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The Modern Language of the Law of Nature:
Rights, Duties and Sociality in Grotius, Hobbes and Pufendorf

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May 1999

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements of the degree of Doctor of Philosophy

Abstract

In this thesis I have retrieved the modern language of the law of nature between the period 1625-1672. I have reconstructed this language as a response to the seventeenth century breakdown of society in Europe.

In Chapters 1, 2 and 3, I lay out Hugo Grotius' moral and political theory grounded in three irreducible principles of self-preservation, the primacy of society and consent. These principles lead Grotius to develop a rich and pluralistic theory.

Thomas Hobbes's theory calls into question the complex Grotian social and political arrangement and in its place provides an absolutist and homogeneous conception of the state. This is treated in Chapter 4.

In Chapters 5 and 6, I lay out Samuel Pufendorf's moral and political theory. Pufendorf accepts Grotius's and Hobbes' initial premises but argues for a 'regular' or homogeneous state.

The retrieval of the law of nature proposed in this thesis is important, for it radically calls into question the conventional manner in which we understand the seventeenth century. Among other things, this work illuminates the common foundation shared by contemporary liberals, communitarians and more radical theories.

Résumé

Dans la présente thèse, l'auteur récupère le langage moderne du droit naturel de la période de 1625 à 1672. Il reconstruit ce langage comme une réponse à la crise de la société européenne au 17e siècle.

Dans les chapitres 1, 2 et 3, il décrit la théorie morale et politique de Hugo Grotius, fondée sur les trois principes irréductibles de la préservation de soi-même, la primauté de la société et l'importance du consentement. Ces principes permettent à Grotius de développer une théorie riche et pluraliste.

La théorie de Thomas Hobbes remet en question les complexes structures sociales et politiques de Grotius et, à la place, propose une conception absolutiste et homogène de l'État. Cette théorie est décrite dans le chapitre 4.

Dans les chapitres 5 et 6 l'auteur décrit la théorie morale et politique de Samuel Pufendorf. Ce dernier accepte les prémisses de Grotius et Hobbes, mais plaide pour un État "normal" et homogène.

La récupération du droit naturel proposée par cette thèse trouve son importance par une remise en question de la conception habituelle du 17e siècle. Entre autres, cette oeuvre permet de voir les fondements communs des libéraux d'aujourd'hui, les communautairistes et les théoristes plus radicaux.

Acknowledgments

This thesis has taken a long time and as a result debts have piled up. The one good thing about this is that it allows one to extensively engage in the most pleasureable of all activities - the expression of gratitude. However, during these long and involved journeyings so many have done so much that I feel obliged to ask for forgiveness at the outset to those who go unmentioned.

I cannot imagine beginning my intellectual life without the assistance of my undergraduate Professor Aspy Rana. His intense and passionate lectures drew me to Political Science and for this and his affections my gratitude is eternal. Professor Shanti Swarup is one of the most inspiring teachers, scholars and friend I have had the fortune to know. I will never forget the years spent with him and his family. To Smita I owe the most. I would like to specially mention two dear friends, Brar and Pathak whose affections mattered more to me than they will ever know.

In Canada my debt goes to all the friends I have made since I arrived in 1986. It is impossible to mention them all but let me mention those who have left a lasting impact: Eugenio Bolengaro, Bhupinder Brar, Trudy Caisse, Jean Chapman, Eyal Chowers, Cecile Cornu, John Crossley, Natalie Daignault, Radhika Desai, Eric Darier, David E., Farzin Farzaneh, Rex Files, Edgar Frechette, Nichalus Grahme, Christine Gilsnen, Shoshana Gilbert, Carol Grey, Gina Hunter, Nancy Kingsbury, Tony Laden, Leila Khalili, Rebecca Kingston, Martha-Marie Klien, Rhonda Mahwood, Melissa Meeker, Lauchlan Munroe, Natalie Oman, K.K. Pathak, David Schulze, Smita Swarup, Herminio Texira Michael Temelini, Phil Wheelton, Paul Wilkinson, and Nora Young.

It is difficult to express what Jean Chapmans' friendship has meant to me over the years. She was my first friend in Canada and her home was and is for me home away from home. My debt to Michael Temelini is equal if not more. He was my first friend and colleague at McGill and remained my dear and respected friend. I cannot hope to recount what I owe him both intellectually and in terms of affections. To the support and friendship of Gina Hunter, Nichalus Grahame, Nora Young, Rebecca Kingston, Lauchlan Munroe, David Shulze and Eric Darrier I shall always be grateful.

To my two supervisors I owe the most: Jim Tully and Chuck Taylor. They have both been a source of immense inspiration over the years. Their passion for scholarship and dedication as teachers will forever be an inspiration for me. To them my gratitude is beyond words.

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Introduction

1. Re-Situating Seventeenth Century Political Theory in Its Historical Context

In this study I have addressed the issues raised by two related and overlapping trends in seventeenth century political thought. The first involves the increased interest in the Stoic concept of *socialitas* in the face of the breakdown of sociable relations among the peoples and nations of Europe. I have traced the genealogy of this renewed interest by retrieving the major juridical works of Hugo Grotius, Thomas Hobbes and Samuel Pufendorf. While these three thinkers wrote extensively on a wide range of matters, I argue that they were first and foremost concerned with restoring conditions of sociality in Europe. Indeed, this overriding concern with sociality informs all their extensive efforts in a number of intellectual fields, efforts which were guided precisely by the need to address all the conditions and occasions that threatened *socialitas*. However, in the extant commentaries on these early modern philosophers, there is little recognition of the fundamental importance of the concept of *socialitas* in the theories. And yet any discussion of these thinkers that does not draw attention to sociality leads to a mis-characterization and thus a misrepresentation of what these key figures in the intellectual history of the West were saying and doing. This holds true whether we are discussing the nature of laws, constitutionalism, rights and duties, property and so on. In all these areas, I would argue, their contributions come into full view only within the overarching and constitutive frames of socialitas. Not to grasp and grapple with this aspect of their theory can only lead to a dangerously skewed understanding of the juridical edifices that still frame and constitute in part not only the contemporary debates in political theory but also current political practices.

The second set of issues which this study will confront flows from the first and relates to the forms of constitutional arrangements accepted and prescribed by these three influential thinkers of early modern Europe. For Hugo Grotius it was necessary that the diversity displayed by the constitutional arrangements then prevailing be philosophically and legally endorsed so as to restore peace in Europe. Quite the opposite position was taken by Thomas Hobbes and Samuel Pufendorf. For both, the very diversity displayed by actual European constitutional practices, and endorsed so enthusiastically by the Dutch theorist, was the most important source of the civil wars which had devastated Europe in the previous hundred years. They argued against Grotius that what Europe needed most desperately was uniformity of constitutional arrangements, not diversity.

Accordingly, they provided the two most powerful and sophisticated theories of homogenization of constitutional practices ever to be produced in juridical political theory.

In due course these Hobbesian and Pufendorfian models were accepted across Europe and eventually spread to much of the world. The unfortunate consequences of accepting these models are only too obvious if we survey the costs that have been paid over the last 400 years in order to impose constitutional uniformity across the complex, plural, diverse and tangled motley of lived constitutional experience. It is only very recently that some contemporary philosophers have recognized the wisdom of Hugo Grotius' plea that unless we constitutionally recognize the lived experience of peoples in their diverse locales, institutions, customs, languages and laws, the drums of war will not be silenced.

