. What choices create is not some new wants, preferences, habits [...], but also a new (not wholly new) identity or character [...] Thus one's free choices, whether of particular acts, or of complex projects, or of overarching commitments, constitute one the sort of person – indeed, *the person* – one has made oneself».

¹⁶⁸ That is, the structures that respect the individual freedom at the heart of integral fulfilment must also be guided by the exceptionless or absolute norms demanded by the same fulfilment; for example, one must not choose and act against any of the basic goods that constitute fulfilment.

can responsibly choose between the various possible good lives that are open to them. By implication, a natural law tradition, as adapted by Finnis, may take account of liberalism's concern for the fundamental value of the individual's freedom in pursuing their own good, within the parameters of justice.

8.2 *Natural Law and Participatory Rights*

Secondly,

The theory we defined [Finnis, Grisez and Boyle] also departs from classical models – at least, as many have understood them – by taking full account of the fact that the moral ought cannot be derived from the is of the theoretical truth – for example, of metaphysics and/or philosophical anthropology¹⁶⁹.

As previously detailed, they deny the possibility of deduction from a pre-existing schema recognisable by theoretical reasoning. Instead, the emphasis is placed on the intelligible reasons that are used in the process of practical reasoning. Finnis therefore argues that the natural law tradition has never been anything other than a sustained deliberation, or a «*disputatio* grounded in reasons»¹⁷⁰.

The *disputatio*, as all human action, is ordered by the purpose of its practice. The natural law therefore implicitly proposes a discourse ethic. By way of an analysis of Plato's dialogue, the *Gorgias*, Finnis proposes that the conditions of discourse may be reduced to the human goods of truth (and knowledge of it) and friendship (good will towards other human persons). As a result, the *disputatio*, and the content that informs it, ought to be guided by their requirements. Therefore, he argues that the natural law has always been an appeal to acceptable public reasons,

that would command a universal consensus under ideal conditions of discourse and meanwhile are available to, and could be accepted by, anyone who is willing and able to give them fair and adequate attention, including those people whose immediate and practical interests (real or supposed) would be more or less damaged, and some or many of whose actual present beliefs would be negated by accepting and action upon those reasons as true. It has never been other than a theory which aspires to ensure that the content of its theses coheres with and illuminates the natural, logical, technical (including linguistic-pragmatic), and moral conditions under which

¹⁶⁹ G. GRISEZ – J. BOYLE – J. FINNIS, «Practical Principles», 101-102.

¹⁷⁰ J. FINNIS, «Natural Law and Discourse Ethics», 371.

those theses can be rationally adopted, affirmed in discourse, and acted upon in other forms of action¹⁷¹.

At an individual level, continual deliberation is crucial in the identification of the basic goods and the requirements necessary to achieve them¹⁷². At a social level, continual public deliberation is necessary for the discernment of the common good that facilitates and fosters the basic goods. The public forum is, above all else, an arena of practical reasoning. There can be no fixed theoretical models from which to deduce answers or measure states of affairs. The legislative authorities should not «pretend to be infallible or to silence further rational discussion or to forbid the reconsideration of the decision»¹⁷³. Rights, therefore, must acknowledge, include and protect the freedoms of participation in public deliberation; albeit guided by the parameters of morality. By implication, the natural law tradition may take account of the democratic concerns of Habermas and the Critical Tradition.

8.3 *Responsibility and Rights*

To restate the basis of my argument: both the liberal and critical traditions fear of an authoritarian imposition of what is perceived to be the good life but ideologically masks particular vested interests. In order to counter-act such a possibility, the liberal tradition focused on the limitation of power by way of a principled tolerance of the freedom of the individual – encapsulated in the so-called first generation rights – to pursue their own perceived interests. The Critical tradition focused on the limitation of power by way of the participation of all in the structures of authority – encapsulated in second generation rights – in order that it may be guided in facilitating the interests of all. I argue that a sound model of practical reasoning in line with the natural law tradition may be so read as to be capable of responding to this challenge.

¹⁷¹ J. FINNIS, «Natural Law and Discourse Ethics», 370.

¹⁷² It is by this method that Finnis is capable of responding to the challenge of Habermas, who argues that neo-Aristotelian approaches «must demonstrate how an objective moral order can be grounded without recourse to metaphysical premises» J. HABERMAS, *Moral Consciousness and Communicative Action*, 213-214, n.15. It appears that Habermas buys into what Finnis would call a stereotype of the natural law; cf. Ch. III, Sec. 2.

¹⁷³ J. FINNIS, *Natural Law and Natural Rights*, 220.

The model may be said to turn on responsibility. First and foremost, there is responsibility of justice¹⁷⁴. In this model, rights are primarily explained as the fruits of justice from the point of view of those who benefit from a just ordering of social relationships. Rights are bound therefore to the duty or responsibilities of all, particularly in those entrusted with authority, to act according to the requirements of justice or the common good. This is faithful to the central claims of the natural law tradition – power must be guided, and therefore, limited by the moral responsibilities of the common good.

Second, there is the responsibility of each individual. The common good provides the conditions for the integral human fulfilment of each. The goods can only be realised through the responsible free choice and action of each person. Justice therefore demands the recognition of the fundamental freedom of all to pursue one of the many kinds of life that will concretise the goods for each¹⁷⁵. It acknowledges that responsibility primarily lies with the individual. Indeed, by doing so it is fostering the sixth basic good – practical reasonableness. It is out of respect for this basic good in the lives of all that authority and society ought to respect the freedom of conscience. A just society can only provide conditions and safeguards, required by the above responsibilities of a life in common. As a result, power is limited by a principled respect of individual responsible freedom – resonating with the liberal tradition.

Third and finally, there is the responsibility of deliberation. It is by way of practical reasoning reflecting on its own actions that the basic goods and the requirements to achieve them disclose themselves. Intelligent reasons provided for actions, tested against common experience and common deliberation (a *disputatio* grounded on reasons), reveal basic or objective reasons in the interests of all. As a result, the common good requires that society allow a public space for the provision, defence and discernment of common goals.

Furthermore, the common good requires continual deliberation because the basic goods, being incommensurable, provide no hard-and-

¹⁷⁴ The requirements of responsibility are also called the modes of responsibility. Cf. Ch. II, Sec. 3.3. Justice, or the «fostering of the requirements of the common good», is the seventh requirement of practical reasoning.

¹⁷⁵ Cf. J. FINNIS, «Commensuration», 219. He writes, «So since the making of the law is always a morally significant social act, engaging the moral responsibility both of the individuals who participate in it and the of the group for whom they act, and self-determining both for these individuals and for the group, the incommensurability of the goodness of alternative actions is of great importance for legal thought and practice. Indeed [...] it is an essential element in the grounding of inviolable human rights which are properly the law's backbone».

fast models to apply¹⁷⁶. A just society, therefore, requires structures that allow for continued deliberation and justification (that is the provision of reasons) for common action. Power will be guided or limited by the access of all to such structures. Conceived in this manner, democracy is not simply majority rule but the fostering of strong civil and public forum for deliberation – resonating with the critical tradition.

To the three orders of responsibility correspond three categories of rights – *status positivus*, *status negativus* and *status activus*. To «the responsibility towards another in justice» corresponds the claims to social rights to a minimum of conditions, such as commodities, peace and order, respect and equality before the law, that facilitate human flourishing (*status positivus*). To «the responsibility of each individual to pursue the good in freedom» corresponds to the rights of liberty against undue intervention, particularly by the state, in certain areas of private life (*status negativus*). To «the responsibility to continually justify actions and deliberate upon the good and its achievement» corresponds the rights of participation in the formation of political opinion and governance (*status activus*).

As testified to by this dissertation, political theories may be identified according to the «decisive importance [...] attached to the question of whether and to what extent one particular right can be seen as a prerequisite for the possibility of enjoying another particular right»¹⁷⁷. The explanatory priority of the good in the justification of rights, to which this dissertation commits itself, argues in favour of the primacy of the first category. Importantly however, the three categories mutually support and constitute one another because the conditions that encourage a common human flourishing are impossible to achieve without a commitment to each aspect. As Thomas Hoppe further points out, each depends in some manner on the others¹⁷⁸. Opportunities for acting on democratic rights of participation in the political order considerably depend on maintaining a minimum social and economic standard. For example, a person who must daily struggle for her family's survival will have few resources, or perhaps little interest, to engage or support freedoms of the speech or the press. As a result, securing basic social and

¹⁷⁶ However, it does insist on exceptionless or absolute norms; for instance, do not choose against any of the basic goods, cf. Ch. III, Sec. 3.3.

¹⁷⁷ T. HOPPE, «Human Rights», 465. An admittedly crude and simplistic generalisation would present the Aristotelian-Thomist tradition prioritising the first category, the Liberal tradition emphasising the second, and the Critical tradition focusing on the third.

¹⁷⁸ Cf. T. HOPPE, «Human Rights», 465 ff.

economic rights must be a condition for any individual possibly being able to freely flourish. The same may be said in reverse. Successful implementations of the conditions that sustain the well-being of an individual require the acknowledgement of her choices and her contributions to the ongoing shaping of society. For example, a person may become over dependent on social welfare to the detriment of their own capacities to contribute, by way of the good of work, to their own fulfilment and the betterment of society.

The differing orders of responsibilities and rights mutually support, rather than exclude, one another. Understood in this way, the Aristotelian-Thomist tradition of natural law is capable of taking account of the priorities of other traditions while remaining true to the resources and models of moral reasoning found within its own tradition.

8.4 Consistency with the Tradition

However, some disagree. Tracey Rowland, in *Culture and the Thomist Tradition*, makes the case that such an accommodation is impossible. Furthermore, it is directly levelled at Finnis and the New Natural Law project. She argues from a historical perspective, drawing upon an account of three traditions of enquiry proposed by Alasdair MacIntyre¹⁷⁹. The Liberal tradition and the Thomist tradition are not simply incompatible. They are necessarily in conflict because the former, of which rights plays a key part, is sourced in the denunciation of Thomism and its theological moorings. She concludes:

How can it be anything else when the genealogy of the rights project begins as an attack on classical Thomism and is then adopted as part of an ideological project to reach a political consensus in circumstances in which there was no commonly agreed upon anthropology? [...] It is not merely Liberal rhetoric to which Liberals are attracted, but a whole package of values about the good, the person and the cosmos¹⁸⁰.

Rights, she argues, are ideological. The dominance of the Liberal interpretation in popular discourse means that people, whose knowledge of concepts such as rights is tacitly acquired, come to think within a Liberal framework. In the end, it leads to the corruption and further social margin-

¹⁷⁹ Cf. A. MACINTYRE, *Three Rival Versions of Moral Enquiry*. MacIntyre charts three traditions; the Aristotelian-Thomist, the Liberal, and the Genealogical. He presents the traditions of enquiry as necessarily in conflict. His account is more culturally bound than the presentation of the traditions in this thesis. For further reading, cf. A. MACINTYRE, *After Virtue*; ID., *Whose Justice? Which Rationality?*

¹⁸⁰ T. ROWLAND, *Culture and the Thomist Tradition*, 155-156.

alisation of the Thomist tradition¹⁸¹. Ultimately, she charges Finnis with an ambivalent attitude towards liberalism¹⁸².

Finnis does support the western political order and the institutions that arise from the liberal tradition but provides an alternative grounding by way of an adaptation of the Aristotelian-Thomist tradition. In an article entitled «The Catholic Church and Public Policy Debates in Western Liberal Societies», he begins by dismissing the term liberal as having «no core meaning sufficiently stable and clear for use in a general political philosophy or theory»¹⁸³. He then proceeds to praise Aquinas for being the «first Whig»¹⁸⁴ for he

insisted that the proper functions of the state's laws and rulers do not include making people morally all-round good by requiring them to abstain from immorality. The role of state government and law, according to Aquinas, is to uphold peace and justice; the requirements imposed, supervised, and enforced by state government and law concern only those sorts of choice and action which affect other people¹⁸⁵.

In effect, to be a «Whig» is to refrain from unduly imposing in an authoritarian manner, by way of the law and state structures, one particu-

¹⁸¹ T. ROWLAND, *Culture and the Thomist Tradition*, 136-158.

¹⁸² Charles Covell makes a similar observation. Writing of Finnis among others, he writes: they were «simultaneously defenders of the Enlightenment, by reason of a common, if frequently unacknowledged, allegiance to the public values embodied in the legal and constitutional organisation of modern Liberal society. The basic fidelity of the theorists to these values was in no way qualified by their shared conviction that the political morality of secular liberal constitutionalism could no longer be supported in terms of the specific ideologies constructed during the actual historical period of the Enlightenment». C. COVELL, *In Defence of the Natural Law*, 234.

¹⁸³ J. FINNIS, «The Catholic Church and Public Policy Debates», 261. He maintains that we should do «our general critical political reflection without attempting to employ «Liberalism» as a framework category». Elsewhere, he maintains that liberalism has no place in a critical theory of jurisprudence, cf. J. FINNIS, «On the Critical Legal Studies Movement» 21-42. In another place he writes, «It is, I think, a mistake of method to frame one's political theory in terms of «liberal» or «non-liberal» [...] character». J. FINNIS., «Is Natural Law Theory Compatible with Limited Government?», 9. In this thesis, the term liberalism is tied to the works of particular individuals and a tradition who claim the term.

¹⁸⁴ The idea that Aquinas was the first Whig was first popularised in the nineteenth century by Lord Acton (1834-1902). Finnis writes: «The first theorist of government to articulate as a specific concept the desideratum that governmental authority/power be legally «limited» seems to have been Thomas Aquinas. (However, these questions of priority are not to be taken too seriously)». J. FINNIS, «Is Natural Law Theory Compatible with Limited Government?», 1.

¹⁸⁵ J. FINNIS, «The Catholic Church and Public Policy Debates», 261. He grants that Aquinas was not fully consistent by also justifying the punishment of heretics.

lar concept of the good life. Aquinas, according to Finnis, admits this position. However, according to Rowland, «A spirit of generosity towards those who are still imperfect in virtue does not make one a «Whig» or a «Liberal» [...]»¹⁸⁶. In turn, Finnis is claiming that the limitation of authority and the refusal to apply paternalistic laws is not a matter of benign leadership but one of principle¹⁸⁷. The issue echoes a central question in the earlier encounter – the extent to which the institutions of governance, by way of the law, may or may not legitimately intervene in the lives of individuals¹⁸⁸. It was then maintained that a central characteristic of rights is to limit (that is, those acts that are not acceptable) and legitimise (that is, those acts that are acceptable) state authority.

In response the central contention that I argue in this thesis is that reasoning according to the natural law may take account of the criticisms and key elements of the other traditions while remaining faithful to the resources of its own tradition¹⁸⁹.

To recall: the first principles of the natural law are differentiated according to a recognition, by way of practical reasoning reflecting on its own actions, of a plurality of goods, and the modes of responsibility that instantiate those goods and make up integral human flourishing. Implicit and necessary in this process is the free choice of each individual to pursue how they instantiate those goods in their lives. Furthermore, and also inherently in the process, is the need for common deliberation in order that the goods and the means to achieve them may be recognised and followed. Contemporary natural law can so account an individual responsibility of free choice and a common responsibility to deliberate on shared issues, while prioritising a responsibility to the other according to a just order. Furthermore, the three planes mutually constitute one another. Therefore, and in order for human flourishing to exist at all, all three responsibilities must be allowed to flourish: to deny any aspect of each is to diminish people's possibilities for attaining the good in their own lives. Consequently, a responsible govern-

¹⁸⁶ T. ROWLAND, *Culture and the Thomist Tradition*, 139-140.

¹⁸⁷ Of course, the limits on government and political authority are varied. For instance, authority is limited by positive law, local customs and moral principles. He continues, «Being “limited” is only to a limited extent a desirable characteristic of government anyway: bad and powerful people and groups want government limited so that they can bully and exploit the weak, or simply enjoy their wealth untroubled by care for others». J. FINNIS, «Is Natural Law Theory Compatible with Limited Government?», 1.

¹⁸⁸ Cf. Ch. VI, Sec. 5.1-5.4.

¹⁸⁹ Cf. Ch. VI, Sec. 7.1-7.2.

ment must be guided by the standards of justice (the first plane), respect for the freedom of the individual (the second plane) and a deep civil democratic culture of deliberation on how the human good may be concretely realised (the third plane). By being normatively guided by such principles, it is limited by such principles. Therefore, the limitation of authority according to the natural law and natural rights is not simply benign but a necessary requirement of the responsibilities of governance according to the principles of natural law.

Corresponding to each responsibility are the different categories of rights – *status positivus*, *status negativus*, *status actus*. In practice, such rights insist that political authority and state-structures, communities and individuals live up to their responsibilities; thereby, being guided and so limited by the norms that facilitate integral human flourishing. Rights may have many sources outside the Aristotelian-Thomist tradition of natural law but they are not necessarily incompatible or inconsistent with natural law models of moral reasoning. In effect then, human rights may continue to function similarly to the older natural law. To paraphrase the words of Michael Bertram-Crowe:

Not to labour the point, the doctrine of natural [and human] rights in many ways played, in the nineteenth century [and today], the part played by the natural law doctrine of former ages. That part might be described as the placing of a curb on the exercise of power in the political sphere (this is the particular force of the teaching on human rights) and the setting of objective standards of good and evil of individual conduct¹⁹⁰.

Rowland makes the kind of mistake identified by Henrich Rommen over fifty years ago. He warns against condemning elements of modernity, such as rights and the associated social structures of modern democracy, because they may have roots in an unacceptable political philosophy. He writes:

We must avoid the mistake of [some] Catholic writers [...] These writers attribute a kind of original sin to these political institutions, forgetting that what matters is not an admittedly wrong theoretical justification of a sound political institution, but its actual service to the common good under concrete conditions¹⁹¹.