This study also seeks to make a methodological point. It seeks, via a careful treatment of the texts, to vindicate Quentin Skinner's historical method in the study of political philosophy. In several articles and books published over the last 30 years, Skinner has argued for the need to situate texts in their historical contexts in order to understand fully and accurately what the given author was saying and doing as she or he wrote the work under examination. In short, retrieving the *meaning* and *point* of a political text can be done only by situating it in its intellectual and practical context. Further, by so situating a text historically we are able to see the author's success or failure in manipulating political conventions to either extend or limit the domain of legitimate political action. The main example Skinner has used to demonstrate the latter point is Machiavelli's *Prince*. In this thesis I would like to invoke a further set of examples to make the same point, namely, the major juridical works by Hugo Grotius, Thomas Hobbes and Samuel Pufendorf. And proceeding in this vein, I will argue that Hobbes unsuccessfully attempts to manipulate the political conventions that find their finest articulation in Grotius' influential work *The Laws of War and Peace*. Pufendorf, on the other hand, will be shown as agreeing with Hobbes' main thrust, while, and at the same time, recognizing the reasons for Hobbes' eventual failure. The monumental *Laws of Nature and Nations* and the little compendium *The Duty of Man and Citizen*, are, I will argue, successful attempts by Pufendorf to manipulate the political conventions in a manner that Hobbes was unable to do.

2. The Contemporary Context: The Return of the Age of Diversity

Today, 400 years after thinkers like Grotius, Hobbes and Pufendorf began building the juridical house that frames our political practices, we are once again

confronting the most critical question they had struggled with: how do we do justice to the irreducible diversity that we see around us. The collapse of the 400-year drive to homogenize constitutional arrangements, has brought us back to the issue of which are the possible and just political arrangements for an age that can no longer ignore the irreducible character of human cultures. In recent years, Canadian philosophers have rediscovered the insights that informed Grotius' plea to his fellow Europeans. It is not by chance that one of the most active centre for these discussion has been McGill University in Montreal, i.e., an environment largely influenced by the struggles for the constitutional recognition within Canada of distinct and diverse traditions. In this contemporary context, very sophisticated arguments have been elaborated that may provide one of our best hopes for the reduction of the violence that invariably results when the political leadership turns a deaf ear to the demands for recognition of diverse peoples in their equally diverse *habitus*. I am thinking here in particular of the work of James Tully, and as his arguments are pertinent to the a historical context which is at the heart of this study, I will briefly present his reflections and then establish the link with the similar preoccupations that emerged in the 17th century.

Along with the increasing number of constitutional experts who are being forced to grapple intellectually and politically with the issue of diversity, James Tully has in the last few years turned his attention to the strange multiplicity that is constitutive of the "Canadian mosaic." Tully isolates six overlapping claims for recognition that are being contested in Canada and argues that only a creative and imaginative Canada can do justice to such a diverse and tangled motley of claims for constitutional recognition. Tully's own scholarly works are clearly some of the most important contributions towards this end. And given the fact that Canada is a microcosm of virtually all the contests being fought over the world for constitutional recognition, he sees his philosophical arguments for diversity as having wider implications. Tully's work is complex and engages the question of diversity vs. uniformity both historically and philosophically. As he is, first and foremost, a historian of ideas, he reconstructs the intellectual and practical contexts within which these ideas were born, given articulation, contested and implemented. The philosophical aspect creatively extends into political theory the insights of Cambridge philosopher Ludwig Wittgenstein and rediscovers the wisdom of the civic humanists and that of Hugo Grotius who maintained that diverse constitutional arrangements are necessitated by our diverse laws, languages, customs and ways of life.

Let me just mention very briefly the main points with regard to modern constitutionalism that emerge from Tully's historical retrievals, which are further buttressed by the philosophical justifications of diversity which emerges as the only road

available to us if we want to avoid endless strife in the twenty-first century. As his work is also a critique of those who claim universality and neutrality for liberal institutions, the historical route he takes demonstrates with meticulous and scrupulous historical retrievals the real costs extorted by these ostensibly neutral liberal institutions from other societies, their institutions of government, laws, languages, customs, and ways of life.

In Chapter 3 of his book *Strange Multiplicity* titled "The Empire of Uniformity," Tully begins to argue that it was Thomas Hobbes and Thomas Paine who gave articulation to the modern constitution in direct opposition to what they saw as the ancient constitution. These thinkers set up a contrast whereby a "modern constitution is an act whereby a people frees itself (or themselves) from custom and imposes a new form of association on itself by an act of will, reason and agreement. An ancient constitution by contrast, is the recognition of how the people are already constituted by their assemblage of fundamental laws, institutions and customs" (*Strange Multiplicity* 60).

These thinkers glossed over the more complex and ambiguous conception of a constitution which for the ancient in fact included an articulation of both the features Hobbes and Paine used to set up their dichotomous vision. Having set up this contrast, they proceeded to define the imposition of agreement by a people as an act of reason and customary forms of constitutional recognition by the ancients as acts of unreflective habit. Rather than seeing these various customary arrangements as reasonable constitutional practices they reinterpreted them as simply lacking in reason. They overturned the prevailing wisdom that 'long use and practice' of a custom reflects and manifests the deliberate judgment of reason, and so the consent of a free people. And this 'consent of a free people' – expressed by their agreement in customary ways – counts more than the authority of the people. As we will see later this is precisely what Hugo Grotius was trying to argue, though, in the end, the issue was resolved in favour of the modern or imposition conception of the modern constitution pushed by Hobbes and Pufendorf. Today what the peoples all over the world and within modern liberal societies are demanding is the recognition of their irreducible cultures, customs and ways of life, such demands constitute the reassertion of 'reason in custom' and the reemergence of the Grotian insight that was replaced by the imposition model.

Tully lists seven reasons why 'modern constitutionalism' (imposition and uniform) view prevailed over 'ancient constitutionalism' (diverse and tangled), the latter being the one recognised by Grotius as the only way to peace. First, the modern constitutionalists' view of popular sovereignty effectively eliminated diversity as a constitutive aspect of politics. Their view of popular sovereignty historically has been presented in three forms: a) the people form a society of equals in the state of nature, or,

behind a veil of ignorance, they rationally deliberate over the type of polity that would be in their best interest; b) that people exist in an advanced stage of historical development and "recognise as authoritative a set of threshold, European institutions, manners, and traditions of interpretation within which they deliberate and reach agreement" (*Strange Multiplicity* 63) – these institutions are not authoritarian but authoritative in the sense that they rest upon principles that are open to amendment upon reflection and deliberation; or c) the people is bound together by a common sense of the good and these horizons are constituted by a shared set of authoritative European institutions, values, manners and their traditions of interpretations.

The second feature of modern constitutionalism that does away with irreducible diversity is that it is defined in opposition to an ancient or earlier/lower stage of historical development. This contrast between the two forms of constitutionalism is constructed on their relative lower stage in historical development. As Europeans encountered diverse cultures they constructed a map of historical progression whereby the diversity they encountered was slotted in one of the four stages development of history. In this stages view of history, the ancient constitutions of Europe and the forms life encountered in other cultures were labeled as traditional, pre-modern, uncivilized and so on, while at the end/top the four stages of history were to be found the 'modern' European institutions and manners. In sum, the earlier or non-European institutions were made out to be lower in the stage of history, though moving towards the highest. These customary institutions were seen to be the product of unreflective habit. It was not that custom was missing from modern constitutional states, but rather that in this case custom had been rationally appropriated through the operations of reflection and deliberation.