Such «a kind of an original sin» is the point of departure of Rowland's criticism. However, what must be recognised is that rights do

¹⁹⁰ M. BERTRAM-CROWE, *The Changing Profile*, 244-245. Parenthesis added.

¹⁹¹ H.A. ROMMEN, «The Genealogy of Natural Rights», 405. He provides J.J. Rousseau as an example of an objectionable political philosophy to «Catholic writers of political romanticism».

play a vital part in the concrete advancement of the common good. To her question are rights inherently incompatible with the natural law tradition and the associated Catholic moral tradition, this thesis argues no. Importantly, human rights are not simply compatible: they may be viewed as important additions to the models of moral reasoning proposed by the natural law. In the words of Finnis:

If its logic and its place in practical reasonableness about human flourishing are kept in mind, the modern usage of claims of right as the principal counter in political discourse should be recognised (despite its dubious seventeenth-century origins and its abuse by fanatics, adventurers, and self-interested persons from the eighteenth century until today) as a valuable addition to the received vocabulary of practical reasonableness (i.e. to the tradition of ‘natural law’ doctrine)¹⁹².

9. Conclusion: Unresolved Questions

Far from being incapable of supporting rights, natural law theory is able to provide a comprehensive framework and mode of reasoning for their use. More importantly, it is able to provide a foundation and normatively guide the social and political associations that have come to sustain rights – namely, constitutional democracy. As observed by Charles Covell:

In one sense, then, Finnis was manifestly an assailant of modern liberalism [...] Yet in another sense, evident particularly in *Natural Law and Natural Rights* [...] he ultimately agreed with other theorists [...] in this case, Dworkin and Habermas] about the form of social and political organisation [constitutional democracy] which most faithfully answered to the aspirations of the common morality of Western civilisation¹⁹³.

Admittedly, the Aristotelian-Thomist tradition of natural law has not been at the forefront of the development of democracy. It may be said that when it came to accept the constitutional democratic political order as appropriate for the common good it was perhaps, to paraphrase Winston Churchill, because it is the best system of a bad lot¹⁹⁴.

¹⁹² J. FINNIS, *Natural Law and Natural Rights*, 221.

¹⁹³ C. COVELL, *In Defence of the Natural Law*, 224. Parenthesis added. Covell is speaking of Lon Fuller, Michael Oakeshott, F.A. Hayek and Ronald Dworkin.

¹⁹⁴ Historically, the natural law tradition limited the power of authority according to two requirements: an appeal to benign leadership and to the principle of subsidiarity. The first was recognised by Rowland above: smaller infringements of vice or wrong-doing were tolerated in the name of the wider social good and order. However, this is unacceptable in a constitutional democracy that accepts a rights-regime. Instead, power must be limited, according a principled recognition of the freedom of its

However, I argue that contemporary natural law is capable of providing a foundation for the very functioning of constitutional democracy and associated individual rights. More exactly and a key implication, contemporary natural law argues that the principles of constitutional democracy adhere to the very presumptions of practical reasoning. The natural law can, therefore, provide a grounding and normative guide for the functioning of the contemporary political order. Such a development may be viewed as example of what Finnis regards as the tradition working «itself pure, or is somewhat closer to having done so»¹⁹⁵.

But this points to a lacuna in the work of the New Natural Law theorists. They rarely turn their attention to an analysis of contemporary democracy. I suggest that this may be due to a lack of consideration to the concept of power and how it functions in society, particularly to the benefit of some over others. It is a vital issue for it distorts deliberation and justification in favour of powerful – whether they are established elites or well-organised social movements or lobby groups – and therefore interferes with the process of practical reasoning in society.

As argued by all three theorists, there is a responsibility at a social level on all those who hold positions of authority to continually justify their actions on the basis of good (or coherent or consensus-building) reasons. They must hold themselves open to question so that in the

citizens. The second is the principle of subsidiarity. Used extensively in Catholic Social Teaching, “Subsidiarity, understood *in the positive sense* as economic, institutional or juridical assistance offered to lesser social entities, entails a corresponding series of *negative* implications that requires the State to refrain from anything that would de facto restrict the existential space of the smaller essential cells of society. Their initiative, freedom and responsibility must not be supplanted. PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, *Compendium of Catholic Social Doctrine*, 185. Cf. PIUS XI, *Quadreagesimo Anno*, 80; JOHN PAUL II, *Centesimus Annus*, 48. The principle that power and responsibility should be placed at the lowest possible level places a limit on state power. But it also implies «*participation* [...] which [...] contributes to the cultural, economic, political and social life of the civil community [...] with a view to the common good»¹⁹⁴. PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, *Compendium of Catholic Social Doctrine*, 185. Cf. PAUL VI, *Octogesima Adeniens*, 22, 46; SECOND VATICAN ECUMENICAL COUNCIL, *Gaudium et Spes*, 75. It was in accordance to this principle that constitutional democracy came to be accepted. However, I wish to argue that rather than being a characteristic implication of one of its principles, democracy adheres to the very presumptions of how the natural law operates.

¹⁹⁵ J. FINNIS, «Natural Law and Discourse Ethics», 371. He writes, «On these [slavery and capital punishment] and a number of other matters the tradition has worked itself pure, or is somewhat closer to having done so. It has always been, essentially, a reflection on the inherent directiveness of the basic reasons for action, and a friendly *disputatio* grounded on reasons, not in mere appeals to the «authority» of anyone, not even Aristotle or Plato».

common and continual deliberation the best reasons come to the fore. Such responsibility may be described as answerability, or at a social level, accountability. Accountability, I put forward, is a potential counter-point, and so a normative principle, to which power must accede, if it wishes to become legitimate authority and sustain ongoing deliberation. This lacuna, I propose, is best filled by a greater dialogue with contemporary sociology.

I now turn to the final part of this thesis in which the considerations of this chapter are placed within a theological horizon.

PART FOUR
FOUNDATION

CHAPTER VII

Theological Deliberations

1. Introduction

Thus far, this thesis has moved through distinct phases, namely History (Chapter I-II), Interpretation (Chapter III-V) and Dialectic (Chapter VI). Briefly sketched in the Introduction, the stages provided a heuristic structure: «method offers not rules to be followed blindly but a framework for creativity»¹. Each presupposed and built upon the results of the former and, implicitly, each aimed towards the subsequent stage and a final goal².

The movement may be characterised as a progression from exposition (History and Interpretation) to evaluation (Dialectic). The course of the evaluation committed the thesis to a specific viewpoint or tradition of enquiry – the Aristotelian-Thomist tradition of natural law – or, in Lonergan's terms, a particular «horizon». The present methodological category of Foundation takes a further step. It completes the progression from exposition and evaluation towards a stance on «the added foundation needed to move from the indirect discourse that sets forth the convictions and opinions of others to the direct discourse that states what is so»³.

¹ B. LONERGAN, *Method in Theology*, xi; cf. ID., «Metaphysics as Horizon», 202-221.

² Cf. Intro, Sec. 4. ff; Ch. 6.1.

³ B. LONERGAN, *Method in Theology*, 267.

2. The Theological Horizon

Lonergan contented that at «its real root» the functional specialisation of Foundation occurs in the human experience of deliberation, evaluation and decision. At one level, deliberation, evaluation and decision provided the heuristic structure or form of the project undertaken in this thesis. But at another, they pointed to its very content – the internal structures of deliberation and justification that provide norms or principles for evaluation and correct decision making according to three theorists representative of three traditions of enquiry. It may be said therefore that this whole thesis has been concerned with the study of Foundations.

In the comparative stage some similarities between the theorists were observed: for instance, a common personal commitment to enter the public debate; a shared purpose in defending rights and the contemporary political order; a critique of some perceived failures in the political order and of positions hostile to rights; and similar internal dynamics of their theories⁴. But there are also differences. To return to Lonergan's terms, such differences may be genetic, complimentary or dialectic⁵. The process of comparison in the last chapter revealed dialectical differences between horizons. At base, what is considered intelligible, true or good for one is considered un-intelligible, false or bad for another: for example, their disagreement on the fundamental nature of practical reasoning and the corresponding explanation of what counts as a good and just reason for action.

Differences between them at this level are so great that they may only be bridged by conversion. To move to a new horizon dialectically opposed to another requires a conscious decision, an about face or new beginning. A conversion between horizons may be intellectual, moral or religious. The first turns towards reality and objectivity; the second changes the criteria of decision making; the third is the affirmation of self-transcendence. According to Lonergan, «Foundational reality, as distinct from its expression, is conversion: religious, moral, and intellectual [...] It is a fully conscious decision about one's horizon, one's outlook, one's world-view»⁶.

⁴ Cf. Ch. VI, Sec. 3-4.

⁵ Cf. Ch. VI, Sec. 5-6.

⁶ B. LONERGAN, *Method in Theology*, 268 ff. In a narrow sense, «Foundation» may be considered simply as that point from which all else follows. But Lonergan is speaking of a more complex ordering of an ongoing, developing reality in which «the first (Foundation) is the immanent and operative set of norms that guides each forward step in the process». Parenthesis Added. He considers the narrow sense to be

The course of the Dialectic, in the previous chapter, overtly committed this thesis to the natural law tradition of enquiry, and its adaptation to accommodate rights-language. The thesis argues for the central role of the good in substantive moral reasoning and in guiding the political order, epitomised by this model. The Aristotelian-Thomist tradition of natural law and theory provides the horizon for the thesis as whole, influencing it from the beginning; for instance, the attention paid to the medieval origins of rights.

But implicit is a further horizon – the theological. For example, both the tradition and the theorist are associated with the Roman Catholic theological tradition of moral enquiry. Although *Natural Law and Natural Rights* is a work of philosophical jurisprudence, John Finnis explicitly refers to «the Roman Catholic Church’s pronouncements on natural law, because that body is perhaps unique in the modern world in claiming to be an authoritative exponent of natural law»⁷.

It is the theological horizon that provides the foundational reality for this thesis, as described by Lonergan above. It is its most basic and fundamental horizon. Considered in this manner, this dissertation has always been a theological thesis; albeit, one that commits itself from the beginning to take the philosophical debate seriously. In light of the progression of this thesis, Lonergan is worth quoting in length:

Neither the converted not the unconverted are to be excluded from the research, interpretation, history, or dialectic. [...] Such different histories, different interpretations, and their underlying different styles in research become the centre of attention in dialectic. There they will be reduced to their roots. But the reduction itself will only reveal the converted with one set of roots and the unconverted with a number of different sets. Conversion is a matter of moving from one set of roots to another. [...] It is a process that may be occasioned by scientific inquiry. But it occurs only inasmuch as a man discovers what is unauthentic in himself and turns away from it, inasmuch as he discovers what the fullness of human authenticity can be and embraces it with his whole being. It is something very cognate to the Christian gospel, which cries out: Repent! The kingdom of God is at hand⁸.

This section is the explicit consideration of the implicit commitments to a theological horizon. The aim of the Chapter as a whole is to place

static. Instead, the wider meaning aims at «decreasing darkness and increasing light and keeps adding discovery to discovery».

⁷ J. FINNIS, *Natural Law and Natural Rights*, vi.

⁸ B. LONERGAN, *Method in Theology*, 271; cf. D. TRACEY, *The Achievement of Bernard Lonergan*, 247-251.

the natural law grounding of human rights outlined in the previous chapter within and consonant to a Christian theological vision.

3. Situating the Theological Discussion

As the widest horizon of the thesis, Part One – History – turned partially on the role of Christian theology, and in particular Roman Catholic theology⁹. It began by charting the rise of rights from the initial systematisation of canon law and the subsequent jurisprudence of church lawyers in the twelfth century. It finished with an analysis of the assertion of a variety of rights, related to the duties of each according to the common good, made by Pope John XXIII in *Pacem in Terris* (1963). Furthermore, the two chapters that comprised this Part were divided at the beginnings of modernity, characterised as that point in the mid-seventeenth century which discarded the core of what went previously. «In this decisive moment of amnesia, theology – or the rejection of it – played a central part»¹⁰.

It was in response to this aspect of modernity that Roman Catholicism rejected the newly prominent rights-rhetoric¹¹. As a result, it downplayed the role of an inherent rights language within its own scholastic and natural law tradition, which is only being fully acknowledged by scholarly research today¹². The negative response to modernity had both socio-political and intellectual dimensions. John Langan writes about the political inclinations of the Church: «Catholicism's institutional sympathies during most of the nineteenth century were with a conservatism which had its roots in the *ancien régime*. It is important neither to conceal nor to overstate these sympathies»¹³. But there were also deep intellectual differences¹⁴. For in-

⁹ I concede that there are variations in approaches to rights between various denominations. For instance, «Protestant opposition to rights language was not as strong or perduring [sic] as Catholic opposition». C. CURRAN, «Churches and Human Rights», 58, n.1. However, this thesis shall focus on Catholic theology. At base, however, it may be said that both perspectives acknowledge similar groundings: the equal dignity and worth of a human being is explained in terms of the person's relationship to God. Cf. J. ALLEN, «A Theological Approach», 119-141.

¹⁰ O. O'DONOVAN – J. LOCKWOOD-O'DONOVAN, *Irenaeus to Grotius*, xviii.

¹¹ Roman Catholicism was not alone. As observed in Part One, there were many strong historical currents of criticism to rights including Luther and early Protestantism, traditionalists such as Burke and communists such as Marx, cf. Ch. I, Sec. 5.2; Ch. II, Sec. 4.1.

¹² Cf. Ch. I.

¹³ J. LANGAN, «Human Rights in Roman Catholicism», 117.

¹⁴ Cf. Ch. II, Sec. 1.

stance, theology viewed with scepticism the turn to the subject and the decline of metaphysics¹⁵.

According to E. Martinez-Fernandez, the movement from rejection to accommodation may be charted in three phases. The first began with hostility and condemnation (1789-1878); the second was a stage of transition and cautious interest (1878-1958); the final period moved towards an acceptance of their significance and continues to this day (1958 -)¹⁶.

The primary catalyst for the appropriation of rights-language was the developing social teaching of the church. Although social teaching was always present in the tradition, by engaging with modern social dilemmas, Catholic social teaching took a new explicit form in the declaration of *Rerum Novarum* (1891)¹⁷. Initially, the language of church teaching in this area did not consist of individual subjective rights¹⁸. Rather, the justice for workers and the poor it wished to affirm was viewed as the necessary result of the duties of all under the natural law. Subsequent documents continued to engage with changing socio-economic and political issues in light of the experiences of the church and the demands of the Gospel. The encyclical *Pacem in Terris* (1963) was the first to be explicitly expressed in rights-language. Of this document, Langan claims that it represents, along with the experience and documents of the Second Vatican Council, a

¹⁵ Cf. J. KOMANCHAK, «Modernity and the Construction of Roman Catholicism», 357 ff; C. CURRAN, «Churches and Human Rights», 38-41.

¹⁶ E. MARTINEZ-FERNANDEZ, «Los Derechos humano y la doctrina social de la Iglesia», 149-182. There was even a cool reaction to the United Nations Declaration on Human Rights, perhaps in part due to the omission of God, and part due to their perceived secular anti-clerical history, cf. F. COMPAGNONI, *I diritti dell uomo: genesi, storia e impegno cristiano*.

¹⁷ Cf. Ch. II, Sec. 5.4. For an overview of the historical development of Christian Social Teaching; cf. J. BOSWELL – F.P. MCHUGH – J. VERSTRATEN, ed., *Catholic Social Thought*; R. CHARLES, *Christian Social Witness*; C. CURRAN – R. MCCORMICK, ed., *Readings in Moral Theology*, V, 3-167; D. DORR, *Option for the Poor*.

¹⁸ Thomas D. Williams describes *Rerum Novarum* as «a veritable Magna Carta of rights» and that «Leo XIII not only invoked rights more frequently [than his predecessors], he also showed an increased affinity to the Liberal use of the term». T.D. Williams, *Who is my Neighbour?*, 32-37. Williams, as many others, presumes a similarity in the type of rights used by Leo XIII and those of the late twentieth century Popes. There is, however, quite a marked difference. The former is characterised by its dependence on the compliance of the duty-holder to fulfil her obligation in justice; the latter emphasises the active claims made by the other to bind the duty-holder. They correspond, in part, to passive and active models of natural rights identified in Chapter I.

resolution of Catholicism's «long struggle with modernising and secularising culture of the West»¹⁹.

Allowing for particular socio-political interests, the motivation for the social teaching of the Church has been primarily inspired by its pursuit of its religious mission, and as a consequence, the desire to protect the Church's freedom to do so²⁰. As *Gaudium et Spes* (1965) declared, «In virtue of the Gospel entrusted to it, the Church proclaims the rights of man: she acknowledges and holds in high esteem the dynamic approach of today which is fostering these rights all over the world»²¹.

Among the many documents of Church social teaching, important elements may be discerned which have underpinned the church's use of rights²²: the priority of the social commitment; the assertion of the dignity of the human person; the preferred place of the poor; the common good; solidarity and subsidiarity²³. The use of rights-language has become extensive throughout the official teaching documents, the statements of local Episcopacies, the reflections of theologians and the actions of lay Christian advocacy groups²⁴. Today, the Catholic Church and the Papacy are considered by many to be significant upholders of many human rights, both at a local and global level²⁵.

¹⁹ J. LANGAN, «Human Rights in Roman Catholicism», 110.

²⁰ D. HOLLENBACH, *Claims in Conflict*, 44.

²¹ *Gaudium et Spes*, 41.

²² Contemporary Magisterial documents are replete with rights language. For an extensive thematic collection to the many references to rights in the teaching of the Roman Catholic Magisterium, cf. G. FILIBECK, ed., *Human Rights in the Teaching of the Church*. Interestingly, the point of departure of this book is also the theme of mission. For a summary of the church's commitment to rights cf. PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, *Compendium of the Social Doctrine of the Church*, 84-88. The core commitments are listed by John Paul II in *Centesimus Annus*, 47. *The Catechism of the Catholic Church* (1992) mentions rights on at least forty-eight different occasions. The 1983 *Code of Canon Law* declares the «fundamental rights of human beings» (CIC 747 §2) and gives a section over to «the obligations and rights of all the faithful» (CIC 280-283).

²³ For a fuller listing, cf. PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, *Compendium of the Social Doctrine of the Church*, 61-122. The Compendium devotes a complete chapter (chapter three) to the foundation and explication of rights; cf. PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, *Compendium of the Social Doctrine of the Church*, 61-90. LEAHY, B., ed., *No Peace without Justice, No Justice with Forgiveness*, Dublin 2006.

²⁴ For bibliographical references to the statements at the level of local church, cf. T. MCGOLDRICK, «Episcopal Conferences World-wide», 22-50.

²⁵ For instance, John Paul II was named as «Person of the Year» by *Time Magazine*, in 1994, in part, for his commitment to human dignity and human rights. Mary

3.1 *A Challenge*

The above all too brief charting of the historical ecclesial movement towards rights-rhetoric is made at this point in order to raise an important challenge, critical to a theological reflection upon rights. Joan Lockwood-O'Donovan warns against a common pitfall associated with the simple placing of rights language within a theological framework. The caution she raises is this: if rights substantially evolved outside a theological vision, as claimed by some in Chapter II, the appropriation of rights may necessarily entail the adoption of an alien framework incompatible with that vision. The necessity of an in-depth historical section to begin this thesis takes further significance in light of her challenge.

The challenge is similar to the one posed by Tracey Rowland in Chapter VI. She maintains that the use of rights by the New Natural Law is contradictory for it admits a liberal ideology that is necessarily in conflict with the Thomist tradition²⁶. In response, it is argued by this thesis that this is not the case: the tradition has resources within itself to respond the challenges of other traditions without admitting an alien conceptual framework²⁷.

Yet, as Lockwood-O'Donovan rightly points out, the dominant model of rights in the contemporary Western world is that of the liberal tradition²⁸. Similar to the observations made thus far in this thesis, she argues that the central conceptual content of this tradition are property rights, contractual relationships and freedom of choice²⁹. The anthropological vision that this implies is of an individual «paradigmatically engaged in disposing, using, exchanging, commanding and demanding»³⁰. Therefore,

Ann Glendon, a professor of Harvard Law School, writes, «the Church has emerged as, intellectually and institutionally, the single most influential champion of the whole, interconnected, body of principles in the Universal Declaration». M.A. GLENDON, «Rights Babel», 623. Of course, it is important to admit that there are many who would disagree and consider the Catholic Church to be a significant obstacle in the path of the implementation of many rights.

²⁶ By ideology is meant «a smoke screen to conceal vested interests». Cf. J.M. LOCHMAN, «Ideology or Theology of Human Rights?», 15.

²⁷ Cf. Ch. VI, Sec. 7.

²⁸ Cf. App. C. She cites Thomas Hobbes (cf. Ch. II, Sec. 2.2), John Locke (cf. Ch. II, Sec. 2.4), Immanuel Kant (cf. Ch II, Sec. 3.4) and contemporary liberals such as Robert Nozick and John Rawls (cf. Ch. V, Sec. 4).

²⁹ Cf. Ch. II, Sec. 2.2.4; Ch. VI, Sec 5.

³⁰ J. LOCKWOOD-O'DONOVAN, «Historical Prolegomena», 64.

the equality of individuals is economic before it is political: behind the multitude of naturally self-governing individuals, whose sovereign collective will government serves, is a multitude of naturally self-owning individuals [...]³¹.

But such a politico-philosophical anthropology, she argues, is opposed to a theological vision, sourced in scriptures, the early Fathers or the Aristotelian-Thomist tradition. She warns that theologians should not uncritically «adopt a child of such questionable parentage as the concept of human rights»³². Theologians and Christians may be overly optimistic in their belief about rights. Such optimism, she contends, encourages the deployment of a counterproductive language that undermines an authentic Christian vision (which is given further consideration later in this chapter). As a result, an uncritical embrace of rights can inhibit Christianity itself – that is, the building of the Kingdom. She offers a condemning evaluation of much of the contemporary theological assimilation of rights: «My impression is that theologians are frequently engaged in a naïve and facile appropriation of the language of rights»³³. Her alarm is not unique. Others urging vigilance include previously mentioned Tracey Rowland and Ernst Fortin³⁴ and others such as Kenneth Craycraft³⁵, James Schall³⁶, Stanley Hauerwas³⁷.

Kieran Cronin, in *Rights and Christian Ethics*, observes two main types of scepticism – conceptual and moral – which broadly coincide with the meta-ethical and normative distinction³⁸. The first claims that

³¹ J. O'DONOVAN, «Rights, Law and Political Community», 30.

³² J. LOCKWOOD-O'DONOVAN, «Historical Prolegomena», 52.

³³ J. LOCKWOOD-O'DONOVAN, «Historical Prolegomena», 53.

³⁴ Cf. E. FORTIN, «The New Rights Theory and the Natural Law». 247-59.

³⁵ K.R. CRAYCRAFT, «Religion as Moral Duty», 55-70, 60. He writes, «The Church has adopted a language that may be irreconcilable with its more ancient and basic claims about man and his relationship to God».

³⁶ J. SCHALL, «Human Rights», 51-61.

³⁷ For instance, Stanley Hauerwas writes: «natural law is often expressed today in the language of universal rights – the right to be free, to worship, to speak, to choose one's vocation, etc. Such language, at least in principle, seems to embody the highest human ideals. But it also facilitates the assumption that since anyone who denies such rights is morally obtuse and should be «forced» to recognise the error of his ways. Indeed, we overlook too easily how the language of «rights», in spite of its potential for good, contains within its logic a powerful justification for violence. Our rights «absolutises the relative» in the name of a universal that is profoundly limited and limiting just to the extent that it tempts us to substitute some moral ideal for our faithfulness to God». S. HAUERWAS, *The Peacable Kingdom*, 61.

³⁸ K. CRONIN, *Rights and Christian Ethics*, 57-80; 81-114. For the an outline of the type of questions raised by the use of rights, cf. A. GERWITH, «Why Rights are Indis-

rights have no logical or epistemological coherence or grounding³⁹. Many theologians who accept rights, he laments, presume the basic logical respectability of the concept⁴⁰. Instead, any moral-theological opposition to the language of rights tends to be normative. Examples of such critique include: rights foster individualism and egoism to the detriment of social solidarity⁴¹; they create an adversarial culture counteracting social harmony and peace⁴²; or they obstruct a deep trust in the providence of God⁴³.

Lockwood-O'Donovan represents this latter type of scepticism. Rights act as a Trojan horse – to accept them is to accept unwelcome propositions about society and the human person that contradict and ultimately undermine more important values and the means to protect those values. To a degree, she is reflecting the critique and caution towards rights made by Burke, Marx and the nineteenth-century Popes⁴⁴. Despite the extensive acceptance of rights by the teaching authorities of the Catholic Church and other Christian denominations, Lockwood-O'Donovan still doubts that a successful adoption is possible:

Christian political thought (both Catholic and Protestant) that is not wholly complacent with this fabric [of democratic, pluralistic, technological liberalism] recognises the need to divest the concept of rights of its offensive theoretical material, but when it attempts to rescue conceptual threads from the fabric the result inevitably falls short: either too much of the fabric adheres to the threads or they lose their coherent texture⁴⁵.

The challenge is worth recounting because it cuts to the central question of this thesis – what is at stake in the use of rights? According to Lockwood-O'Donovan and others what is at stake is too much to risk. For theological defenders of rights-rhetoric what is at stake is such that human rights are an important, if not necessary, aid in the advancement of the theological vision.

A historical prolegomena also provides further theological challenges. For instance, the historical chapters of this thesis and the observations of Lockwood O'Donovan draw attention to what is ab-

pensable?», 329-344. Further works include A. GERWITH, *Human Rights*; ID., *Reason and Morality*.

³⁹ Cf. Ch. II, Sec. 5.2.1.

⁴⁰ K. CRONIN, *Rights and Christian Ethics*, 57.

⁴¹ Cf. M.A. GLENDON, *Rights-Talk*, 17 ff.

⁴² Cf. S. HAUWERVAS, *The Peaceable Kingdom*, 61 ff.

⁴³ Cf. K. CRONIN, *Rights and Christian Ethics*, 81 ff.

⁴⁴ Cf. Ch. II, Sec. 4.1.

⁴⁵ J. LOCKWOOD-O'DONOVAN, «Historical Prolegomena», 55.

sent. Rights – understood as possessive claims or entitlements predicated to the individual subject – are not immediately evident in the Scriptures or the early Tradition. In fact, they are not present at all. As Barnabas Mary Ahern attests «It would be anachronistic to try to match details of this highly developed doctrine [human rights] with precise provisions and explicit statements in the books of the Bible which belong to an entirely different age»⁴⁶. How then may a Catholic theology and the Magisterium interpret these two primary sources of Revelation (scripture and tradition) in order to provide a foundation for rights that is consonant with those sources and so not fall foul of the above danger?

3.2 Methodological Approaches

Concisely, the contemporary theoretical foundation by Catholic theology of human rights, and their defence and propagation, is twofold – in line with its commitment to the fundamental compatibility of nature and grace. As observed in the working papers of the Roman Catholic International Theological Commission:

The example of the 2nd Vatican Council and of recent popes is interesting for methodology. Although first appealing to human experience and human reason, they have then looked as well to both the doctrine of creation (image of God; supernatural destiny) and to Christ and the Gospel for additional supports of human dignity and human rights⁴⁷.

Rights may be supported according to two pillars; the dictates of reason and the truths of revelation. Of this twofold method, David Hollenbach observes that it is a fundamental commitment of Catholic theology to both reason and faith in moral and dogmatic reflection which creates one of the deep biases of the catholic tradition to respond to issues with a both/and rather than either/or⁴⁸. Evident throughout the documents of the Magisterium, it is captured by the first section of *Pacem in Terris*. Firstly,

Any human society, if it is to be well-ordered and productive, must lay down as a foundation this principle, namely, that every human being is a person, that is, his *nature* is endowed with intelligence and free will. By virtues of this, he has rights and duties of his own, flowing directly and si-

⁴⁶ Cf. B.M. AHERN, «Biblical Doctrine», 301. He continues, «No sacred writer would have thought of using the term ‘human dignity’».

⁴⁷ Cf. W. PRINCIPE, «The Rights of the Human Person», 392 ff.

⁴⁸ Cf. D. HOLLENBACH, *Justice, Peace, and Human Rights*, 93 ff.

multaneously from his very nature, which are therefore universal, inviolable and inalienable⁴⁹.

That is immediately followed by the statement

If we look upon the dignity of the human person in the light of divinely revealed truth, we cannot help but esteem it far more highly; for men are redeemed by the blood of Jesus Christ, they are by *grace* the children and friends of God and heirs of eternal glory⁵⁰.

Walter Kasper has described this methodological approach as an ascending argument of natural law supplemented by a «descending specifically theological argument»⁵¹. For instance, a paper intended to foster the reflection upon and advocacy for human rights published by the Pontifical Commission on Justice and Peace, entitled *The Church and Human Rights*, organises much of its material according to the plane of reason (art. 36-39) and the plane of faith (art. 40-44)⁵².

Within an implicit theological horizon, this thesis has thus far focused largely on the elaboration of human rights according to philosophers, historians, sociologists and jurists – the first pillar. The present chapter turns to the specific claims and insights of Christian theology – the second pillar. Its most fundamental presupposition, then, is faith. In the words of the International Theological Commission reflecting on the rights and dignity of the human person,

Even if Jesus Christ may be seen as the culmination of all human longing for union with God, the Incarnation and the Saving Work of Jesus Christ are the mysteries unattainable by unaided human reason and unprovable by reason once they have been revealed; they can be investigated only within faith⁵³.

Firstly, the following chapter will further trace the implications this bi-directional approach. Secondly, it will trace a movement between the theological reasons offered for the dignity of the human person and a consonant model and employment of human rights.

⁴⁹ *Pacem in Terris*, 9. Italics added.

⁵⁰ *Pacem in Terris*, 9. Italics added.

⁵¹ W. KASPER, «The Theological Foundation», 59-60.

⁵² Cf. PONTIFICAL COMMISSION JUSTICE AND PEACE, *The Church and Human Rights*, 21-32.

⁵³ Cf. W. PRINCIPE, «The Rights of the Human Person», 391.

4. The Relationship between Faith and Ethics

At base, the scepticism of Lockwood-O'Donovan turns on the relationship between models of faith and ethics – the vision of the former is threatened by the presumptions of the latter. In *Faith and Ethics*, Vincent MacNamara surveys the debates and developments of Roman Catholic moral theology of the past hundred years in light this relationship. It reveals a «situation usually characterised as a clear division between the autonomous ethic and the *Glaubensethik*»⁵⁴. In admittedly crude terms, the «Autonomy» school rejects any specific Christian moral norms beyond what may be discerned by reason alone and the «*Glaubensethik*» (Faith-Ethic) school claims that some content of morality may be revealed and so specific to Christianity. Both schools of thought do claim the distinctiveness of Christian ethics: the former argues that faith provides a unique motivation for moral action; the latter claims that faith provides both motivation and some distinctive norms to guide moral action⁵⁵.

Of the former, «Most uncompromising of all is the position of Gerard Hughes»⁵⁶. Hughes writes, «We stand on essentially the same footing as secular moralists [...] Our Christian faith cannot supplement the knowledge of ethics which is available to us apart from Christian revelation»⁵⁷. Therefore, «We should not use Scripture or Tradition as the ultimate authority for deciding *any* moral issue»⁵⁸. Instead, faith makes available to moral action a motivation that marks the Christian different from a person of good will.

In a two-part article entitled, «Reflections on an Essay in Christian Ethics», Finnis agrees with Hughes's starting point that a credible basis for ethics may be provided outside of Revelation⁵⁹. But he re-

⁵⁴ V. MACNAMARA, *Faith and Ethics*. 1-66.

⁵⁵ For further reading on the debate, cf. C. CURRAN – R. MCCORMICK, ed., *Readings in Moral Theology*, II; V. MACNAMARA, *Faith and Ethics*.

⁵⁶ V. MACNAMARA, *Faith and Ethics*, 49. He notes that Hughes, as Finnis, is of the Anglo-American tradition of analytic philosophy.

⁵⁷ G. HUGHES, *Authority in Morals*, 24. Later, he writes: «I have accordingly argued that the appeal to Christian tradition cannot be an ultimate appeal; and that the appeal to moral principles as though they were ultimately authoritative misrepresents their true philosophical status». G. HUGHES, *Authority in Morals*, 91.

⁵⁸ G. HUGHES, «A Christian Basis for Ethics», 24-43, 43; ID., «Infallibility in Morals», 415-428.

⁵⁹ J. FINNIS, «Reflections on an Essay in Christian Ethics. Part One», 51-58; ID., «Reflections on an Essay in Christian Ethics. Part Two», 87-93. The second article rejects the inherent consequentialism of Hughes's work for reasons already touched upon, cf. Ch. VI, Sec. 4.

jects Hughes's conclusion (and by association, much of the Autonomy school). In the first of the two reflections, he argues that Hughes misunderstands the claims of authority made for Revelation (transmitted by way of Scripture, Tradition and Magisterium) in Catholic moral theology, for he «slides back and forth between two quite different senses of 'ultimate'»⁶⁰. The first sense is «exclusive» or «exclusionary»; the second meaning is «conclusive», «with certainty» or «of convincing force». Understood in this latter way, Revelation can claim ultimate authority without being the only or unique court of appeal in considering moral issues. It does not override antecedent rational argumentation, as implied by the former sense. The appeal to Revelation's authority, therefore, is not an attempt to circumvent independent moral reasoning but to clarify, correct, guide and support moral beliefs and practices⁶¹. Rather than mere motivation towards moral action, Revelation provides a resource to moral reflection for the Christian that supplements, and not substitutes, the partial justifications of a person of good will.

4.1 *Theological Reasons for Action*

A central aspect of the dialectical encounter of the previous chapter concerned the provision of intelligible reasons in the justification of moral norms and action⁶². At that point, an initial distinction was made between motivation and justification. Vincent MacNamara observes that the above debate also revolves, in part, on this distinction. The Autonomy school, he notes, confusingly uses the term «motivation». Motives may be described as intelligible reasons for action.

But motives are particular kinds of reason, or reasons under a particular aspect. All motives are reasons, but not all reasons are motives. We are interested in moral reasons and one may have a moral reason for doing some-

⁶⁰ J. FINNIS, «Reflections on an Essay in Christian Ethics. Part One», 52. He continues: «(A) x is ultimately authoritative if, and only if, it provides an answer to a [moral] question *in the absence* of any other considerations supporting either that answer in particular or the authority of x in general. (B) x is ultimately authoritative if, and only if, it constitutes a *conclusive* argument for a certain answer to a [moral] question, even though there are other arguments or considerations supporting that answer in particular and/or the authority of x in general [...] Catholic theology [...] considers that God's will as revealed in scripture (interpreted by tradition) is ultimately authoritative in sense (B) but *not* in sense (A)».

⁶¹ Cf. J. FINNIS, «Reflections on an Essay in Christian Ethics. Part One», 55-58.

⁶² Cf. Ch. VI, Sec. 6.1-6.4.

thing without thereby having a motive [...] reasons for action can be independent of motives⁶³.

Although difficult to clearly distinguish, motives may be said to explain behaviour from a pragmatic, psychological or causal point of view. But on their own, they do not necessarily provide a justification for a moral act. Justification provides reasons for why an act is determined, evaluated or judged to be good or beneficial or right. A justifying reason is «a consideration which entitles one to say that to act thus is to act morally. A motive [...] does not»⁶⁴.