The third contrast that modern constitutionalists drew was between regular states and irregular states (and here Pufendorf is a key figure). The ancient constitution was seen as irregular in form for it was 'multiform,' an 'assemblage' of customary and varied local laws, a motley of criss-crossing political and legal jurisdictions. The modern constitution was seen by contrast as established by a sovereign people who expressed in a uniform manner its legal and political will. This view appeared around the end of the 30 year war which was then understood as a conflict around the locus of sovereignty. The theorists argued that it was the confusion created by overlapping political and legal jurisdictions that had caused this terrible destruction in Europe and sought a constitution pursuant to which there would be single locus of sovereignty - the people - and centralised in a single person or assembly with the intentions of building a single uniform government held in check through a system of balance between the various institutions.

The diverse plurality of the ancient constitution is seen as irregular and diseased, a condition from which the polity must be cured so as to be brought to health.

The fourth feature of modern constitutionalism is the sophisticated account of custom that is built into the four stages theory of progress. It is not simply that the impositionist view wins out over the recognition view of plurality by some arbitrary measure while states are being centralised and consolidated. Rather, according to the stage theory, history itself secures this outcome. Uniformity is achieved by the unintended effects of economic and social historical development – the hidden hand of reason. As history progresses it rationalizes economies, cultures and customary institutions into the uniformity that these thinkers prescribed. Governments help this process along through various disciplining and rationalizing measures, however it all happens within the frame of unintended consequences of historical development. (*Strange Multiplicity* 67)

Fifth, the modern constitution is associated with a specific set of European institutions. They argued that these societies are converging and thus will form a uniform type of legal and political institutions – called by Kant 'republican constitutions.' As Tully puts it succinctly, "The people alienate or delegate political power to governments in these institutional forms. Institutions of representative government, separation of powers, the rule of law, individual liberty, standing armies and a public sphere are definitive of a modern or republican constitution, for it is only at the modern level of historical development that they are necessary" (*Strange Multiplicity* 68). These definitive constitutional institutions were taken to be constitutive of modern sovereign states and all others were taken to be lower, traditional, irregular, ancient or stateless societies.

The sixth feature was that the people of these nations were given an identity through the concept of a nation with their national narratives and public symbols. A common place where they felt a sense of belonging and allegiance, a common name, and a common corporate identity or personality. As Tully goes on to say, "From Pufendorf onwards, this corporate identity of nation and nationals in a state is seen as necessary to the unity of a modern constitutional association" (*Strange Multiplicity* 68).

This constitutional nation has two complementary forms of equality. First, the people are seen as equals in the sense that any other treatment is taken to be the height of injustice. Second, the constitutional nation is equal to all other constitutional nations. Both these were seen as stemming from the European struggle against imperial papal powers. However, colonies outside of Europe were seen as belonging to a lower stage of historical development, and this justified the contention that the rule of equality did not apply to them.

The last feature of modern constitutionalism, according to Tully, is that there is a founding moment which provides the rules and procedures for the possibility of democratic politics. This is further reinforced by another assumption: these rules are rationally arrived at, are universally applicable, and people agreed to them for all time. The republican tradition has its law giver, as well as the original consensus arrived at by the community (for the communitarian) or by the nation (in the nationalist tradition). For the liberal tradition, the basis of consensus is the original or hypothetical contract to which all rational citizens would agree were they to be asked the question. Tully contends that seen in this light the modern constitution seems a precondition to democratic politics rather than as one that is participating in it. As he puts it, "This anti-democratic feature is mitigated by the assumption that the people gave rise to it at some time, and by the elaborate theories of modern constitutionalism from Hobbes to the present which serve to persuade us that we would consent today if we were reasonable. In this respect , the ancient constitution appears more democratic. It has changed and adjusted by the governments, as the customs and circumstances changed, in accordance with nothing more, or less, than the conventions of the constitution· that is, the present interpretation of customary ways of changing the constitution in the past" (*Strange Multiplicity* 69)

Tully goes on to show how this 'partial forgery' that is the modern constitution was set in place both intellectually and practically through the practices which Hobbes, Pufendorf and Locke, among others, were engaged in. Alongside he runs the advocates of the ancient constitution, who challenged the claims of the moderns and were never quite silenced, as is evident today in the familiar cacophony of claims that the irreducible ways of living and governing of different people should be recognized. We should note that, while Tully's text does note explicitly mention Grotius, his arguments run right through the discussion in a subterranean fashion and connect in surprising ways with contemporary claims for recognition by different peoples. Today, 400 hundred years after its invention, modern constitutionalism is beginning to look anti-democratic and unmodern.

3. The 'Modern' Language of the Law of Nature

Stephen Toulmin[1] has brought to light two of the most significant effects of the religious civil wars of sixteenth and seventeenth century: first, the people in Europe had lost the art of interacting among themselves with mutual respect; and, the various countries in Europe had lost the art of conducting relations among themselves

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[1] Stephen Toulmin, *Cosmopolis: The Hidden Agenda of Modernity*, 89-137.

diplomatically without resorting to open warfare. In other words, 'sociality' among people and nations in Europe had significantly broken down with critical and varied implications for individuals, society, and nations. I would like to claim that this is one of the most illuminating and formative contexts to situate the works of: Hugo Grotius' *The Laws of War and Peace* (1625); Thomas Hobbes' *Of the Citizen* (1642) and *Leviathan* (1651); Samuel Pufendorf's *The Law of Nature and of Nations* (1672) and *On the Duty of Man and Citizen* (1673). If these texts are read as addressing the breakdown of 'sociality' among the people and nations of Europe it makes quite perspicuous what these authors were doing in writing these texts and the practices in which they sought to effect changes.

Hugo Grotius constructs the 'modern' language of the law of nature as a complex of rights and duties of sociality informed by his theory of society. The law of nature, the dictate of right reason are the rights and duties of sociality that are the necessary conditions for the individual and society's preservation and well–being.

Grotius' effort to provide Europeans with a new language of the law of nature involves five steps. First, he constructed the essentially social and rational nature of man[1] in which the law of nature is grounded and by which it is apprehended and lived. Second, (a) the new language of the law of nature is constructed by demarcating the law of nature from volitional law – civil, divine and the law of nations; (b) the criterion for this demarcation is not different subject matter but point of origin, that is, civil law, divine law and the law of nations originate in the free-will of man and god while the origin of the law of nature is the social nature of man ('right reason' accessible to all men with rational faculties); (c) the scope of law of nature is necessarily universal and grounded in the essentially social nature of man; (d) the law of nature applies exclusively to external actions and internal considerations of actions are left to Aristotelian distributive justice and the law of love (divine law); (e) and last the law of nature is made independent of god's will.

The third step is to build a framework of justice that accords with the social and rational nature of man. He does this by giving law a three part definition: (a) all actions that conflict with the larger good of society constitute acts of injustice; (b) a body of rights that are the moral qualities of the self. These rights which are the property of the self are instrumental to the higher rights of society, that is, to the public good; and (c)

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[1] Throughout this dissertation, the gender specific term 'man' employed in the primary sources is not altered . This usage is meant to highlight the exclusionary nature of the concepts employed by natural law thinkers and to highlight the conspicuous absence of women in their thought and the practices upon which they were reflecting.

volitional law and the law of nature. The law of nature which is a dictate of right reason grounded in the social nature of man makes perspicuous man's rights and duties of sociality. These rights and duties governed by 'right reason' as in the above two instances subordinates individual rights to those of the common good or the higher rights of society.

The fourth step is to reinforce this framework of justice grounded in the social nature of man consistent with the common good of society by expediency. The public good is not simply an end in itself standing in opposition to individual self–interest, rather, it is demonstrated to be in accord with one's self–interest. This is the domain of 'law properly so called' or civil law enforced by the sovereign/citizens.

The above four inform Grotius' treatment of the varied array of subject matters set out in Books I and II. It is an extensive treatment of rights and duties of sociality that men possess and must perform toward themselves, other men as men, and citizens as citizen. Further, it is a thoroughgoing treatment of the diverse and varied juridical arrangements and institutions Europeans established in the process of living socially. This comprehensive articulation of the new language of the law of nature on a vast range of substantive matters is Grotius' fifth step.

Chapter I will attempt to demonstrate the first four steps or conceptual moves that Grotius makes to set up his 'modern' language of the law of nature. I would like to claim that in the process Grotius makes a break with his pre–modern predecessors in the law of nature tradition. It is this break that creates in part the conditions for modern juridical thought and practice set in place by Thomas Hobbes and Samuel Pufendorf.

Chapter II and III will lay out for examination the important topics treated by Grotius. This final step of Grotius' agenda attempts at clarifying and laying down rights and necessary duties of sociality to mitigate against dissolution of society and covers an enormous range of topics and as such it is not feasible to treat them all in this thesis. Accordingly, the selection of the topics that are treated in these chapters are influenced in part by Grotius' own emphasis upon them, the importance they were to have in the political theories of Thomas Hobbes and Samuel Pufendorf as well as a perspective that looks back on 400 years of living in this juridical house, first by Europeans and later as a result of imperialism by non–European peoples all over the world.

Let me briefly state the arrangement in these chapters. Grotius first asks and answers the question whether use of force is ever justified in order to defend one's life. It is within this context that he treats the question of sovereign power, its varied character, original locations, possible transfers, its transgressions by governors, the law of non-resistance, the rights of resistance and the limitation to alienation of sovereignty. It is here that we become aware of the diverse and complex nature of these political questions,

practices and institutions existing in 17th century Europe and their endorsement by Grotius within the overall context of sociality. Second, I will treat Grotius' claims with regard to the justified use of force for the defence of property. Within this discussion he treats the origin of private property and limits to individual ownership. And lastly, the right to use force for punishment. This allows him to lay down the original location of the right of punishment, the purposes of punishment and punishment for crimes against god within the context of religious civil wars. The second and third points are discussed in Chapter III.

Thomas Hobbes further develops the language of the modern law of nature. He too grounds the dictate of right reason, the law of nature, in his conception of human nature. However, he distances himself from Grotius' conception of nature as essentially social and his understanding of the duties men must perform in society is premised on the instinct for self preservation. For Hobbes it is the imperative of self preservation in the state of nature and not sociable nature that drive men to (civil) societies and obey the laws of nature. And these laws of nature, social duties or virtues must be enforced by the sovereign authority in order to ensure individual self preservation and social peace. Accordingly, Grotius' first step is entirely done away with and replaced with a minimal conception of the self with a powerful instinct for self preservation.

Second, Hobbes retains the demarcations that Grotius makes between different forms of law. However, his criterion for making the demarcation is different – as in Grotius volitional law is sourced in the will of man or god but the law of nature is premised on long term or strategic considerations for peace and individual preservation. As in Grotius the scope of the law of nature is universal being a dictate of right reason. Also, along with Grotius the law of nature applies only to men's external actions and is made independent of god's will.

Grotius' third step is accordingly adapted. He takes no issue with Grotius' first definition of justice being acts in accordance with the good of society, rather he argues forcefully that the law of nature are those dictates that lead to the well being of society and constitute the true moral science. However, Hobbes criticises Grotius on the second part of the definition of justice where he claims that a body of rights (*ius*) constitutes law (*lex*). For Hobbes it is the performance of social duties, the laws of nature that constitutes justice. Though those actions, or duties that contribute to sociality must have primacy over short term, instrumental ends of individuals which only a 'fool' would recommend.

Grotius' fourth step is retained virtually intact by Hobbes. However, while for Grotius expediency simply acted as a reinforcement to the performance of socially

necessary duties, in the case of Hobbes the laws of nature simply are strategic actions that eventually benefit individuals while furthering the larger ends of society.

Last, and as we shall see Hobbes disagrees most with Grotius on the necessary juridical edifices needed to ensure the performance of the laws of nature. To put it briefly, Grotius' arguments for endorsing pluralistic constitutional arrangements, the different possibilities for the distribution of sovereign power with its varied locations and the complex treatment of the role of resistance are replaced by an absolutist homogeneous conception of the sovereign state. However, as for Grotius, this is done by Hobbes in the larger interest of social peace among Europeans.

Samuel Pufendorf acknowledges his debt to both Grotius and Hobbes in his construction of the law of nature or the duties of man and citizen. He accepts Grotius' argument that men possess both a rational and social nature. He also accepts the importance Hobbes places on this powerful instinct for self preservation. He brings these two premises together in order to build his argument for a comprehensive theory of sociality - the law of nature - as a necessary condition of peace. He both commends and accepts Grotius' argument demarcating the various forms of law. Though, unlike both Grotius and Hobbes, for Pufendorf the law of nature is dependents upon god as its author and enforcer. Also, he accepts Grotius' argument that laws of nature refer only to men's external actions, thus reinforcing the 'social' as the objective domain of analysis for understanding human behaviour.

Pufendorf accepts Grotius' third step almost entirely. He emphasises along with Grotius and Hobbes the absurdity of any conception of justice that injures the interest of society; further, in part, justice does include a cluster of subjective rights; and last, in almost all instances rights of society take precedence to individual rights. However, in Pufendorf the role of duties towards oneself, other men as men and citizens as citizens is much more elaborate than in either Grotius or Hobbes and forms the most comprehensive theory of justice grounded in duties that was to be constructed in juridical political theory.

Pufendorf is also in agreement with Grotius and Hobbes on the importance of expediency in the performance of one's duties of sociality. He reiterates that only incorrect reasoning or plain stupidity will see a conflict between self interest and the public interest.

However, it is in his political theory that he comes closest to Hobbes and distances himself from Grotius. Like Hobbes he is convinced that divided sovereignty in some cases endorsed by Grotius is sheer madness. Further, Pufendorf has no place for varied political arrangements that we find in Grotius nor a right to resistance. In line with

Hobbes he strongly advocates the homogeneous nature of juridical institutions and sovereign power.

4. Methodology

While Scholars of the 17th century differ greatly amongst each other, they have all certainly added to our understanding of the period, as well as provided a good reminder of the rich, complex, tangled-motley, or rather, higeldy-pigeldy character of juridical institutions and practices within which we are embedded today. First, I would like to emphasize that it is important to recognize the importance of this diversity in interpretations as they more accurately reflect the diverse and varied nature of political thought and action. Moreover, I think it is important to point out that any set of historically and theoretically inclusionary claims, irrespective of the school (or scholar) that makes them, are to some extent illusionary. The reason for sliding into this illusion is that each school sees itself as having all the necessary theoretical concepts and procedures to study the phenomena under investigation. However, these concepts and tools have only partial abilities, and, in fact, study only a small segment of the reality under investigation. This tendency to slide from insight to illusion (inclusionary claims) is due to the fact that scholars do indeed investigate, or hope to investigate, the 'objective domain' made accessible by their distinct vocabularies in its entirety. After all, the objective domain of any investigation is, at least in part, constituted by the conceptual vocabulary of the practitioners. So it is quite easy to slip into the illusion, and it is not a stupid error, to mistake one's neighbourhood for the whole city.