MacNamara criticises the Autonomy school for ambiguity. He argues that the resources of Revelation do supply reasons to the Christian that make certain choices intelligible and allow certain actions to be judged as morally appropriate. Such reasons do not merely provide a motivation but also a framework and a final ground of their judgments. In turn, such reasons will determine some specifically Christian moral actions – for example, choosing to be poor, commitment to virginity or celibacy, not to take up arms or to bear suffering with dignity.

What is involved here is the determination of the moral response. It is difficult for human beings to determine its extent. The Christian allows belief in Christ or in the Father to fill out his or her understanding. What is in question, therefore, is not the arousing of desire to implement a moral judgment already arrived at; it is not motivation but understanding of the moral demand⁶⁵.

The assertion is drawn upon by Kieran Cronin: «What MacNamara is saying, [...] is that one must take a step back beyond motives to the justifying reasons which move people. And [...], one will find reasons based on religious beliefs, which distinguish the actions of Christians from those of non-Christians»⁶⁶. Importantly, asserting reasons on religious grounds does not mean that reasons on other grounds are insignificant, may be ignored or are automatically wrong. As noted above, Catholic moral theology maintains that Revelation supplements rather than substitutes moral reasoning. He continues,

I am claiming that religious beliefs provide ultimate justifying reasons for acting morally without contradicting the fundamental natural law reasons. I use two different terms - «ultimate» and «fundamental» - to qualify the dif-

⁶³ V. MACNAMARA, *Faith and Ethics*, 104.

⁶⁴ V. MACNAMARA, *Faith and Ethics*, 105.

⁶⁵ V. MACNAMARA, *Faith and Ethics*, 109.

⁶⁶ K. CRONIN, *Rights and Christian Ethics*, 240.

ferent kinds of reasons here, because I want to maintain their complementary roles in moral reasoning within Christian ethics⁶⁷.

It may be said that Cronin's use of the term «fundamental» may be paralleled to Finnis's «basic goods». Moreover, his use of the term «ultimate» corresponds to that of Finnis. Revelation provides for Christians an authoritative source of reasons that justify their moral actions. Theologically informed reasons for action are those justifications offered for action according to the central tenets of belief (such as dogma or the creed), texts (such as the scriptures), symbols (such as the liturgy) and traditions (such as types of spirituality). From the point of view of belief, actions are judged as morally good to the extent that they reflect the truth perceived in faith. It is in this manner that «theological reasons for action» provide the explication of the final ground or foundation for Christian moral activity.

4.2 *Taking Theological Reasons Seriously*

As previously outlined, the second pillar of the Roman Catholic foundation for rights is based on theological reasons. Not all who consider rights do so naively; taking such reasons seriously is important for believers, wider society, and theology itself⁶⁸.

Firstly, such reasons are critical for believers because, as Cronin continues, «the moral focus will be on patterns of action which reflect the truth about human life in this world. And central to this truth is the existence of a God in whom one lives and moves and has one's being»⁶⁹. Christian belief bears an imperative to consider and justify one's actions in the light of faith. At a social level, it compels the Christian community to attempt to bring the conceptual categories of theology to bear on societal life and common enterprise; or in this case, on the correct ordering of justice, the employment of rights and the theory and practice of the law. On one hand, theology may critique systems of justice, rights and law that are considered incompatible with its central truths. On the other, it may constructively engage with other disciplines focused on these areas, such as jurisprudence, in order to constructively correlate their central questions and concerns.

⁶⁷ K. CRONIN, *Rights and Christian Ethics*, 242.

⁶⁸ This may be supported by even a cursory review of the literature in theological journals. For instance, around 1998, many journals responded to the fiftieth anniversary of the United Nations Declaration in a constructively critical, as much as celebratory, manner; cf. *La Civiltà Cattolica* 3538 (1998); *Morlia*, 21 (1998) 4; *Rivista di Teologia Morale*, 30, (1998) 4; *Milltown Studies*, 42 (1998).

⁶⁹ K. CRONIN, *Rights and Christian Ethics*, 243.

But, and secondly, how can theologically informed reasons for action inform the wider debate about rights outside a specific Christian community? It is still largely dominated by the secular theorists; a situation reflected in this thesis⁷⁰. As already outlined, this is partly due to historical reasons; rights gained momentum when severed from their original theological moorings. Indeed, some theorists, such as Leo Strauss, argue that reflection on human rights «should be kept independent of theology and its controversies»⁷¹. However, as brought out in the expositions and comparative study of the contemporary debate, there is no value-free means (as proposed by legal positivism) to analyse the law, justice and human rights. In contemporary society, the legitimate rule of law based on rights must be continually informed by understandings of the good, according to Finnis, principles of political morality, as observed by Dworkin, or engagement by the participants in the process of deliberative democracy, as proposed by Habermas. The rule of law is value-laden. There is a responsibility on everyone, and particularly on the holders of authority, to take account of and provide a continual clarification and justification for the values or goods that inform the rule of law⁷². Theology has a valid part to play in that process – either, as noted in the previous paragraph, in the form of ideological critique or by a constructive engagement that proposes a common correspondence between the implications of the central tenets of theology and the concerns of jurisprudence, sociology, political science and other human sciences. Indeed, theology may offer a counter-balance to some extremes in the secular debate.

Thirdly, theology reflecting on rights needs to take its own reasons seriously. As will be argued in the next section, a simple appeal to their appropriateness is not enough. In fact, such a straightforward assertion by theologians can lead to potential dangers. To return to the challenge of Lockwood-O'Donovan:

Across denominational boundaries there is a quite a predictable argument from the creation of human-kind in God's image to the unique dignity of persons in community to their universal possession of rights [...] there ap-

⁷⁰ Cf. D. PATTERSON, ed., *Cambridge Companion to the Philosophy of Law and Legal Theory*. Of forty-two chapters, it has only one chapter on the potential conceptual relationships between theology and law and another on the constitutional arrangements between state law and religion. In this work, to focus solely on theological or natural law theorists would be to remain unconnected and ultimately misconstrue the wider debate.

⁷¹ L. STRAUSS, *Natural Rights and History*, 164.

⁷² Cf. Ch. VI, Sec. 4.

pears to be a consensus about the unproblematic nature of the move from human dignity to human rights once the theological «foundation» or «analogy» is prepared⁷³.

In allowing for her concerns, the next sections of this chapter dwell on the «logic» that moves from the dignity of the person – as proposed by natural reason or revelation – to human rights.

5. From Human Dignity to Human Rights

The assertion of human dignity plays an important role in contemporary rights declarations and their political protection and promotion⁷⁴. The Preamble of the *United Nations Declaration on Human Rights* (1948): «Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world [...]»⁷⁵. The more recent *Charter of Fundamental Rights of the European Union* (2000) affirms as its first article: «Human dignity is inviolable. It must be respected and protected»⁷⁶. Furthermore, it is used widely in the advocacy of rights by non-governmental organisations. Observing such a tendency, Oscar Schactner writes,

References to human dignity are to be found in various resolutions and declarations of international bodies. National constitutions and proclamations, especially those recently adopted, include the idea or goal of human dignity in their references to human rights. Political leaders, jurists and philosophers have increasingly alluded to the dignity of the human person [...] No other ideal seems so clearly accepted as a universal good⁷⁷.

Yet despite such a prominent place, he also notes that there is no «explicit definition of the expression “dignity of the human person” in international instruments or (as far as I know) in national law»⁷⁸. Per-

⁷³ J. LOCKWOOD-O'DONOVAN, «Historical Prolegomena», 53.

⁷⁴ Cf. Ch II, Sec. 5.3.

⁷⁵ I. BROWNLIE – G.S. GOODWIN-GILL, ed, *Basic Documents*, 18. It is also included in article one of the same document: «All human beings are born free and equal in dignity and rights». Other examples include principle VII of the Helsinki Accords which commits the participating states to those human rights «all of which derived from the inherent dignity of the human person», cf. I. BROWNLIE – G.S. GOODWIN-GILL, ed, *Basic Documents*, 557-584, 561.

⁷⁶ I. BROWNLIE – G.S. GOODWIN-GILL, ed, *Basic Documents*, 547-556, 548. The EU Charter is not a treaty as such but it does have a guiding role in European Community law but its exact place has yet to be determined.

⁷⁷ O. SCHACTNER, «Human Dignity», 401.

⁷⁸ O. SCHACTNER, «Human Dignity», 401.

haps the observations made of rights during the process of drafting the UNDHR may be applied also to dignity – all are unanimous on its importance provided nobody asks why?⁷⁹

Moreover, scholarly reflection on rights gives relatively little consideration to the concept. To take an apt example, the three central theorists of this dissertation rarely refer to human dignity – as testified to by the central expository chapters. The index of *Natural Law and Natural Rights* refers to dignity three times and points the reader to the term personality. It does not appear at all in the index of *Taking Rights Seriously*. The index of *Between Facts and Norms* merely directs the reader to the term integrity. To these authors, a simple appeal to dignity as the source of human rights is inadequate for a full explication.

The etymological root of dignity is *dignitas* or worth. In the context of the above Declarations and Instruments of International Law, it refers to the intrinsic worth or value of the human person. But the documents (and indeed, much of the advocacy of assertions by political and NGO groupings) offer no answer to two important questions identified by Martin McKeever: «*how* do we come to know the dignity and worth of the human person and *how* this knowledge leads to the recognition of the rights subsequently listed [...]»⁸⁰. Instead, the former (dignity) is often presumed and the latter (rights) is simply asserted to arise from it.

Although often taken for granted, there is no simple logical or straightforward move from human dignity to human rights⁸¹. In this regard, Lockwood-O'Donovan is right. To take a practical example, it is possible to assert the human dignity of oneself or many by forfeiting rather than claiming one's own human rights in an act of self sacrifice. M.J. Meyer concludes that «having human rights – though they are at times well suited to the expression of our dignity – does not capture everything that is significant about human dignity»⁸². To take a scholarly example, it is possible for a journal issue to be dedicated to the

⁷⁹ Cf. G. THILS, *Les droits de l'homme*, 51.

⁸⁰ M. MCKEEVER, «The Use of Human Rights Discourse», 117.

⁸¹ Against such an unqualified move from the assertion to dignity to consequent rights, Kieran Cronin writes: «I would suggest that the notion of equal dignity (which is assumed) conceals serious philosophical difficulties. Originally, the language of dignity was used in such a way that it distinguished certain persons or classes of people from others. Dignity often refers to a status someone has or to some gift which sets the person apart as particularly admirable ... Frequently we value things that are rare or unique, but the language of uniqueness when applied to millions of strangers sounds like wishful thinking of high-blown rhetoric». Cf. K. CRONIN, «Response to Prof. Hannon's Paper», 114.

⁸² M.J. MEYER, «Dignity, Rights and Self-Control», 521.

concept of dignity without being committed to any consequent extended analysis of rights⁸³.

Instead of a simple logical derivation from the former to the latter, it is the contention of this thesis that the two arise from the same dynamic of practical reasoning⁸⁴. As outlined and accepted by this thesis, the basic reasons for action are those justifications understood by the actor to be those purposes considered to be most worthwhile or good. On the one hand, the assertion of the dignity or worth of the human person is the recognition that each person can and ought to live in a worthwhile way⁸⁵. On the other, the subsequent listings of rights are those norms that protect, foster and facilitate the good or worthy lives of all. In the terms of the natural law, knowing that each person is worthwhile (or possesses dignity) is to recognise and allow each to pursue the goods that make each life worthwhile (protected by the core of human rights). In a manner, the two questions identified by McKeever do not logically follow one from the other but are mutually dependent on each other.

The dignity of the human person is a value-assertion of practical reasoning. Importantly, it cannot be deduced from any facts regarding the human person offered by the other sciences⁸⁶. This is not to disregard the important role of theoretical reasoning in deepening our common understanding of the human person⁸⁷. Information from philosophy or the human sciences, such as metaphysics, anthropology, psychology or sociology, do inform the deliberation of practical reasoning. In turn, values which are recognised by practical reasoning inform the understanding, organisation and application of the information offered by the theoretical sciences concerned with the human person. The movement,

⁸³ Cf. *Concillium*, (2) 2003. Entitled, «The Discourse on Human Dignity», the journal issue provides relatively few references to human rights. For two of the more significant references, cf. P. VALADIER, «The Person who lacks Dignity», 49-56, 50; M. JUNKER-KENNY, «Does Dignity need a Theological Foundation?», 57-66, 58.

⁸⁴ Ch. VI, Sec. 7, 7.1-7.3.

⁸⁵ In one of the few references to Dignity in *Natural Law and Natural Rights*, Finnis writes, «an unwavering recognition of the literally immeasurable value of human personality in each of its basic aspects [is] the solid core of the notion of human dignity [and] requires us to discount the apparently measurable evil of looming catastrophes which really do threaten the common good [...]». J. FINNIS, *Natural Law and Natural Rights*, 225-6.

⁸⁶ As observed in an earlier chapter, such a move, termed the naturalistic fallacy, is widely established as unacceptable in modern philosophy and is commonly proposed as a critique of the natural law. Cf. Ch. III, Sec. 2. But it is argued by this thesis, that the natural law tradition has the resources within its own tradition to respond to such a critique. Ch. III, Sec. 3.4.

⁸⁷ Cf. R. GEORGE, «Natural Law and Human Nature», 31-41; cf. Ch. III, Sec. 3 ff.

therefore, operates in both directions in the process of deliberation. In the words of Finnis,

there is thus a movement to and fro between, on one hand, assessments of human good and of its practical requirements, and on the other hand, explanatory descriptions (using all the appropriate historical, experimental, and statistical techniques to trace all relevant causal interrelationships) of the human context in which human well-being is variously realised and variously ruined⁸⁸.

Ethics, or a reflection upon practical reasoning towards action, is essential to the pursuit of understanding of the human person. Ethics is not a derivative discipline – it does not provide prescriptions following from a pre-apprehended abstract knowledge. Rather, it contributes to a complete understanding of the human person by discerning the purposes, goals or integral fulfilment to which the human person aspires and the means by which they may be achieved. It is a central and constitutive part in all human reflection⁸⁹.

6. A Theology of Human Dignity and Human Rights

The same may also be said of moral theology. Moral theology is not a derivative discipline to the speculations on revealed truths. Rather, it is central to and constitutive of theology as a whole for it contributes to a complete understanding of the human person – who is the subject of salvation. In specific regard to rights, therefore, there can be no strict deduction of such norms from the assertion of the theological fact of the dignity of the person: «such a foundation is possible neither deductively – i.e. by a priori deduction from given theological premises – nor still less inductively – i.e. by a purely positivistic a posteriori approach»⁹⁰. To do so is to neglect the complex historical and social con-

⁸⁸ J. FINNIS, *Natural Law and Natural Rights*, 17.

⁸⁹ As outlined in the expository chapter, reflections on human nature – such as a theological anthropology – do not provide the norms as such. Instead, they may be inferred «by way of an assemblage of reminders of the range of possibly worthwhile activities and orientations open to one». J. FINNIS, *Natural Law and Natural Rights*, 81.

⁹⁰ W. KASPER, «The Theological Foundations», 149, n. 3. He remarks of his own approach: «The method pursued can be described as reductive or transcendental. It starts out from human rights as they have been historically developed in order to trace them back to the freedom grounded in the dignity of man, in the way that this is attested in Revelation. Such a legitimising reflection has at the same time a critical function, since it judges the concrete historical forms of human rights as it were retrospectively from their source of validity».

figurations bound to particular times and places – and potentially fall into the trap identified by Lockwood-O'Donovan. Instead,

The assertion and defence of human rights in the name of Christ and the Gospel must, it seems, be based not so much on *theological deduction* of specific rights from his saving work as on (1) a constant insistence on the enhanced personal dignity that derives from Christ's revelation and effective presence, and (2) a Spirit-inspired prophetic judgment by Christians condemning evils that appear for the first time or that, having existed, are now seen to be incompatible with the human dignity of any existing human being because each person is affected by Christ's saving work⁹¹.

Theological reflection on rights involves a «to and fro movement» between points (1) and (2). The method then is not of strict deduction but one of inference, clarification, substantiation, and corroboration guided by sound reasoning. It moves between the theological categories by which revealed truths are comprehended and the practical reasoning of Christians in the living through the truths of their faith.

To conceive of method in moral theology in such a manner, moves moral theology to the centre of theology. Ethics is not secondary to faith. Rather, there is a mutually informing relationship, implying two consequences. Firstly, it is a dynamic view that allows for the historical development of both dogma and moral norms – as testified to by the move from hostility to acceptance of rights observed above. Secondly, it becomes incumbent on systematic or dogmatic theologians who offer theological justifications for rights to take the anthropologies proposed by ethical reflection seriously.

In light of the above methodology, the chapter now turns to provide a presentation of *a* theology of rights consonant with the Catholic tradition – particularly in light of the theological *loci* of the Scriptures and the Magisterial teaching of the Second Vatican Council⁹². It will move back and forward between the *loci*, while being informed by the insight of integral human fulfilment, so that they may mutually enrich each other. It does so in order to answer the proposed questions of C. Wackenheim: «In the language of the Council what does the expression *iura hominum* embrace? How is the current proclamation linked to the Gospel?»⁹³. It is a creative process that moves back and forth between the

⁹¹ W. PRINCIPE, «The Rights of the Human Person», 418.

⁹² On the mutual relationship between Scripture, Tradition and the Magisterium; cf. *Dei Verbum*, 7-10. This chapter primarily draws upon the authority of the Scriptures and the Magisterium, making intermittent reference to the Tradition which was more fully outlined in Chapter I.

⁹³ C. WACKENHEIM, «The Theological Meaning», 49.

theological *loci* – with a continued awareness of the moral presumptions to which they align themselves. Of the cluster of moral ideas that gather around rights, I wish to focus on freedom, before unpacking the theological categories that act as the foundation or analogical equivalent to the assertion of human dignity. I admit that it is not the only model that may be discerned⁹⁴.