The other important reason I think is that we have been habituated by our training to aspire for a form of knowledge exemplified by the universal explanatory theory. This view, and other similar views, most immediately owe their dominance to the behavioural movement in the social sciences grounded in the 'Vienna Circle' and both find substantial support in the works of philosophers of language at Cambridge, notably Russell, Moore, and early Wittgenstein. The historical reason why this form and end of knowledge has become so 'natural' for us is that it rests on several centuries of epistemological work that has made it a customary and conventional form of thinking and acting. This was first thought systematically by Thomas Hobbes, Rene Descartes, Pierre Gassendi and John Locke in response to the breakdown of sociality in late 16th and early 17th centuries.

I would like to reinforce this complex, tangled, plural, crisscrossing, overlapping feature of political theory, and the need for diversity of conceptual tools and retrievals, by making a historical survey. I will do the above by rearranging certain historical examples so as to obtain greater historical perspicuity on these phenomena. At the same

time I also hope to be able to vindicate another methodological claim, the substantively indeterminate quality that any social phenomena possesses. A historical survey which attends to the differences in the meanings of concepts, their uses, and the functions they perform, throws light on how concepts emerge, how effective they are in doing the task that they are employed for in their particular conceptual frameworks, as well as, the practices in which they intervene. It also sheds light on why concepts possess the seemingly transcendent qualities they seem to have and this in turn reminds us of the limitations of transcendent models and theories. Further, such a survey makes clear the various paths that we have taken to reach the present and thus the particular conventions we work within and take for granted while making the inclusionary claims we do. And seeing the limited nature of the universal claims the various theories espouse has a freeing effect. It frees us to think and act differently and opens up the potential of a critical and progressive ethos. Here I might just mention that one of the most dangerous illusions that this survey helps in dispelling is the one created by the various theories that see history as inevitably progressing through the various stages. Even when this is not explicitly stated it informs virtually all Liberal and Marxist historiographies. And last, we see why the phenomena under investigation is not random, nor relativist, or in Feyerabend's language true only to one principle, that is, 'anything goes'.

But before moving on I would like to say something more on the Wittgensteinian method for which I have some preference. As mentioned above, the partial though generally expressed histories have been influenced by the prevailing epistemology, that is, a family of tools classed together as positive, it matters little by which school they are employed. Rather than seeing these ways of thinking and acting as the products of long and sustained period of complex practices we tend to simplify and reify them. Once this simplification and reification is effected these 'objective' conditions appear as providing *a priori* propositions within which bits and pieces of this history are then systematically situated and expressed in general terms.

It may seem that I am belabouring this point but the danger of being bewitched by dominant conceptual schemas is always present. That we are to a large extent held captive by these pictures in spite of efforts to free ourselves seems to point to the apparent futility of ever freeing ourselves. A case in point is the progress view of history which is so intrinsically interwoven into our practices and reflections upon them that while meeting with sustained criticism over the years refuses to be dislodged. To paraphrase Wittgenstein, they (pictures) are in our language and language seems to repeat it to us even as we try valiantly to struggle out of them. So what does he mean that language repeats them to us inexorably and that breaking out is not that easy? By this he meant

that the concepts we use, have meaning, are intelligible, perform their functions, only within a complex of rules, procedures, theories, and grounds of justification. Second, the ability to use (understand) these concepts, is acquired by us through custom, education and training, in other words, in the practice of employing them . So when we use a concept, or problematize it for critical purposes, we are implicitly or explicitly working within this two tiered cluster - there is really no outside of it. Then does this mean we are forever condemned to being held captive of the languages, pictures, theories, or paradigms and the practices within which they are interwoven? The answer to this that we find in Wittgenstein is a resounding no. We can, and do, standardly call into question a concept, or a range of concepts, by working with concepts that we do not problematize, or, in other words, go on to use conventionally and customarily. Here a good example would be Michel Foucault's work on knowledge, power and sexuality. In that case what is Wittgenstein disallowing? Well, given the nature of language, he does not see any possibility for claims aspiring toward total critique (or revolution), where we wipe the slate clean and begin anew - such claims have appeared all too often in western political theory. Given this Wittgensteinian understanding of the nature of language, criticism can only be piece-meal, never total, though not unsystematic. To put it a little differently, all criticism takes place in language by problematizing segments of it with linguistic tools that we use unproblematically, that is, conventionally. He went on to demonstrate this argument, this type of critique, by extensive use of language-games both historical and hypothetical. It is here that Wittgenstein introduces the all important concept of 'Survey' I mentioned above and what I intend to do in the thesis. By surveying two or more language-games, historical or hypothetical, we get clear on the different employments of concepts, the uses and functions that they perform, their various meanings – meaningfulness, intelligibility and what is done with them. As such, we get clear on the different meanings of the same concepts, as well as, the sameness of the different concepts that have been used in the various language-games. This renders their work clearer, more intelligible, and sheds light on what they were saying and doing in writing these texts, in other words, the meaning and intent of the author. And this last point is important, for clarity is not being sought for its own sake, or simply for some epistemological purpose, but because it allows us to understand the interventions these thinkers were making in the political concerns of their day. By getting clear on the above by means of a survey there is a freeing effect. This 'freeing effect' is brought about by recognizing the different ways of thinking and acting in the different language-games and their context specific nature. This then allows us to see our own practices as having the same indeterminate and parochial quality and thus always open to correction. The

allegedly a-historical, a priori, understanding gives way to another view, more correct than the first, (which after all is mostly illusory), that recognizes its own partial nature, its historical specificity and its contextual character. Further, this allows us, now standing on grounds as solid as they can get, to pry open or reject universalizing theories, without sliding into relativism.

I would like to apologise for this long detour, however, since the 17th century as the common epistemic (and moral) horizons disintegrated in the West, epistemological justifications have become necessary before any intellectual task is begun. In other words, before the start of any new inquiry, one's method must be justified.

5. An Evaluation of Richard Tuck's Pioneering Work.

I would like to state in the introduction that this study was largely inspired by Richard Tuck's pioneering work on Grotius and Hobbes and I would like to flag my debt as well as my differences with him at the outset. I would like to begin by first situating him within the Cambridge School to which he belongs and which has had a profound influence upon my intellectual development. In the last two decades 'Cambridge School' scholars have published an immense amount of excellent historiographical philosophical work. Most of these retrievals have attempted to clarify the conceptual language of Renaissance and Early Modern political practices. They have done this by situating texts within their intellectual and practical contexts in which they were intended as, and were, more or else effective interventions. The unique nature of their work is due, in part, to their appropriation and innovative reworking of methodological tools made available by philosophers of language in the last few decades. In particular, their historical retrievals owe much to the insights of later Wittgenstein, Searle and Austin. Their painstakingly meticulous work, within a coherent research agenda, informed by a sophisticated understanding of language and its uses, clarifies large segments of the complex tapestry of conceptual engagements by philosophers from the late Renaissance through to the eighteenth century. As a result, there is greater understanding of how European political concepts emerged, the purposes they served, and their relation to practice. Most importantly, they have demonstrated the deeply historical and conventional nature of political concepts and practices. At the same time the use of these new methodological tools, the activity of employing them over a period of years has led to their further refinement and sophistication. I think one can claim that the study of political philosophy is witnessing a new renaissance through the works of these historical philosophers of the 'Cambridge School'.

Individually and collectively they have given many reasons for the importance of such retrievals. Some are obvious: they help us to clarify the vocabulary of politics that is interwoven with present day political practices. That is, ways of thinking and acting constitutive of modern political agents are made perspicuous by situating them within their historical (practical and intellectual) contexts. Second, and connected to the first, they shed light on juridical[1] civic-humanist, and reason of state practices of governing conduct. These practices have been universalized through economic, cultural, and religious imperialism. Third, they make intelligible the otherwise inexplicable fact that while we cannot give 'good reasons' in the Kantian/Habermasian sense for some of the most important political practices (what may seem even more perplexing, more often than not, good reasons are not even demanded), it is *reasonable* to think and act in particular ways. To put it differently, they bring into plain view a feature of our moral and political practices, that is, the customary conditions that make them possible, rational and contested. Fourth, these retrievals allow us to note the common horizons or grounds that are, at least in part, shared by those who profess the most critical stance towards them, for example, the various brands of post-modernism. Last, as mentioned above such retrievals have a freeing effect. By rendering historical and contextual (though not relativist) economic, moral, legal and political practices such retrievals remove the objectivist illusion and open up the possibilities of thinking and acting critically and differently.[2]

One of the most important contributors from within this perspective has been Richard Tuck. Since his first book on the *Natural Rights Theories: Their Origin and Development* (1979); *Hobbes* (1990); the much improved edition and Introduction, Thomas Hobbes' *Leviathan* (1991); numerous articles[3] ; and his recent publication

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[1] Legal and political institutions that began to emerge in Europe from Gregorian legal revolution in the twelfth century.

[2] For further reasons see James Tully ed., *Meaning and Context: Quentin Skinner and his Critics* (1988); and Charles Taylor, 'Philosophy and its History,' in *Philosophy in History*, eds. Richard Rorty, J. B. Schneewind and Quentin Skinner, (1984) 17-30. All the articles in this book, via various paths, taken together, remove all doubt on the importance of history for doing philosophy.

[3] To mention only those relevant for my argument, "The 'Modern' School of Natural Law," *The Languages of Political Theory in Early-Modern Europe*, ed. Anthony Pagden (1987) 99-122; "Optics and Sceptics: The Philosophical Foundations of Hobbes' Political Thought," *Conscience and Casuistry in Early Modern Europe*, ed. Edmund

Philosophy and Government 1572-1651 (1993), Tuck has enormously enriched our understanding of this period. He has meticulously pieced together histories that hitherto had been outside our horizons. I cannot hope to do justice to the intricate design he has traced over the years but at least with regard to his recent articles and books let me just gesture towards some of them. He has brought to light the complex and varied appropriations of the Stoics by 16th century civic humanists and the Aristotelian Scholastics; the growth of the language of *raison d'etat*, and the replacement of Cicero by Tacitus; the rather effective repudiation of Scholastic Aristotelian epistemology and ethics by the Sceptics, Michael de Montaigne and Pierre Charron; the construction of the 'modern' language of the law of nature by Hugo Grotius and Hobbes; the work of the group around Marin Mersenne, namely, Rene Descartes, Pierre Gassendi and Thomas Hobbes, who took up the challenge posed by the sceptics and went on to produce theories of knowledge, ethics, politics, law, science etc., grounded in foundations allegedly immune to the force of the sceptical arguments.

His most extensive work has been the historical retrievals of Grotius and Hobbes. In these important historical excavations Tuck has sought to emphasize the importance of the sceptical crisis that engulfed Europe in the sixteenth and early seventeenth centuries. Fundamental to the story Tuck tells is the discovery of Sextus Empiricus, *Outlines of Pyrrhonism* in the 16th-century and used by Michael de Montaigne to thoroughly call into question the epistemic and moral grounds of Aristotelian Scholastics. It is against this backdrop, Tuck stresses, that the works of Grotius and Hobbes are to be understood. He further contends that the responses made by Grotius and Hobbes to the Sceptics provided the foundations upon which the other thinkers in the 17th and 18th centuries built their philosophical systems. Further, this body of work, from Grotius to Kant is a solid, coherent, and consistent, tradition of critical reflection[1] that we have to

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Leites (1988a) 235-23; "Hobbes and Descartes," *Perspectives on Thomas Hobbes*, eds. G. A. J. Rogers and Alyan Ryan (1988b) 11-42; "Humanism and Political Thought," *The Impact of Humanism in Western Europe*, eds. Anthony Goodman and Angus MacKay (1990) 43-65.

[1] Michael Seidler is in agreement with Richard Tuck, see his "Introduction" which largely appropriates, and situates itself in Tucks historical narrative, *Samuel Pufendorf's 'On The Natural State Of Men'* (Lewiston, NY: The Edwin Mellon Press, 1990). However, a signpost for a more tangled and complex account see, James Tully, "Introduction," *Samuel Pufendorf, On The Duty Of Man And Citizen According To Natural Law*, trans. Michael Silverthorne (1991) xiv-xxxvii.

understand aright, for in large measure it continues to provide much of the contemporary moral, political, and scientific practices with their recognizably familiar foundations.[1]

There is much in these works with which I am not only in agreement, but from which I have learned enormously. However, in an effort to demonstrate the particular reasons for the importance of Hugo Grotius and Thomas Hobbes as founding members, and establish the coherency of this tradition Tuck has at times overlooked, and at others, re-descriptively interpreted their works. It is with these that I have some difficulties. In what follows below I will briefly set up his arguments and hold most of what he has claimed intact, but go on to suggest that his reading of Grotius and Hobbes needs to be re-examined. As mentioned above, according to Tuck, the Sceptics in the 16th century made a dual and simultaneous attack on the existing epistemic and moral frameworks. The first called into question the claims of a possible common moral universe. Their contention was simply that it did not stand up to empirical proof. The second called into question human powers of perception, the extant ground of all knowledge-claims. In this case, they argued that given the cases of possible mis-perception it was impossible to claim certainty for the various knowledge-claims that were ultimately grounded in sense-perception. They demonstrated the two claims by furnishing illustrations standardly used by pyrrhonian sceptics, in particular, by Sextus Empiricus. The important role played by

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[1] Richard Tuck has, with some justification, claimed that Kant and neo-Kantians so changed our moral and political agenda, that not only did the problems that these thinkers were engaged in disappear, but also the major actors themselves. While he is correct to some extent, he does not account for the fact that in the eighteenth century a new object domain of investigation emerges in the eighteenth century; that is, 'commercial society' grounded in the calculable vocabulary of 'interest', which displaces to a significant extent, theorizing within the natural jurisprudence. Moreover, the effects of this new phenomena, commercial/capitalist societies, creates the two classes, now locked in a seemingly imminent conflict. This further directs the attention of thinkers in the nineteenth century to the mechanics of our economic rather than our juridic practices; our economic practices now appeared to be obviously foundational to the juridical structures and practices. Quite the opposite understanding, than in the seventeenth century; when our complex of juridical practices were taken to be foundational to politics and society in general. This I think, is the more important reason, why the two greatest and influential thinkers of natural jurisprudence, Hugo Grotius and Samuel Pufendorf, who so dominated moral, political, and legal thought and action in the seventeenth and first half of the eighteenth centuries, disappeared from our horizons.

the sceptical arguments, which were constitutive of and constituted by the religious and political crisis of the sixteenth and early seventeenth century has been pointed out by many scholars working within the contextualist perspective.[1] What is different about Tuck's work is that he has built a narrative connection between the sceptical crisis and the works of Grotius and Hobbes.