6.1 *The Theological Employment of Rights*

It is conceded that the cautionary counsels of Rowland and Lockwood-O'Donovan, among others, need to be taken seriously⁹⁵. They are correct to say that slack employment of rights by the Magisterium, theologians or Christian advocates may lead to counter-productive consequences. For instance, the pronouncements often fail to discern between differing fundamental types of rights, as identified by Hohfeld and contemporary jurisprudence⁹⁶. In the eagerness to assert the importance of rights, other pronouncements can underplay the foundational role of the good in their eagerness to assert the importance of rights. Finally, a lack of implementation or the perceived lack of commitment to rights within the internal organisation of the Church ultimately undermines its witness to human rights in the world⁹⁷.

It is not however a leap-into-the-dark⁹⁸. It is the central contention of this thesis that the natural law tradition has the resources to adapt and adopt rights-language while remaining faithful to its means of moral reasoning that prioritises the good⁹⁹. Parallel is the claim that rights are

⁹⁴ In proposing a theology of human rights, the following sections draw upon scriptural and dogmatic exegesis. I do not claim to provide an in-depth analysis. Instead, in light of scripture and dogma, I wish to point to a way to develop the meaning of rights for the divine-human relationship in their contemporary political, social and cultural environment – the purpose which motivates the moral theologian's task.

⁹⁵ Cf. Ch. VI, Sec. 7.4; Ch. VII, Sec. 3.1.

⁹⁶ Cf. Ch. II, Sec. 5.2.

⁹⁷ Cf. J. CORIDEN, «Human Rights in the Church: A Matter of Credibility and Authenticity», 67-75. This thesis does not focus on internal institutional matters of the Church's practice. In focusing on the external debate, such issues fall outside the parameters of what this thesis set out to achieve, cf. Intro, Sec. 3 ff.

⁹⁸ A brief overview of contemporary moral theologians in other language groups also shows a general welcome for the contribution of rights-language while pointing to a need for a nuanced approach, cf. F. COMPAGNONI, «I Diritti Umani: 50 anni dop», 523-527; J. ETIENNE, «Les droits de l'homme sont-ils d'inspiration individualiste?», 297-306. J.A. LOBO, «Los Derechos Humanos. Hito conductor temático de la Declaración de 1948», 433-458; D. MONGILLIO, «La morale cattolica e i diritti umani», 528-537;

⁹⁹ For the central conclusion of this thesis; cf. Ch. VI, Sec. 7-7.4.

consistent to the moral, intellectual and theological tradition of Catholicism. While conceding that rights-rhetoric involves a risk, it is a risk worth taking. As Finnis observes

Along with this goes [...] an old Christian ambition: to baptise certain profane concepts, to despoil (plunder) the Egyptians [...] This picking-out of a word from the great babble of human intercourse involves risks that Christianity has, from the very beginning, been willing to run [...] ¹⁰⁰.

Importantly, it is not a gamble to be taken unconditionally – a point further argued by Finnis in an article, entitled «Catholic Social Teaching Since “*Populorum Progressio*”». It was published in 1982 in a collection of articles on the theme of Liberation Theology¹⁰¹. The main concern of that time was the infiltration of a Marxist ideology into theological reflection. The theological experience of liberation was reduced to a mere socio-political concept of freedom which is ultimately incompatible and so in conflict with central Christian tenets¹⁰².

Interestingly, the thrust of the argument mirrors the same disquiet of Rowland and the others. In the aftermath of the decline of Marxism-Leninism as an ideological force, a focus has turned to those aspects of liberalism – out of which rights gained impetus – that oppose a Christian vision. The risk of contamination is too great, they argue, because it admits to a form of freedom that is alien and ultimately corruptive of an authentic Thomist and theological tradition. Rowland writes,

The idea that a classical Christian mode of self-formation takes the form of a participation in the life of the Trinity wherein a person receives a vocation as a gift of grace is difficult to assimilate to a principle which holds that human dignity rests upon the capacity for autonomy and self-creation¹⁰³.

At base, her argument turns on the concept of freedom, conceived as «autonomy and self-creation». Aided by a counter-productive employment of rights, the theological experience of freedom, they argue, is being reduced to an economic and individualist concept. The concerns of Rowland and others regarding ideology turns on the notion of «free-

¹⁰⁰ J. FINNIS, «Catholic Social Teaching», 315. This article was published two years after *Natural Law and Natural Rights* (1980). At that point he held that rights are associated with a post-Suázerian tradition. It is a view he now considers less significant; cf. Ch. III, Sec. 5.

¹⁰¹ Cf. J. SCHALL, ed., *Liberation Theology in Latin America*.

¹⁰² Cf. CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Instruction on Christian Freedom and Liberation*, 1986; ID., *Instruction on certain aspects of the “Theology of Liberation*, 1984.

¹⁰³ T. ROWLAND, *Culture and the Thomist Tradition*, 153.

dom». In a manner, it parallels the concept of «liberation», around which the debate turned in the previous generation. Of the latter term, Finnis wrote: «it seems to be right to take a relaxed attitude to the concept, provided one is clear about the conditions on which one is using it»¹⁰⁴. He subsequently proceeded to identify conditions inherent to Catholic Theology which may «bracket» the term or provide an appropriate framework for its use.

6.2 *The Theological Employment of Freedom*

I wish to contend that a further six conditions may be adapted and applied to the employment of the concept of freedom, understood as either personal and political autonomy, in order to bracket the term from the ideological abuses of liberalism¹⁰⁵. They are suggested as potential sign-posts in a continued deliberation which aims at disclosing a theology of human rights.

To momentarily recall the traditions of moral enquiry: freedom is an integral part of all three traditions' understanding of the human person and the consequent organisation of society. The natural law tradition links freedom to making purposeful decisions; the liberal tradition conceives of freedom as autonomy or independence; and the critical tradition emphasises the political aspect of freedom. For each tradition, such notions of freedom are normative, requiring society to be organised accordingly. It was argued that the natural law tradition may take account of the latter two without betraying its own resources. By doing so, it placed personal and political autonomy within the deeper moral parameters entailed by human fulfilment.

To briefly outline a theological model of freedom given greater attention in the latter parts of this chapter: freedom is an essential aspect of salvation in Christ, for it is Christ who, as the truth incarnate, sets free (Jn 8: 31-32). Freed from the bonds of sin, death and the law, the believer is freed for God, for the other, and the good to which they are called. It may also be described as a purposive freedom in which the person lives out their human dignity in accordance with the dignity bestowed by God. Such a vision of purposive freedom, allows the theological tradition to align itself with the model of freedom offered by the natural law tradition.

Added to the parameters provided by the quest for human fulfilment as proposed by the natural law (the basic goods and requirements of

¹⁰⁴ J. FINNIS, «Catholic Social Teaching», 316.

¹⁰⁵ J. FINNIS, «Catholic Social Teaching», 317-319.

practical reasonableness), I wish to offer six conditions inherent to the theological vision and capable of directing the appropriate use of freedom in a theology of human rights.

First: the final goal of freedom is communion with God. Freedom is the result of salvation and cannot be solely identified with it. Therefore, a theology of human rights may not conceive freedom as an end in itself but as a necessary condition for the achievement of further goal.

Second: freedom is linked to continual conversion. It is a vocation to be lived out in accordance with the person's dignity. This feature of freedom highlights the importance of personal responsibility and behaviour. Therefore, a theology of human rights cannot reduce freedom solely to the outcome of appropriate social structures.

Third: conceiving freedom to be fulfilled by way of the other, a theology of human rights cannot dilute the importance of the social aspect of the human person. Therefore it must resist those aspects of any ideology which would further privatise the individual: for example, an insistence that religion remains out of the public realm.

Fourth: the provision of freedom does not, of itself, solve all the problematic issues beset in morality. Therefore, a theology of human rights that emphasises freedom must also respect the goals and principles evident in other branches of moral theology, such as bioethics, sexual ethics, among others.

Five: as purposive, freedom aims towards some positive state of affairs. A theology of human rights, therefore, cannot limit itself to attending to only those negative aspects of the individual and society that hinder freedom. Rather, it must also attempt to contribute a substantive account of the goals and principles that enhance the freedom of the individual and in society.

Sixth and arising from all of the above: a theology of human rights must humbly refuse to single out, and so idolise, the idea of autonomy or political freedom. For instance, of the latter, politics is not an end in itself. Instead, it must charge them with the fullest moral force by asserting their validity for all, while at the same time, insisting on the vital moral import of discerning and fostering in each individual the freedom to live for the good.

Accommodating such a model of freedom, the rest of the chapter concentrates on the theological reasons for human dignity and human rights – moving back and forth creatively, in a mutually clarifying and mutually supporting manner, between the theological *loci* of the scriptures and the Magisterium. The tradition will be drawn upon in a lesser way.

7. Theological Reasons for Human Dignity and Human Rights

As pointed out previously, the concept of human dignity plays an important role in the justification of rights in international and national law, political discourse and by advocacy groups. Similarly, human dignity is also a focal point in the theological appropriation of rights and its ongoing justification by theologians¹⁰⁶ and by the Magisterium: recall the opening the lines of *Pacem in Terris*¹⁰⁷. Observing the signs of the times in *Gaudium et Spes*, the Second Vatican Council praised the deepening awareness of the «sublime dignity of the human person, who stands above all things and whose rights and duties are universal and inviolable»¹⁰⁸. In particular, John Paul II continued to repeat such observations in many documents of social teaching and pastoral letters and visits¹⁰⁹. To give but one example here, *Sollicitudo Rei Socialis* comments on

*the full awareness among large numbers of men and women of their dignity and of that of every human being. This awareness is expressed, for example, in the more lively concern that human rights should be respected, and in the more vigorous rejection of their violation*¹¹⁰.

Three points arising from the previous reflection on dignity relate to the present discussion¹¹¹. First, the concept of dignity refers to the worth or value of the human person. Such a notion is predictably attrac-

¹⁰⁶ To take a sample: J-M. AUBERT, «Human Rights», 139-144, 142; J. BLANK, «The Justice of God», 27; J. MOLTMANN, «Christian Faith and Human Rights», 149; W. KASPER, «The Theological Foundations», 148-166, 151.

¹⁰⁷ *Pacem in Terris*, 1; cf. Ch. II, Sec. 5.4; Ch. VII, Sec. 2.2.

¹⁰⁸ *Gaudium et Spes*, 62. This particular document makes at least nine further references to human dignity; cf. *Gaudium et Spes*, 16, 17, 19, 21, 26, 27, 27, 29, 41, 60. What is more, it makes at least eighteen individual references to the fundamental rights of the human person, cf. *Gaudium et Spes*, 21, 25, 26, 29, 29, 41, 42 (rights of the family), 52, 65, 67 (right to work), 68 (right to establish trade unions), 73, 73, 74, 75 (right to vote), 82.

¹⁰⁹ He questioned, «What foundation can we offer as a basis on which human rights can flourish? Without doubt this basis is the dignity of the human person». JOHN PAUL II, *Address to 5th International Colloquium of Juridical Studies*, 10 March 1984; cited in D. MURRAY, «The Theological Basis», 81. For a fuller collection, cf. G. FILIBECK, *Human Rights in the Teaching of the Church*.

¹¹⁰ *Sollicitudo Rei Socialis*, 26. This particular document makes further references in to dignity and human rights in at least nine more paragraphs; cf. *Sollicitudo Rei Socialis*, 15 (twelve times), 26, 33, 39, 40, 42, 44, 46, 49. To give one more example, to highlight the significant levels of rights-language; of all the Encyclicals, *Centesimus Annus* uses the phrase dignity 27 times and rights 112 times – which to my reckoning is the most often of any of the documents.

¹¹¹ Cf. Ch. VII, Sec. 3.

tive to theology. It has a transcendent referent that conceives of the human person as more than a mere object and so resists reductionist definitions of the human person – and the modes of moral reasoning that support such models¹¹². However, and as a second point, a straightforward appeal to the concept of the dignity of the human person is insufficient on its own for the foundation of rights and their consequent delineation. Similarly, a simple appeal to whatever acts as the theological analogical equivalent to human dignity is inadequate on its own – and, as previously observed, it is open to underlying problems¹¹³. Therefore, and as a third point, a fuller anthropology is required – that is, a vision of the human person, as a whole – in order to respond to the pitfalls associated with the previous point. As Patrick Hannon asserts,

When anyone speaks of a human right, there is implied some idea of what «human» means [...] it is of utmost importance to know what is to count as human. And the answer which any of us will give to that question will depend ultimately on our vision of life, and on what we make of the project of human being in the world¹¹⁴.

It is the importance of the wider issue of what it is to be human that holds most appeal for Christian theology¹¹⁵. In particular, it has become a characterising concern of the contemporary era¹¹⁶. The two documents quoted at the beginning of this section provide ample evidence of such a focus. For instance, in discerning the church's and humanity's vocation, *Gaudium et Spes* begins by proposing that,

Believers and unbelievers are almost at one in considering that everything on earth is to be referred to humanity at its centre and culmination.

But what of humanity? [...] the church can offer an answer to them which describes the true human condition, provides an explanation for its weakness and recognises its dignity and calling¹¹⁷.

John Paul II, in *Sollicitudo Rei Socialis*, writes that the main aim of the Church's social doctrine, and by inference the appropriation and theological understanding of rights, is,

¹¹² Cf. Ch. VI, Sec. 4 ff.

¹¹³ Cf. Ch. VII, Sec. 3.1.

¹¹⁴ P. HANNON, «Rights», 101.

¹¹⁵ C.J. PINTO DE OLIVERIA, *Ethique chrétienne*.

¹¹⁶ Hannon further writes, «Moreover, I would argue that for Christians to try to detach our ideas about human nature completely from Christian theology is impossible, and even if it were possible it would be an impoverishment». P. HANNON, «Rights», 102.

¹¹⁷ *Gaudium et Spes*, 12.

to interpret these realities [of human existence, in society and in the international order, in the light of faith and of the Church's tradition], determining their conformity or divergence from the lines of the Gospel teaching on man and his vocation, a vocation which is at once earthly and transcendent¹¹⁸.

The need for a deeper anthropology provides a space by which theology can make a contribution to the wider debate. For instance and as previously mentioned, theology can and does insist on the transcendent aspect of the human person and this commitment rejects any attempt of reductionism of the human person. Indeed, the assertion of human dignity is to oppose such approaches, for the person is of such unique value that any attempt to reduce the person to a thing, a means or a number is violation of the person itself. In the words of David Hollenbach:

The imperative arising from human dignity is based on the indicative of the person's transcendence over the world of things. The ability of persons to think and to choose, their hopes that always outrun the historical moment, and the experienced call to discriminate between good and evil actions – all these indicate that persons are more than things. This warrant for the foundational principle of Catholic rights theory is held to be accessible and plausible apart from the particularist doctrines of the Christian faith¹¹⁹.

But the warrant for human dignity is two-fold: it is made known by way of the dictates of reason (and in particular in practical reasoning) and in the disclosure of Revelation. He continues,

The Christian faith does provide however a second explicitly Christian warrant for the principle of human dignity. The beliefs that all persons are created in the image of God, that they are redeemed by Jesus Christ, and that they are summoned by God to a destiny beyond history serve both to support and to interpret the fundamental significance of human existence¹²⁰.

The rest of this section focuses on the doctrines of the Christian faith – particularly as disclosed through the sacred scriptures. It is divided into sub-sections – the order of creation and the order of redemption. The former concerns the theology of creation and specifically the creation of humanity in the image of God. The latter considers the dynamic of salvation-history culminating in the redemption of humanity by Je-

¹¹⁸ The paragraph concludes, «its aim is thus *to guide* Christian behaviour. It therefore belongs to the field, not of *ideology*, but of *theology* and particularly of moral theology». *Sollicitudo Rei Socialis*, 41.

¹¹⁹ D. HOLLENBACH, «Global Human Rights», 376.

¹²⁰ D. HOLLENBACH, «Global Human Rights», 376.

sus Christ and humanity's subsequent mission. This division is to facilitate the structuring of ideas but, as will be argued, they are mutually interconnected.

7.1 *The Order of Creation*

7.1.1 «Let us make Mankind» (Gen 1:26)

To the above question «what is humanity?», *Gaudium et Spes* immediately responds that «humankind was created “in the image of God” with the capacity to know and love its creator»¹²¹. The assertion that humanity is created in the image of God is the theological reason or warrant most commonly offered for the dignity of the human person. Of such a starting point, Lisa Sowle Cahill, in an article entitled «Towards a Christian Theory of Human Rights», observes,

The explicitly religious and theological corollary of «human dignity» is «image of God», the primary Christian category or symbol of interpretation of personal value. The person is created in God's image and it is this image which is distorted by sin and restored to wholeness in Christ¹²².

She identifies two significant interpretations of the image of God. The first considers the image of God to be intrinsic to the person, resulting from being God's creature and the second deems the image, and so the dignity of the person, to be graced, conferred or attributed to the person by the sovereign God. In common, they assert that the value or worth of the human person is ultimately dependent on God. They consider the dignity of the person to be the result of «God's gracious providence». The former is associated with the Catholic tradition and the latter with the Protestant tradition¹²³.

The development of the first model of rights, which stresses the inherent image of God in the created person, may be traced in Chapter I¹²⁴. Fre-

¹²¹ *Gaudium et Spes*, 12.

¹²² L. SOWLE-CAHILL, «Toward a Christian Theory», 279.

¹²³ Cf. J. MOLTMANN, «Christian Faith and Human Rights», 182-195. J. ALLEN, «A Theological Approach», 119-141. Of these two writers, Sowle Cahill continues, «it is not true that in the second approach rights are precarious or only provisionally attributable to human personhood. Both Moltmann and Allen presuppose that all persons are of value in the sight of God, that every person as de facto existing in community and under God's claim is valued by God and therefore is the bearer of rights».