As his story unfolds, Grotius takes up the challenge to provide a universal ethics grounded in premises not vulnerable to the arguments of the sceptics. He does this by appropriating two concepts familiar to the lawyers of Roman law and employs them to form the minimal grounds acceptable across cultural boundaries. These two concepts are, 'right' and 'self-preservation'. The concept of right (*ius*), was standardly used in Roman law to mean an act or a state of affairs that was in accord with law. Grotius takes this concept of right and re-descriptively employs it as a 'moral right'. This subjectivization and re-description of right as a moral power is then conjoined with Cicero's first principles of self-preservation and the means to self-preservation.[2] With these linguistic moves Grotius has his first principle of morality, of the 'modern' language of the law of nature. In Grotius' language they are now, a right to self-preservation, and, a right to the means of self-preservation. Tuck goes on to claim on behalf of Grotius that no matter what the cultural differences among people they will all accept that everybody has a right to self-preservation and its means. From this minimal premise we can Grotius allegedly claims go on to build a comprehensive system of laws.

Tuck continues, while Grotius believed he had successfully overcome the sceptical problem it was Hobbes who correctly perceived that given the sceptical attack on perception and knowledge-forms grounded in it, Grotius' solution did not resolve the

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[1] The wars of religion and the civil wars had a devastating effect on Europe wiping out nearly 30% of the population and rendering impossible any political society. It is within this context it made sense, at least to sixteenth century sceptics to point to the stance of ataraxia; and it is within this context of fanatics running around, all in possession of truth, massacring whole populations, that the sceptics stance, of not taking sides and living a life of disengagement, seemed imminently reasonable, but at the same time, to its seventeenth century heirs, terribly paralyzing.

[2] These first principles, when conjoined with subjectivized concept of right alters, both, their sense and reference fundamentally. After all, for Cicero, they were merely expedient consideration, instrumental towards the higher goods. Tuck does not draw out this distinction between Grotian and Ciceronian uses of these first principles, and as result, there is considerable ambiguity here in Tuck.

problem. The reasoning goes like this: Even if we accept the rights of self-preservation and their means as premises on which nobody would dispute, because of the possible problems with sense-perception we cannot know for certain what counts as a threat to self-preservation. And so, in the absence of having a sure means of knowing for certain what counts as a threat to self-perception, all preemptive strikes are justified. This then once again takes us back to the condition prior to the Grotian solution, the war of all against all. Tuck claims that the sceptics are finally answered by Hobbes who appropriates Grotius' subjectivized language of right and then completes his solution by instituting a Sovereign as the final arbitrator to what counts as a threat to self-preservation.

6. Five Questions

This is a powerfully convincing picture reconstructed with the help of high quality historical and textual scholarship. However, I would like to suggest that there are five difficulties with this construal. I am of course open to being convinced otherwise.

6.1 Overlooking Complexity

First, must we read Grotius and Hobbes as responding simply to the sceptical crisis, or should their works be situated within a far more complex background. I will not spend any time on this, but simply point to the work of James Tully, who has systematized the four areas of concern of the major philosophers in the 17th century, as well as, the practical conditions that occasioned them.[1] The concerns that were taken up by these philosophers had to do with the theoretical nature of political power and government; the various techniques to be employed in governing; the relationship between politics and religion; and last, the type of knowledge-claims and grounds of justifications appropriate to political and religious theory and practice. The above concerns, which generated so much intense intellectual activity in Europe, had been occasioned by the religious civil wars of the last 100 years, leaving Europe devastated as never before; the need to consolidate the newly emerging administrative and centralizing absolutist new monarchies who were at the same time locked into commercial and military rivalry and struggle within a pan-European balance of power; the European imperial struggle for conquest, domination, expropriation, exploitation of non-European people and resources. These rested on, in a constitutive/constituted relation, to the extensive civic humanist attack on the Scholastic Aristotelian epistemology and universal moral claims that swept

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[1] James Tully, *An Approach to Political Philosophy: Locke in Context* (1993) 9-10.

Europe and quite thoroughly called into question all the knowledge forms that issued from it. And of course, it is within this cluster of concerns and their occasions that the sceptical arguments have their place.

6.2 Grotius' conception of agency and political association

The second concern I have is that Tuck presents a version of Grotius that does not account for large parts of Grotius' text. If Grotius was providing two primary rights, and with their help building a system of the law of nature, Tuck's account, would be a correct portrayal. However, I would like to suggest (at some cost to Tuck's narrative), that this is not all that Grotius was doing in his magisterial work, *The Laws of War and Peace*, which was, as Tuck constantly reminds us, so admired by all, even when they disagreed from Hobbes and Locke in England, to Pufendorf and Leibniz in Germany, and those who constituted the Scottish Enlightenment, from Gershom Carmichael to Adam Smith.

I would first of all like to point out the significant Grotian arguments and passages that are not accounted for by Tuck and argue that if we accept their existence (and their existence, we cannot, for obvious reasons, doubt), then we have only two options; provide reasons why they are not to be taken account off; or, account for them while keeping the narrative intact. At this moment I cannot see how either of the two can be done. There is, so it seems to me, a third possibility open to us; however this would considerably alter the picture - at least as it now stands.[1]

Grotius' first construction of his system of natural jurisprudence is in the winter of 1604/5, (though first published in 1868) *Commentary On the Law of Prize and Booty*, this finds full expression in his magnum opus, *The Laws of War and Peace* in 1625. The first was written in order to justify the acts of war that Dutch commerce in South-East Asia entailed. The second, which in large measure follows the first, is compiled to further his first intent, especially in the absence of any normative justification for wars of commerce.[2] Moreover, it is also an attempt to provide Europe with a comprehensive legal

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[1] I think he is now moving in this direction and drawing upon a more multifaceted formative context, as in his 1990-91 Carlyle lectures, delivered at Oxford, he has more correctly (at least in my view), situated the 'modern' language of the law of nature, that is the language of right and the system of jurisprudence built with it, within the context of legitimizing Dutch wars of commerce.

[2] This point has been made by Tuck in his second lecture in the Carlyle series of lectures at Oxford, 22 January, 1990-91. The previously existing justifications of war

system, concentrated at the point where illegalities were most present - that is, at the relations among nations - and in the sphere of international relations at that point where laws were standardly held in opposition - the sphere of war (*LWP*, Prolegomena 28-31). The three books are an answer to two questions; what is a just war and what acts in war are just (*LWP* 1: 1.1). These were the most significant questions in a Europe devastated by wars of religion, civil war and the beginnings of wars of colonization. As he says, "[w]ar itself will finally conduct us to peace as its ultimate goal" (*LWP* 1: 1.1). In responding to these two questions Grotius gives us a comprehensive treatment of the theoretical questions of government and political power, the art of governing, the relationship between religion and state, and the types of knowledge-forms appropriate to them.[1] They were, as he knew, the new foundations on which others could build.[2]

Before embarking on the project Grotius had to counter what he took to be the strongest arguments in opposition to such a task. The spokesperson that he selects as his worthy opponent is Carneades, whose arguments, it is clear, were not only familiar but carried a great deal of force among Grotius' projected audience. Carneades had argued that justice was simply a matter of expediency: that is, we call 'just' those acts that serve our self-interest and 'injustice' those that do not. Accordingly, justice differs from place to place, and in the same place over a period of time. Moreover, those acts directed otherwise are simply the product of folly: contrary to self-interest and justice (*LWP*, Prolegomena 5). Grotius says this is not to be accepted even for a moment. He begins his account by drawing a picture of human agency in stark contrast to the expedient self-

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were two; first, by the Aristotelian scholastics who continued to stress the Augustinian argument that the only just cause of war was an injury that had been received. The other justification was provided by the civic humanists drawing from Cicero and Tacitus, that it was justified to wage war for the interest of one's state. However, this justification simply mapped on to actual practices of states, rather than, underpinning these actions normatively. Though, to be sure, it did provide some legitimation on account of expediency.