¹²⁴ Cf. Ch. I, Sec. 4.1.1; Sec. 4.2.2; Sec. 5.1.3. For instance, Jean Gerson (1363-1429) insisted on the rights that corresponded to the natural faculties of the person by virtue its creation in response to the claims of Jean Wyclif (d. 1384) who claimed that such dominium was bestowed by grace and therefore could be lost its withdrawal or rejection.

quently, the theological debates in history that advanced rights turned on what was inherent to the person after the Fall or being in a sinful state, that is, removed from the grace of God. The resolutions to those crises committed this theological approach to the essential dignity or worth of each person in spite of the fact that they are finite and sinful because the person is said to be «like God, e.g. as intelligent, free, communal, and loving. This resemblance is intrinsic and is not destroyed by sin. Thus even in a fallen creation, certain rights are grounded in the essential worth of the person»¹²⁵. I wish to propose two aspects to this theological warrant – being created and being in the image of God¹²⁶.

Firstly, being created refers to dependence. The theological insight is that the very created-ness of humanity is gift and grace. Accordingly, the claim of human dignity is the assertion of the value and worth of humanity because it is created in an act of grace and gift by a sovereign God evaluates creation, and humanity, to be good. Creation is bestowed with a positive value¹²⁷. Importantly, it has a value that is intrinsic to the act itself and to that which is created. In the scriptures, it is in the context of creation that being in the image of God is first mentioned. The creation account of Genesis forcefully asserts, by way of repetition, that all that is created is evaluated by God to be «good»¹²⁸ (Gen 1:1-31). In particular, humanity «made in the image of God» is considered to be «very good» (Gen 1: 31). Considered in this manner, human dignity is dependent and resultant of God's gracious providence. It can therefore incorporate the concerns of the Protestant models that wish to emphasize the sovereignty of God and humanity's complete dependence. However, it also marks the point of departure for the Catholic tradition's confidence in the created order and humanity. If there is an intrinsic dignity to what is created, then aspects of creation may be ex-

¹²⁵ L. SOWLE-CAHILL, «Toward a Christian Theory», 279.

¹²⁶ After the opening chapters of Genesis, the scriptures do repeat the doctrine of creation in the image of God (apart from the prohibition on homicide, cf. Gen 9: 6). «The significance of the image of God versus for theology lies in their long post-biblical history of interpretation». R. RUSTON, *Human Rights and the Image of God*, 277. For instance, in this thesis, cf. Ch. I, Sec. 5.3.1; Ch. II, Sec. 5.3.

¹²⁷ This account has elements in common with Babylonian myths of creation. However, the Priestly account (Gen 1) differs by its emphasis on the gracious initiation of God. There is no heroic struggle over the demon or the evil one. Instead, creation is a gracious act according to a plan and for the benefit of mankind created in His image. The earlier Yahwest account (Gen 2: 4-25) presents God as an artisan creating perfectly. In both cases it is sin that introduces disorder. The scriptural exegesis presented in this chapter relies, in the main, on G. VON RAD, *Genesis*; C. WESTERMANN, *Genesis 1-11*.

¹²⁸ The translation used by this thesis is the New Revised Standard Version.

plored as expressions of and pointers towards the Creator from whom that dignity originates.

An important corollary arises from this aspect, particularly in the Catholic tradition. Being dependent on God, all of creation is considered to be directed towards God. It not only has an intrinsic dignity: it also has an intrinsic structure. Creation, including humanity, is inherently ordered towards the transcendent. It is an order that is bestowed by God as part of the same act of grace that is the act of creation. Importantly, it is discernable. Humanity is capable of identifying that which constitutes a creation ordered towards God and what is required to live by it.

7.1.2 «In the image of God» (Gen 1:27)

Secondly, being in the image and likeness of God refers to resemblance. Humanity is viewed to share certain characteristics with the Creator or is capable of sharing in the purposes of the Creator (*capax dei*). For example, the capacities to know and love are of value because they are God-like or are the appropriate responses to God. Humanity, therefore, is of value or dignity because it corresponds or is capable of response to the value and dignity of its Creator. The difficulty arises in trying to precisely locate what characteristics of being human are in the image of God. James Childress, in an article in the *New Dictionary of Christian Ethics*, observes,

Although the image of God is often construed as reason and free will, it has also been interpreted as spiritual capacities, such as self-transcendence or the capacity for and the call to relationship with God, and as excellences, such as righteousness¹²⁹.

Arising from Catholic doctrine's confidence in the created order and humanity's capacity to understand the purposes inherent within it, *Pacem in Terris* locates human dignity as follows:

God also created man in His own «image and likeness», endowed him with intelligence and freedom, and made him lord of creation, as the [...] psalmist declares in the words: «You have made him little less than the angels, and crowned him with glory and honour, You have given him rule over the works of your hands putting all things under his feet»¹³⁰.

The endowment with reason and free will as markings of being made in the image of God facilitates the theological warrant that supports the

¹²⁹ J. CHILDRESS, «The image of God», 292.

¹³⁰ *Pacem in Terris*, 3; referencing Ps. 8.

first pillar for rights, identified above¹³¹. It permits and justifies reflections on human experience – such as those of the document, or those that comprise the central conversation of this thesis. It supplies an assurance for models of reflection that may not be immediately apparent or referred to in the Revealed sources of theology. The confidence is supported on the corollary of the previous aspect – that creation, and humanity, has an inherent and discernable order. Models of reflection, including those of ethics, may be judged appropriate to the extent that they are capable of recognising and responding to the inherent order of creation. The same may be said of models of rights, their subsequent listing, and the manner in which they are advocated and applied. It is this important point that permits Finnis, for example, to state that there is,

no foundation in Catholic theology of the «fundamental human rights» to which such constant appeal is nowadays made, other than the foundation affirmed in the first pages of *Pacem in Terris*, viz., the principles of order divinely inscribed in the inclinations and capacities of our created nature, discernible more or less clearly by our practical intelligence, and crystallised with the moral force of our conscience¹³².

Such an order helps ground the claims of universality for such models, while remaining consonant to the specific claims of Christian Revelation. As belonging to all, rights based on an already existing created order are capable of being reasonably recognised by all. And, as ultimately resulting from the act of grace that is creation, such rights will be consonant with God's gracious providence.

Pacem in Terris further associates another feature of being human to the belief of «being in the image of God»; namely, lordship. Although the document quotes Psalm 8, it is a significant motif of the Creation narrative. God is sovereign over all creation. To be in the image of God is, to some degree, to share in such lordship. Genesis tells of the animals being brought forward to be named (Gen 2:19-20). Biblically, naming is a significant act that bestows meaning. But, in the context of the Genesis story, it indicates that humanity participates in the ongoing act of creation. Furthermore, humanity is commissioned «to go forth and multiply, and fill the earth and subdue it» (Gen 1:28). An obligation, and hence responsibility, is given to continue the work of creation. Humanity is the co-creator with the Creator: it is co-sovereign with the all-sovereign God. Human dignity, therefore, rests in sharing both the

¹³¹ Cf. Ch. VII, Sec. 2.2.

¹³² J. FINNIS, «Catholic Social Teaching», 315.

characteristics of God and in sharing in the divine plan or ongoing work of creation.

The issue of lordship was critical in the theological debates concerning rights of Medieval Era sketched in Chapter One. At base, the debates concerned the scope or parameters of individual dominion or sovereignty – the extent to which it was possible to be «the lord or *dominus* of one's own relevant moral world»¹³³. Theologically speaking, such dominion is not separate from or in distinction from the dominion of God but turned on the manner and extent to which humanity shared in the sovereignty of God¹³⁴.

7.1.3 «Because you have done this» (Gn 3:14-19)

As a result, the autonomy and freedom that this implies is firmly placed within the wider context of humanity's dependence as creatures and the pursuit of its responsibilities as co-creators. God is always greater. To attempt to be or become God or to usurp divine sovereignty, or even to become God's equal, is presented in the initial narratives of Genesis as rebellions against God and the correct and original ordering of creation. For example, the serpent in the Garden of Eden tempts by offering an equal status to God (Gen 3:5). God also recognises this attempt by man and so the original dependent relationship is broken and humanity is alienated from God (Gen 3:22). Kieran Cronin points to this rebellion as «*the original sin*»¹³⁵. Other initial narratives include the Tower of Babel which recounts the humanity's motivation to reach the heavens. Instead, it ultimately leads to strife and miscommunication (Gen 11:1-9). Such acts result in the initial and further corruption of the original image of God, or original dignity, and points towards the need for its renewal or recreation. Take for example the narrative of the The Flood (Gen 6:5-9:17)¹³⁶.

Humanity is not God's equal. The relationship has a proper order, as all creation has an inherent order. But the important supposition of this,

¹³³ R. TUCK, *Natural Rights Theories*, 3.

¹³⁴ Cf. Ch I, Sec., 4.1 - 4.2. For instance, John XXII (1249-1334) argued that human dominium, which he interpreted as a form of ownership, was conceptually the same as God's dominium over creation. John Locke (1632-1704) was to make the same influential argument over three hundred years later.

¹³⁵ K. CRONIN, *Rights and Christian Ethics*, 258. Italics added.

¹³⁶ «The LORD saw that the wickedness of humankind was great in the earth, and that every inclination of the thoughts of their hearts was only evil continually. And the LORD was sorry that he had made humankind on the earth, and it grieved him to his heart» (Gen 6:5).

and previous points (humanity's dependence on God, the sovereignty of God, endowment with freedom and intelligence etc), is that God has in fact entered into a relationship with humanity. The relational aspect of the human person is fundamental to a theological anthropology. God initiates and sustains the original relationship between humanity and God and within humanity itself «male and female he made them» (Gen 1:27). Furthermore, a right relationship is sustained between humanity and created order (Gen 1:15). Breakdown in all three relationships result from the original rebellion. The initial narratives of Genesis that form the history before the Call of Abraham (Gen 12:1) tell and retell the rupture and renewal of right relationship. As will be further outlined, it is because of this experience of sin allied with the hope of redemption that rights are of theological concern.

Being created in the image of God, therefore, is to acknowledge the God-given (created-ness), God-like (resemblance) and God-responsive (relationship) nature of the human person. All three constitute theological sources of the human person's dignity. Yet because of original sin, the created order is in need of recreation, the image of God is obscured and need of new disclosure and relationships need to be redeemed.

7.2 *The Order of Redemption*

7.2.1 «new creation» (2 Cor 5:18)

The above reflections focus on a theology of creation, from which theological deliberations regarding rights «usually begins»¹³⁷. By and large, the point of departure is the doctrine of the image of God before moving on to the events of salvation-history¹³⁸. Yet, such a simple move can miss an important line of reasoning. It is through the prism of the latter that the former comes to light or, at least, more clearly so. To give a biblical example: Barnabas Mary Ahern, in an article, entitled «Biblical Doctrine on the Rights and Duties of Man» points out «The story of the Bible really begins with the book of Exodus»¹³⁹. It is the experience of liberation from slavery and the establishment of the covenant between God and his chosen people, recounted in book of Exodus, which directs the biblical writers' account of creation. To take a more nuanced theological model: Kieran Cronin argues that «Crea-

¹³⁷ W. KASPER, «The Theological Foundations», 158.

¹³⁸ For instance, cf. T. HOPPE, «Human Rights» in *TD*, 454-470.

¹³⁹ B.M. AHERN, «Biblical Doctrine on the Rights», 302; 302-304. He continues, «It can be truly said that the patriarchal history was all written in the light of and according to the pattern of the formal Covenant».

tion in God's image can be understood with the help of the covenant model, with the suggestion that man's creation is the first covenant he experiences»¹⁴⁰.

The order of creation is interpreted according to the order of redemption. The latter, therefore, has some precedence or primacy. In this way, it may be said that the events of salvation-history are the true theological foundations of rights. Critically, it is more than a mere conceptual priority. It is also based on an existential priority. Human rights concern the concrete and historical struggles of people. This is also the arena of salvation. Salvation takes place in history or in the experiences of God's salvific will and the struggles of God's people to live accordingly. It is brought about in the historical context of human events. And because the salvific journey happens through history, human rights are of theological concern¹⁴¹.

Furthermore, there can be no dichotomy between salvation and secular history. Salvific events happen in history and the full sweep of salvation-history is brought to light through such interpretative works of God as the Exodus. To return to a biblical example: exegesis can reveal the large extent how the newly forming Israelites took to themselves the law of the surrounding cultures. Although developed outside of their historical experience, such law codes were interpreted and applied in light of their own central salvific experience – the Exodus-event. This central interpretative work of God was brought to bear on the historical experience of early society building by the Israelites which appropriated the new law code. The process often moulded the old code into new form, with new content and, most significantly, a new justification. As C. Villa-Vicenzo observes:

Sometimes laws and customs were simply taken over. Often they were modified, and in other situations rewritten. The single theological concern was the same. It was to use the resources available in any given situation

¹⁴⁰ K. CRONIN, *Rights and Christian Ethics*, 258.

¹⁴¹ Commenting on the contemporary experience, as captured by *Gaudium et Spes*, Avery Dulles writes. «The church, rather than being a *societas perfecta* alongside the secular state, is seen as a pilgrim people, subject to the vicissitudes of history and sharing in the concerns and destiny of the whole human race (*GS*, 1). The church is linked to the world as the sacrament of universal unity (*LG*, 1), a sign and safeguard of the transcendence of the human person (*GS*, 76), a defender of human rights (*GS*, 41). In a dynamically evolving world (*GS*, 4) social and political liberation pertains integrally to the process of redemption and hence is not foreign to the mission of the church [...] The church's concern for human solidarity, peace and justice, therefore is not confined to the sphere of supernatural salvation in a life beyond». A. DULLES, «The Gospel, the Church, and Politics», 641.

and in each changing situation to give expression to the central liberating message of the Exodus – the specific way of life associated with the worship of Yahweh. [...] The task of law-making in the Bible has always been a creative act of putting together the necessary ingredients in fulfilment of the covenant promise of God to God's people¹⁴².

Creation, as noted previously, was also interpreted in the light of salvation-history. The biblical authors shaped their (often borrowed) accounts of Creation according to the purposes revealed in the salvific works of God, namely the events of the Exodus culminating in the establishment of the Covenant between God and people. This covenant-pact was the primary symbol in the Old Testament of the «the justice of God» and, as Ahern notes, «It is the same Covenant theme which finds eminent expression in the story of Creation»¹⁴³. Justice, therefore, was intimately linked to creation by the biblical writers. There is an order, reflected in both. And as noted above the early stories of Genesis tell and retell that rebellion unleashes a disorder to both. Through these narratives, a pattern is established. The pattern is the dynamic of sin and redemption played out in salvation-history. Disorder results from disobedience to the given order of God and it is by way of God's beneficent justice that creation is renewed, «by which God sought to renew his image in the people of Israel and to restore the human dignity which he intended for mankind in its very creation»¹⁴⁴. Living according to God's justice – that is, returning to the original dependence on God – is the means by which human dignity is fostered and restored.

The dynamic of sin and redemption played out in salvation-history – that is, in the concrete struggles of a people attempting to respond in faithfulness to the graciousness providence of their God – not only stamps itself in the origins of history but also points to history's conclusion when all of creation is restored. In the Hebrew experience, it points to the end time. But it also points to the event and person who would help usher in God's final justice and new creation – the Messiah. For Christianity that event has happened in Jesus Christ. Through Jesus Christ the person and the community and the whole cosmos becomes, in the phrase of St. Paul, a «new creation» (2 Cor 5:17; Gal 6:15). It is through the personal and communal experience of salvation that the cosmos is disclosed to be in need of and brought to salvation by the Christ-event.

¹⁴² C. VILLA-VICENZO, *A Theology of Reconstruction*, 115.

¹⁴³ B.M. AHERN, «Biblical Doctrine on the Rights», 304.

¹⁴⁴ B.M. AHERN, «Biblical Doctrine on the Rights», 308.

7.2.2 «the last Adam» (1 Cor 15:45)

If, as argued above, the events of salvation history have pre-eminence in the theological foundations of rights and, as asserted by Christianity, Jesus Christ is the «climax of salvation»¹⁴⁵, then «The real theological foundation, [...] is placed at the Christological level»¹⁴⁶.

The source of sin – identified above as the rebellion against the proper order established in creation and the covenant relationship – is overcome in Christ through the establishment of a new everlasting covenant¹⁴⁷. Sin debases (but does not destroy) the human dignity conferred in the gracious gift of creation and restored in the gift of the Covenant. But such a tarnishing, by personal and social sin, «is overcome in principle and at least in an incipient way for individuals and human society by Christ's saving work of freeing from sin and reconciling all to the Father»¹⁴⁸. Because of the obedience of Jesus to the will of the Father, God re-bestows for a final and enduring time, the unqualified evaluation of the goodness of creation, and in particular, of humanity (1 Cor 15:20-45). But it is more than a mere distant appreciation. God actively responds to the self-offer of Jesus: love responds to love and overflows to embrace all. In light of the Christ-event, human dignity or worth takes on a deeper meaning than provided by a theology of creation or philosophy¹⁴⁹. At its most fundamental level, humanity is considered to be of inalienable worth because it is loved by God: «Is it Christ Jesus, who died, yes, who was raised from the dead, who is

¹⁴⁵ *Lumen Gentium*, 5. «All these things, however, happened as a preparation and figure of the new and perfect covenant which was to be ratified in Christ».

¹⁴⁶ W. KASPER, «Theological Foundations», 158. Other examples include: «in Christ and through Christ, human persons have acquired full awareness of their dignity». John Paul II, *Redemptor Hominis*, 11.

¹⁴⁷ Ch. VII, Sec. 6.1.3.

¹⁴⁸ W. PRINCIPE, «The Rights of the Human Person», 403. Nine phases in Christ's saving work are identified in the article.

¹⁴⁹ W. PRINCIPE, «The Rights of the Human Person», 416-417, 419. He continues, «Thus, for example, the moral duty of justice and mutual help seen from the theology of creation (and from philosophy to a considerable degree) is deepened by Christ's revelation and giving of the commandment of the New Covenant: we are to love others not only as ourselves but in that fuller measure with which Christ loved each person and gave his life for each one of us. Cf. John 13, 34; 15,12; Gal 2,20. «Thus, for example, the moral duty of justice and mutual help seen from the theology of creation (and from philosophy to a considerable degree) is deepened by Christ's revelation and giving of the commandment of the New Covenant: we are to love others not only as ourselves but in that fuller measure with which Christ loved each person and gave his life for each one of us.

at the right hand of God, who indeed intercedes for us? Who shall separate us from the love of Christ?» (Rom 8: 31-35).

On one hand, Christ's saving work, culminating in the Paschal Mystery of his death and resurrection, re-establishes human dignity through the overcoming of sin. But on another, the very person of Jesus unveils the depths of human dignity. The image of God – tarnished by sin – is both restored and fully revealed by Jesus. In the process of restoration, a «new creation» (as identified in the previous section?) is initiated: in the unfolding of revelation, a «new Adam» is disclosed (Col 1:13). To return to the words of *Gaudium et Spes*: «Christ the new Adam, in the very revelation of the mystery of the Father and of his love, fully reveals man to himself and brings to light his most high calling»¹⁵⁰. The image of God bestowed on each in creation comes to clearer light in Christ (2 Cor 4:4). To live in accord to that image therefore is to live in imitation of Christ and to instantiate his message (Col 3:11).

The Christ-event imposes itself and is accepted by Christians in the same manner in which the Exodus-event acted in the experience of the Jewish people. The example provided in defence of this point in the previous section is particularly suitable. A direct parallel may be drawn. The early Israelites appropriated a foreign law code and reinterpreted it according to the central liberating experience of the Exodus. For Christianity, the central liberating experience is in Jesus Christ and Christianity also appropriated (in acts of adoption, modification, elimination and justification) from the surrounding culture in accordance with the demands of this central experience. The opening sections of this thesis, concerning the discipline of jurisprudence and Aristotelian philosophy in the twelfth century, testify to this dynamic. With regard to rights, the same dynamic continues in contemporary Christianity. A rights focused law code was, in part, developed in secular environments. Contemporary Christianity is now appropriating such a code and language into its ethical and theological reasoning. Yet the theological concern remains the same. Rights are appropriated, structured, content-filled and justified by Christianity in accordance to its central salvific experience – the Christ-event.

As argued above, this process takes place in a two way movement between the commitment to the dignity of the human person as revealed in Christ and the prophetic judgements of Christians in confronting historical events and evils. In other words, rights are interpreted in

¹⁵⁰ *Gaudium et Spes*, 22. See also *Compendium of the Social Doctrine of the Church*, 68-69. «It is Christ, the image of God (cf. 2 Cor 4:4; Col 1:13) who enlightens fully and brings to completion the image and likeness of God in man»

light of Christ and, in turn, made into instruments of Christ's salvific work. Rights become instruments of Christ's saving work when placed in service of the dignity that is restored in Christ and originally bestowed by God in creation.

7.2.3 «children of God» (1 Jn 3:1)

The Christian doctrine of the image of God proposes that the dignity of humanity is bestowed in creation and restored in Christ. Yet, the original stain of sin still scares the human experience, placing the person within the continued «struggle, and a dramatic one, between good and evil, between light and darkness»¹⁵¹. The person itself, and hence its dignity, is at the heart of this struggle, for «It is man [...] who must be saved; it is mankind that must be renewed [...] body, soul, heart and conscience, mind and will»¹⁵². In other words, salvation extends to every aspect of the person, «the total subject; societies of many kinds; the cosmos; all of them in their entire historical dimension»¹⁵³.

By his saving work, Christ redeems all that was damaged by original sin. Sin's source was identified above as a rebellion against the proper ordering of humanity's dependence on the Creator and its resultant responsibilities as co-creators, and hence a breaking apart of the Covenant relationship¹⁵⁴. In Christ, this covenant relationship, which also marks the created order, is re-established «once and for all» (Heb 10:1-22, 10). Right relationship, therefore is renewed – between God and humanity, between people, and between people and creation.

This renewed relationship is marked by intimacy and connectedness. Yahweh is revealed as «Our Father» (Mt 6:9). All become adopted sons of God¹⁵⁵ by virtue of their faith in Christ – the only Son (Gal 3:26; Eph 1:5). Yet it is more than a mere instruction of Jesus¹⁵⁶. Rather, adoption is due to participation in the Son-ship of Christ. Adoption is, therefore, participation into the triune God – into the very relationship of Father and Son overflowing in the Spirit. It is brought about and sustained by the Spirit (Rom 6:4), and instantiated in the sacrament of bap-

¹⁵¹ *Gaudium et Spes*, 13.

¹⁵² *Gaudium et Spes*, 3.

¹⁵³ W. PRINCIPE, «The Rights of the Human Person», 398.

¹⁵⁴ Cf. Ch. VII, Sec. 6.1.3.

¹⁵⁵ At this point, the thesis does not neutralise the gender reference because of the initial cultural link between sonship and the significance of inheritance. Humanity is co-heir with Jesus because humanity is co-heir with Jesus (Rom. 8: 17).

¹⁵⁶ Jesus gives the title of «sons of God» to the peacemakers (Mt 5,9), to the charitable (Lk 6, 35), to the just who have risen (Lk 20, 36).

tism (Gal 4,5 ff; Rom 8: 14-17). Through baptism, the Christian is incorporated into the body of Christ – the church. But this presupposes true conversion (Tt 3:5; 1 P 1:3; 2:2) by which Christians are called to reproduce in themselves the image of the only Son (Rom 8:29). However, they are still treated as adopted children, even if they fail to live in accordance with the requirements of imitating Christ (Heb 12: 5-12).

The human person is the subject of salvation, yet the salvation offered in Christ is marked by the eschatological truth of already-but-not-yet. So also is the associated dignity: it is graciously given by the initiative of God and revealed in the person and actions of Christ, but because of sin, it is still in need of full appropriation and so constant cultivation. To return to the initial reflections referred to earlier on what it is to be human, *Gaudium et Spes* later continues,

Man gains such dignity when, ridding himself of all slavery to the passions, he presses forward towards his goal by freely choosing what is good, and, by his diligence and skill, effectively secures for himself the means suited to this end. Since human freedom has been weakened by sin is only by the help of God's grace that man can give his actions their full and proper relationship to God¹⁵⁷.

To the dignity that is given (creation) and the dignity that is restored (salvation in Christ), may be added the dignity that is realised (conversion-vocation) by each Christian in conforming, by way of grace, to Christ and the natural order of creation. The former is endowed or gifted and the result of the initiative of God: the latter is achieved or attained and the result of the lived response of the person. Human dignity is as much gained as it is graced, which is in accordance with the Catholic commitment to the mutual necessity of good works and grace which must two go hand in hand.

These two aspects of dignity – dignity as achievement and dignity as endowment – correspond to the two ways in which the doctrine of the image of God is generally used in the theological justification of rights. Roger Ruston, in *Human Rights and the Image of God*, characterises the two functions as active and passive. The active sense, he maintains, was emphasised by early Christian theologians and was «concerned with its implications for the way in which a person should conduct his or her life on earth»¹⁵⁸. On the other hand and in the passive sense, which he argues is a modern interpretation, «the image says something

¹⁵⁷ *Gaudium et Spes*, 17. *Gaudium et Spes* 19 states «The dignity of man rests above all on the fact that he is called into communion with God».

¹⁵⁸ R. RUSTON, *Human Rights*, 269.

about how persons bearing the image ought to be treated (or should not) be treated by others»¹⁵⁹.

Both modes of operating may be identified in Chapter I. The former provided a justification for rights as requirements of following the natural law and the Gospel: the latter widened the scope of what it means to be human¹⁶⁰.

In the contemporary justification of rights by the Magisterium, both are operative. To take a lengthy example: the declaration on religious freedom at the Second Vatican Council, *Dignitatis Humanae*, states,

It is in accordance with their dignity as persons – that is, beings *endowed* with reason and free will and therefore privileged to bear personal responsibility – that all men should be at once be impelled by nature and also bound by a moral obligation to seek the truth, especially religious truth. They are also bound to adhere to the truth, once it is known, and *to order their whole lives in accord* with the demands of truth.

However, men cannot discharge these obligations in a manner in keeping with their own nature unless they enjoy immunity from external coercion as well as psychological freedom. Therefore, the right to religious freedom has its foundation, not in the subjective disposition of the person, but in his very nature¹⁶¹.

On one hand, humanity's dignity is endowed: on the other hand, it requires that life ought to be lived in accord or harmony with its requirements – in this case, with the religious truth. The two are conceived as mutually constitutive in the very nature of what it is to be human. As a result, it is incumbent on society to ensure the consequent right to religious freedom. To treat the human person in a coercive manner is not simply to deny their (endowed) dignity but also to deny them the possibility of conducting their lives with (achieved) dignity by living in pursuit of the truth. In turn, providing the conditions that allow for each person to pursue that which is in accordance with their dignity, that is, the common good and human rights, is to act in a manner that respects the (endowed) dignity of all. The two aspects operate together by way of a «to and fro» movement – identified earlier as the fundamental methodology in a theological justification of rights¹⁶². This interaction is the concern of Christian ethics and Christian spiritualities of justice. Reflection develops according to the constant assertion of the

¹⁵⁹ R. RUSTON, *Human Rights* 269.

¹⁶⁰ An example of the former kind is Thomas Aquinas; cf. Ch. I, Sec. 3.2. An example of the latter is Francesco de Vitoria; cf. Ch. I, Sec. 5.3.1.

¹⁶¹ *Dignitatis Humanae*, 2. Italics added.

¹⁶² Cf. Ch. VII, Sec. 4-5.

graced dignity of each and the consistent concrete judgements on the conditions and requirements necessary to realise human dignity – particularly and most of all, in the face of the real injustices and evils which demean it¹⁶³. Consequently, it is the historical struggle of the Christian people to confront injustices (eg economic exploitation, racism, gender discrimination, authoritarianism etc) that is the immediate context for Christians participating in the ongoing delineation of specific rights and deliberation on their foundation and appropriateness.

As pointed out earlier, history is also the arena of salvation. On one hand, the offer of salvation is the restoration of those relationships debased by sin, by way of God's forgiveness and mercy offered through Christ. On the other,

Salvation is indeed the *freeing-from* the evil of sin, but it is also something positive, a *freeing-for*, a *freeing-for* the good, an enabling to *be* good personally and to *do* good, especially a good beyond what unaided human power can achieve, whether this be an individual or social good¹⁶⁴.

In the pithy phrase of Donal Murray, «Sin, in fact, is the opposite of freedom, the destruction of freedom: “Everyone who commits sin is a slave” (Jn 8:34)»¹⁶⁵. In the same article entitled, «The Theological Basis for Human Rights», Murray firstly proposes a phenomenology of freedom, in which the internal logic of freedom is mapped. Freedom, in order to be true to its own internal logic, must be linked to responsibility, equality and participation. For example, he writes,

The logic of freedom is that, in order to be free, I have to be respecting the freedom of the other. Human rights are, therefore, *a condition of genuine freedom* not only for those whose rights are respected but also for those who are called to respect them¹⁶⁶.

Secondly, he considers freedom in the light of faith, outlining three significant enslavements from which we are saved – the Law, Death and Sin – for «it fills in the picture in a dramatic way [...] This is now the solid basis of freedom: “For freedom Christ has set us free” (Gal 5:1)»¹⁶⁷. Free-

¹⁶³ «The whole of man's history has been the story of our combat with the powers of evil, stretching, so our Lord tells us, from the very dawn of history until the last day». *Gaudium et Spes*, 37, referring to Mt 24:13; 13: 24-30, 36-43. Information portals of Catholic organisations that incorporate rights-advocacy into their mission include www.catholiccharitiesusa.org; www.trocarie.org; www.caritas.de.

¹⁶⁴ W. PRINCIPE, «The Rights of the Human Person», 398.

¹⁶⁵ D. MURRAY, «The Theological Basis», 94.

¹⁶⁶ D. MURRAY, «The Theological Basis», 82-90, 86.

¹⁶⁷ D. MURRAY, «The Theological Basis», 90-99, 90.

dom in Christ is to be freed from mere legalism and free to live for justice and solidarity: it is to be freed from the absurdity of death and free for a life with meaning; and it is to be freed from sin in order to be free to live for the other in a new relationship, which in turn, is to live a life of fulfilment. It is to live for the kingdom of God.

8. Conclusion: Pertinent Points

Paralleling points made in previous chapters, I wish to propose a number of observations.

Firstly, as one of the theological loci of Revelation, Tradition in Catholic thought is more than a tradition of enquiry. However, it does share the comparable dynamic. And, similarly to the philosophical traditions of enquiry, it is the central contention of this thesis that the Catholic theological tradition may change, in response to socio-economic challenges and to other traditions, while remaining faithful to its own resources and mission. Encountering other traditions and models of reasoning requires vigilance. But, more importantly, it also involves the very dynamic of a tradition. By definition, a tradition of enquiry, if it is to remain vibrant, must test the consistency of its own resources, unpack its implications, purify its own internal contradictions and be capable of responding to and posing challenges to other traditions. It was in this historical process that rights-language initially grew within a theological framework – and it is within the same process that rights may be re-appropriated.

Secondly, the re-appraisal of rights language is part of the wider re-evaluation of modernity in Roman Catholicism. The encounter is marked by the dynamic observed in the previous point. Therefore, the characteristics and institutions of modernity are not accepted without qualification. For example, the turn to the subject that characterises modernity is incorporated into a new humanism that respects the transcendental openness to Revelation and to the other. This chapter focused on the concept of human dignity which has a central normative claim in our contemporary era. Two particular impulses are worth noting – personal autonomy and political autonomy (democracy). I would argue that theological reflection requires further engagement with these issues.

Thirdly, the Catholic theological tradition commits itself to two mutually supportive warrants for the dignity of the human person. Effective moral reasoning recognises the value of each person and the means by which it may be realised. In turn, Revelation provides a further affective source in unpacking the meaning of dignity. The prophetic judgements of the community help demarcate the demands of such an endowed dignity. Human rights therefore, being such claims, become

instruments in the realisation of the full dignity of each person before God.

Fourthly, a central element to the thesis is the rights-typology consisting of justice, rights and law with associated terms of freedom and state-society. Bringing theological categories to bear: justice is disclosed as an inherent order in creation and in the person. Crucially, it is fundamentally independent of the individual, even if its demands change over time. The covenant is the primary symbol that cuts across both justice and the law, implying that both are expressions and so requirements of the correct ordering of the divine-human relationship. In particular, I singled out the notion of freedom for attention. Rights are decisively linked to personal and political freedom implying the need for particular care in providing the guidelines for a theology of freedom. Finally, the state supports and provides the conditions that allow and foster the above to happen for the good of each individual and the common good of all.

Fifthly, as it did with its associated natural law tradition, the theme of «order» echoes throughout the above theological reflections. Rights are norms that protect and foster the dignity of the human person – a person that is ordered towards God, to another, within itself, and in creation. Rights, therefore, act as a basic standard of what is worthy of man and so necessary for his development and progress¹⁶⁸. As a result, and in the words of John Paul II,

the concept of faith makes quite clear the reasons which impel the Church to concern herself with the problems of development [and hence human rights], to consider them a duty of her pastoral ministry, and to urge all to think about the nature and characteristics of authentic human development. Through her commitment she desires, on the one hand, to place herself at the service of the divine plan which *is meant to order all things* to the fullness which dwells in Christ (cf. Col 1:19) and which he communicated to his body; and on the other hand she desires to respond to her fundamental vocation of being a «sacrament», that is to say «a sign and instrument of intimate union with God and of the unity of the whole human race»¹⁶⁹.

¹⁶⁸ *Sollitudo Rei Socialis*, 33.

¹⁶⁹ *Sollitudo Rei Socialis*, 31. Italics added

CONCLUSION

Almost nobody knew his name. Nobody outside his immediate neighbourhood had read his words or heard him speak. Nobody knows what happened to him even one hour after his moment in the world's living rooms. But the man who stood before a column of tanks near Tiananmen Square – June 5, 1989 – may have impressed his image on the global memory more vividly, more intimately than even Sun Yatsen did. Almost certainly he was seen in his moment of self-transcendence by more people than every laid eyes on Winston Churchill, Albert Einstein and James Joyce combined¹.

This moment, recalled in *Time Magazine*, is one of the persistent images of the many popular political movements of 1989. Unlike Eastern Europe, the student protests in China were brutally repressed invoking a wave of revulsion and condemnation throughout the on-looking world.

There are many complex issues simplified and possibly distorted by this image. Yet similar events to those of Tiananmen Square provoke universal denunciation. The conviction that such events are intolerable demands the very real question: Why is it wrong to drive a tank over a crowd of unarmed students? To this very question, Martin McKeever writes that there are a myriad of possible answers. One reaction is to declare that such actions are against human rights. He continues,

In such a response, human rights discourse is being used as an ethical category in the sense that the action is classified as morally wrong on the basis of a set of criteria supplied by or implicit in the idea of human rights. Such a manner of discussing moral issues, particularly of a social nature, has be-

¹ P. IYER, «The Unknown Rebel», 15.

come so common that we tend to take it for granted; perhaps overlooking the fact that it constitutes yet another way of doing ethics².

To use human rights is to be involved in the ethical enterprise. It is to share in the purpose and aim of ethics as a whole, which is to develop the standards or identify the presuppositions for answering practical moral questions for the betterment of the person. Human rights can provide an important framework to the urgent question, why is it wrong to drive a tank over a crowd of unarmed students?

To revisit the thought-experiment that guided our initial reflections: Stephen Lukes asked, «what way of thinking does accepting the principle of defending human rights deny and what way of thinking does it entail»³? In other words, what is at stake? In using the language of human rights, I have argued that what is at stake is nothing less than *justice, freedom and democracy*. In summation:

This thesis was an exploration of that framework or, to be more precise, three proposed frameworks by three theorists, each representative of a different tradition of enquiry (History). It presented the respective theorists in their own terms (Interpretation) before providing an evaluation by way of a comparative study (Dialectic). It took a stance in favour of an adapted natural law tradition, and its model of moral reasoning, which is capable of supporting human rights. What was revealed in the course of the study is that by amending itself in order to provide a basis for human rights, the tradition was capable of accounting for the challenges of other traditions while remaining true to its own resources.

While defending the priority of an objective justice linked to the substantial good of the human, the tradition can account for personal freedom or autonomy – as defended by the liberal tradition – and political freedom or deliberative democracy – as defended by the critical tradition. All three requirements are presented by the traditions as necessary to respond to and protect the dignity of the human person. However, I argue, that that all three are mutually constitutive when personal freedom and political freedom are grounded in the wider moral considerations of objective justice. Respecting and fostering the dignity of each person demands that society, and specifically the state, must be organised accordingly. Primarily, it must be directed by its responsibility to the common good in providing the just conditions for integral human fulfilment of each. Consequently, it must allow a certain freedom for each individual to responsibly choose their good. Furthermore, it must

² M. MCKEEVER, «The Use of Human Rights Discourse», 104.

³ S. LUKES, «Five Fables about Human Rights», 234.

foster the responsibility of all to deliberate, thereby discerning the good and how to achieve it.

Some further observations may also be drawn from this study, which parallel, in part, the conclusions of previous chapters. First and foremost, what is at stake is the individual itself. The intimate association of human rights to the dignity of the person is in order to link rights to a value, transcendent of any measure or reduction. In moral and legal reasoning, they counter reasons that may justify, in political and social discourse, the exploitation or discrimination of the person (or group).

Furthermore and secondly, a more substantive account of what it is to be a person is at stake. There is a to-and-fro reflection on the dignity of the person and the judgements of practical reasoning that specify human rights. In particular, this thesis argues that this method opens a space that allows for theological reasons and discourses orientated to the good, or the natural law, to inform our shared understanding.

As a result and thirdly, the development of the natural law is at stake. Natural law is unique in claiming to provide a substantive account of the human person (by way of the good) and moral reasoning (by way of the principles of practical reasoning). It therefore has much to offer. However, it is very much at risk of becoming ghettoised and irrelevant if it does not adapt to take account of a rights-language that gained much impetus independent of the natural law tradition. To do so, is to encounter other traditions, which in turn, is to engage and incorporate elements of other traditions.

Consequently and fourthly, a range of issues are at stake. For instance, issues of justice, freedom, law and the state-society which were identified as a cluster of associated ideas that help define the concept and functioning of rights. In particular, the notion of freedom is crucial, for it is personal and political freedoms that are fostered and protected by the traditions of modernity most allied to rights. Placed within a natural law and a theological model of reasoning, freedom is conceived as purposive – aiming towards a personal and transcendent good. Connected to a purposive freedom, I argue that human rights find a more thorough foundation that enables a stronger assertion of their inalienability and a greater means of specifying genuine rights. In turn, this provides an internal protection against being undermined by proliferation and manipulation.

Fifth and practically, what are at stake are the institutions of the western political order. In order to defend rights, I was also required to defend the principle of a limited government that respects the personal of individuals and the principle of deliberative democracy that respects political autonomy. I wish to contend that the natural law can provide a

model of reasoning that can be manifested in, and so ground, the civil and political institutions of constitutional democracy.

Sixthly, what is at stake in the use of human rights is moral reasoning itself. Perhaps, the deepest commitment shared by the three theorists of this dissertation is to the practice of reason – and its ability to provide the standards for a just, lawful and free society. Human rights are an expression of that faith in reason.

Finally, the mission of theology itself is at stake. This study was placed within a wider Christian appraisal (Foundation). I argued that the Catholic theological tradition, similarly to the philosophical tradition to which it is closely associated, is capable of supporting rights language while remaining true to its own resources. These two pillars are mutually supportive: taken together, the former asserts the endowed dignity of humanity, in its creation and salvation by God, and the latter helps guide the realisation that dignity in each. Human rights bear a moral and theological imperative. By demarcating the demands of dignity, they become instruments in the building of the kingdom.

The dignity of the unknown rebel, who faced the tanks in Tiananmen Square, is in his courage to the point of forfeiting his right to life. It is by the sacrifice of his own rights that he asserted the dignity of all and so the basic rights of all – and by implication justice, freedom and democracy. Yet, it is also to point to an *aporia*. The dignity of the human person is always more. Rights on their own cannot capture all that it is to be human. Yet, they do capture the fundamental requirements that facilitate the person to be all that they are called by God to be.

APPENDICES

APPENDIX A -THE GENESIS OF RIGHTS

TEXTS

Gratian'
Decretum
(c.1140)

Thomas Aquinas
Summa Theologiae
(c.1270)

William of Okcham
Opus Nonaginta Dierum
(c. 1333)

▶ 1100 1200 1300 1400 ▶

Founding
University of Bologna
(1113)

Magna Carta
(1215)

Franciscan Poverty
Controversy (1321)

CONTEXTS

Beginning of Legal Studies ▶

Growth of City States ▶

Rediscovery of Aristotle ▶

Nominalism ▶

Commentators

Brian Tierney
The Idea of Natural Rights

Michel Villey
*La Formation de la
Pensée Juridique Moderne*

TEXTS

Jean Gerson
De Vitae Spirituali Anima
(1402)

Fran. de Vitoria
Relectio de Indis
(1539)

Fran. Suárez
*Deo legibus ac
Deo legislator*
(1612)

▶ 1400 1500 1600 ▶

Hundred Years War
(1337-1453)

Discovery of America
(1492)

Luther at
Wittenburg (1517)

CONTEXTS

Nominalism ▶

European Renaissance Humanism ▶

Reformation ▶

Revival of Thomism ▶

Commentators

Richard Tuck
The Origins of Natural Rights

Quentin Skinner
*Foundations of Modern
Political Thought*

Anabel Brett
*Liberty, Right
and Nature*

APPENDIX B - THE GROWTH OF RIGHTS

(First Expansionary Period)

TEXTS

| | | | |
|---|---|---|--|
| Hugo Grotius <i>De Jure Belli</i> (c. 1652) | Thomas Hobbes <i>Leviathan</i> (1651) | John Locke <i>Two Treatises of Government</i> (c. 1691) | J-J Rousseau <i>The Social Contract</i> (1762) |
|---|---|---|--|



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| | | | |
|------------------------------|----------------------------------|--|--|
| Francis Bacon (1561-1672) | English Civil War (1642-1646) | English Glorious Revolution (1688) | <i>American Declaration of Independence</i> (1776) |
|------------------------------|----------------------------------|--|--|

CONTEXTS

Scientific Revolution ▶ The Enlightenment ▶ Socio-economic changes ▶

Commentators

Gary Herbert *The Philosophical History of Rights*
 Noberto Bobbio *Thomas Hobbes and the Natural Law Tradition*
 Ian Shapiro *The Evolution of Liberal Rights*
 Leo Strauss *Natural Right and History*

(Second Expansionary Period)

TEXTS

| | | | |
|--|---|---|--|
| I. Kant <i>Critiques</i> (1781-1790) | | | John XXIII <i>Pacem in Terris</i> (1963) |
| E. Burke <i>Reflections on the Revolution in France</i> (1790) | | | |
| J. Bentham <i>Anarchical Fallacies</i> (1796) | Karl Marx <i>On the Jewish Question</i> (1844) | W.N. Hohfeld <i>Fundamental Legal Conceptions</i> (1919) | <i>UNDHR</i> (1948) |



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| | | | | |
|---|-----------------------------------|--|---|---|
| French Revolution <i>The Declaration of the Rights of Man the Citizen</i> (1789) | Abolition of Slavery (1865) | Widening of Franchise in Britain (1867) | Two World Wars Bolshevik Revolution (1917) | Founding of United Nations (1948) |
|---|-----------------------------------|--|---|---|

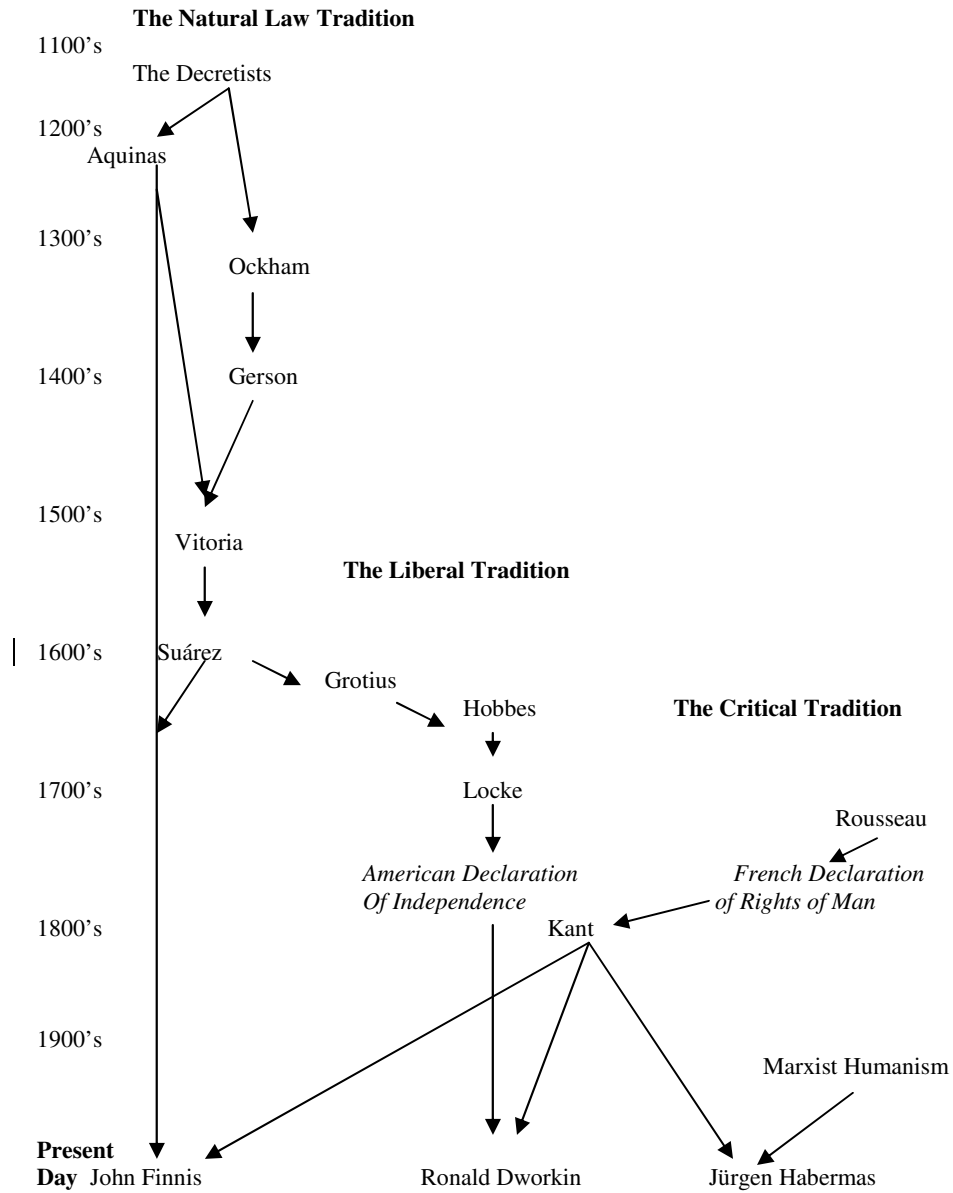
CONTEXTS

Responses to French Revolution ▶ Ideological struggles and Cold War ▶
 Industrial Revolution ▶ Labour Movement/Social Democracy ▶
 Catholic Church response to modernism ▶ Suffragette and Emancipation Movements ▶

Commentators

Jeremy Waldron *Nonsense Upon Stilts* Carl Wellman *The Proliferation of Rights*

Appendix C – A Geneology of Rights



ABBREVIATIONS

| | |
|------------------|--|
| AAS | <i>Acta Apostolicae Sedis</i> , Città del Vaticano |
| ACPQ | <i>American Catholic Philosophical Quarterly</i> |
| AJJ | <i>American Journal of Jurisprudence</i> |
| <i>Anth</i> | <i>Anthropetes</i> |
| APQ | <i>American Philosophical Quarterly</i> |
| ARS | <i>Archiv für Rechts und Sozialphilosophie</i> |
| ASS | <i>Acta Santa Sede</i> , Città del Vaticano |
| <i>AusJP</i> | <i>Australasian Journal of Philosophy</i> |
| App. | Appendix |
| art. | article |
| c. | circa |
| <i>CathL</i> | <i>Catholic Lawyer</i> |
| Cf. | confer |
| CIC | <i>Code of Canon Law</i> (1983) |
| Ch. | Chapter |
| <i>ClerRev</i> | <i>The Clergy Review</i> |
| <i>Com</i> | <i>Communio: International Catholic Review</i> |
| <i>Conc (GB)</i> | <i>Concillium</i> . London Edition |
| d. | died |
| ED | <i>Euntes Docete</i> |
| eg | example |
| etc | etcetera |
| edn. | edition |
| <i>Ethics</i> | <i>Ethics</i> |
| EE | <i>The Encyclopaedia of Ethics</i> , ed. L. Becker – C.B. Becker, New York 1992. |
| ff. | forward |
| <i>Gr</i> | <i>Gregorianum</i> |
| <i>HeyJ</i> | <i>Heythrop Journal</i> |
| ID. | IDEM (the same) |

| | |
|----------------|--|
| Intro. | Introduction |
| <i>ITQ</i> | <i>Irish Theological Quarterly</i> |
| <i>IJPS</i> | <i>International Journal of Philosophical Studies</i> |
| <i>JPP</i> | <i>Journal of Political Philosophy</i> |
| <i>JRE</i> | <i>Journal of Religious Ethics</i> |
| <i>Jurist</i> | <i>The Jurist</i> |
| <i>JVI</i> | <i>Journal of Value Inquiry</i> |
| <i>LLALR</i> | <i>Loyola of Los Angeles Law Review</i> |
| <i>LouS</i> | <i>Louvain Studies</i> |
| <i>LTM</i> | <i>Los Angeles Times Magazine</i> |
| <i>MA</i> | Massachusetts |
| <i>MiLS</i> | <i>Milltown Studies</i> |
| <i>Mind</i> | <i>Mind</i> |
| <i>Month</i> | <i>The Month</i> |
| <i>Moralia</i> | <i>Moralia</i> |
| <i>MSt</i> | <i>Milltown Studies</i> |
| <i>NBl</i> | <i>New Blackfriars</i> |
| <i>NDCE</i> | <i>The New Dictionary in Christian Ethics</i> , ed. J.F. Childress – J. MacQuarrie, London 1986, |
| <i>NDLR</i> | <i>Notre Dame Law Review</i> |
| <i>NDT</i> | <i>New Dictionary of Theology</i> , ed. J. Komanchak – M. Collins – D. Lane, Dublin, 1987. |
| <i>NLF</i> | <i>The Natural Law Forum</i> |
| <i>NSchol</i> | <i>New Scholasticism</i> |
| <i>NYRB</i> | <i>The New York Review of Books</i> |
| orig. | original |
| <i>Origins</i> | <i>Origins</i> |
| <i>OJLS</i> | <i>Oxford Journal of Legal Studies</i> |
| <i>PAS</i> | <i>Proceedings from the Aristotelian Society</i> |
| <i>PBA</i> | <i>Proceedings from the British Academy</i> |
| <i>PhilQ</i> | <i>The Philosophical Quarterly</i> |
| <i>PolS</i> | <i>Political Studies</i> |
| <i>PS</i> | <i>Philosophical Studies</i> |
| <i>PSS</i> | <i>Philosophy of the Social Sciences</i> |
| <i>PPA</i> | <i>Philosophy and Public Affairs</i> |
| <i>PPAL</i> | <i>Proceedings from the Pontifical Academy for Life</i> |
| <i>RMT</i> | <i>Readings in Moral Theology</i> |
| <i>RTM</i> | <i>Rivista de Teologia Morale</i> |
| <i>RTL</i> | <i>Revue Theologique de Louvain</i> |
| <i>RP</i> | <i>Review of Politics</i> |
| <i>SCE</i> | <i>Studies in Christian Ethics</i> |
| <i>SCH</i> | <i>Stuides In Church History</i> |
| Sec. | Section |

| | |
|----------------|---|
| sic | indicates an apparent error is part of quoted material and not an editorial mistake |
| <i>SIULJ</i> | <i>South Illinois University Law Journal</i> |
| <i>ST</i> | AQUINAS, St. THOMAS, <i>Summa Theologiae</i> , ed. T. Gilbey, London 1964. |
| <i>StMor</i> | <i>Studia Moralia</i> |
| <i>StL</i> | <i>Studium Legionense</i> |
| <i>RJ</i> | <i>Ratio Juris</i> |
| <i>RTM</i> | <i>Rivista Teologia Morale</i> |
| <i>Tablet</i> | <i>The Tablet</i> |
| <i>TD</i> | <i>Theology Digest</i> |
| <i>Thought</i> | <i>Thought</i> |
| <i>TM</i> | <i>Time Magazine</i> |
| <i>TS</i> | <i>Theological Studies</i> |
| <i>Thom</i> | <i>The Thomist</i> |
| <i>UFLR</i> | <i>University of Florida Law Review</i> |
| <i>UNDHR</i> | UNITED NATIONS, «Universal Declaration on Human Rights» in I. BROWNIE – G. GOODWIN-GILL, <i>Basic Documents on Human Rights</i> , Oxford 1971, 2002 ⁴ , 18-23. |

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