[1] The four areas of contribution of all philosophers in the seventeenth century as systematized by James Tully (1993).

[2] As he puts it at the end of his stupendous effort, revealing in the language of virtue and not right: "At this point I think that I can bring my work to an end, not because all has been said that could be said, but because sufficient has been said to lay the foundations. Whoever may wish to build on these foundations a more imposing structure will not only find me free from envy, but will have my sincere gratitude" (*LWP* 3.25.1).

interested characterization that underlies Carneades claim. For Grotius, men have an innate 'impelling desire for society' (*LWP*, Prolegomena 6); not simply a society of any kind but one ordered towards peace such as is possible when rational individuals come together. More light is shed on this when he identifies this impelling desire for society with Stoic concept of 'sociableness'. Such an understanding takes into account the role played by self-interest but does not reduce society as a function of individuals locked in maximizing their self-interest. Nor does it give it primacy. The interest of the common-good has prior claim and is a good in itself. This impelling desire for society of a particular Stoic character is made possible by four other features of human agency. The first of these natural features is a 'disposition to do good to others', which according to Grotius results from some 'extrinsic intelligent principle' (*LWP*, Prolegomena 7); the second, is the instrument of speech; third, is the faculty of reason, described as the ability to generalize; and lastly, a faculty, that is, 'a power of discrimination', an ability to make judgments with regard to right and wrong (*LWP*, Prolegomena 9). This rich portrayal of the 'nature of man' that undergirds Grotius's language of the law of nature is excluded by Tuck in his account; in particular, of the answer Grotius makes to Carneades; and in general, of his construction of 'modern' language of the law of nature. My second question then is: can we ignore this and yet arrive at a correct reading of Grotius's account of the law of nature? I would like to suggest that any claim, on behalf of Grotius, has to take into account, this rich picture of human agency and political association with which he worked.

6.3 The Law of Nature, Self-Preservation and Its Means

The third question on Grotius will make the suggestion made above clearer. This relates to the first principles of the law of nature, the right of self-preservation and the right to the means of self-preservation. Grotius' discussion of these laws takes place within a complex of the three definitions of law. This discussion is also not in Tuck's account of rights. Let me briefly point to this discussion. Law is given an explicitly triadic definition. First, law is that which is in opposition to injustice (*LWP* 1: 1.3.1); opposition to justice is the same as being in opposition to society; this society is one which is in accord with the Stoic primacy of the common-good; acts against the common-good are then unjust and those that are in accord with it are just.

The second definition of law grows out of, and is situated within, the first construal of law. In this second definition, law is a 'body of rights', that is, 'a moral quality of a person' (*LWP* 1: 1.4). The second step introduces the subjectivised understanding of right so familiar to us today. This right (*ius*) is not an act that is in

accordance with law (*lex*) but is situated in the self, and partly constitutes the foundation of Grotius' system of the law of nature. This is the second linguistic move by Grotius to ground his system of laws in the 'nature' of human agency.

The third definition of law is 'a rule of moral actions imposing obligation to what is right' (*LWP* 1: 1.9.1). This is divided in two, law of nature and volitional law: The first principles of law of nature, that are the 'dictate of right reason' (*LWP* 1: 1.10.1), are self-preservation and its means, and duty to abstain from that which contributes to destruction (*LWP* 1: 2.1.1). This is then conjoined with the second definition of law as a body of rights, or moral powers. Grotius now has his two primary rights and a duty, and they in part serve the function of normative premises in his system of the law of nature. And as these are situated in the human agency as their moral powers (*facultas*), Grotius takes the third step and completes the picture in which the nature of human agency is foundational to the law of nature.

Let me state this complex picture of the foundations more clearly. As we saw above, the second definition of law is grounded in the first definition, and the latter is made possible by the rich portrayal of the nature of man; that is, Grotius makes foundational to his system of law the human agency, not only as a consequence of the moral rights that they possess, but also – and it is this sphere that is ultimately foundational - the particular social nature of man (made possible by certain innate tendencies, faculties and instruments), constituting a society centered around the primacy of the common good to which our primary rights (of preservation and their means) are instrumental.

This is not a mere drawing of connections where they may, or, may not exist; Grotius straightforwardly points to this in Prolegomena 6, where he lays out the social nature of man: 'This maintenance of the social order, which we have roughly sketched, and which is consonant with human intelligence, is the source of law properly so called.' Further, when he discusses the first principles of the law of nature, he emphasizes that these rights are only functional to the higher rights, those of society organized around the common-good;

I find it difficult to interpret Grotius as simply translating interest into right, as in the end, Tuck has claimed. That would be only a little different, from what Carneades was saying; a simple translation of the language of interest into the language of right, without taking into account the complex picture within which it is nested, does not shield justice from the charge of expediency. Nor, does it make for normative foundations, which is what Grotius saw himself as building. At best, Tuck's re-construction of Grotius, answers the sceptic by providing a minimal ethics that would be acceptable across cultural

boundaries, but, at the same time, sets up a structure of interlocking expedient action, which is precisely the characterization Grotius was trying to de-legitimize in his work (as he categorically emphasized, this view, must not for a moment be accepted). I do not want to push this point further but want to get on to the fourth question which I think is more problematic.

6.4 The Different 'Nature of Man' in Hobbes and Grotius.

As mentioned above, Tuck has argued that Grotius does not provide the full solution to the problem raised by the Sceptic. The presence of scepticism regarding our powers of perception calls into question our abilities to know what does and does not count as a threat to self-preservation. The minimal premises on which all could agree is made superfluous. And so we are back full circle. This is, of course, where Hobbes steps in; by instituting the Sovereign, Hobbes takes the final step to complete the answer to the sceptic, largely constructed by Grotius. By making the Sovereign the final adjudicator on what constitutes a threat to self-preservation, grounds of imminent uncertainty are finally removed; and, the Grotian premises do their work, that is, provide Europeans (whose moral world had been utterly fractured), with a common moral ground, albeit, a very narrow one. This also provides the grounds for obligation; if we do not obey the Sovereign, we go right back to the condition created by the always present possibility of misperception (lending justification to all sorts of preemptive action), that is, a war of all against all.

I would like to suggest that if we look at the texts closely, the narrative connections are less linear and a lot more tangled. Not that there are no commonalities between Grotius and Hobbes, but rather the commonalities are of a different kind, and the differences, which are rather sharp, are disregarded by Tuck. The fourth question is located in the very different conception of human nature in Grotius and Hobbes. Hobbes has no place for Grotius' rich construal of human nature. Accordingly, there is no concept of a society where the common rather than individual good is primary. Hobbes' human by nature possesses simply the senses, and a few passions that direct their thought and action. There is no other innate property. All other human attributes are the result of either socialization or study. This difference has several important implications for their conceptions of moral and political philosophy. As Tuck does not take into account the rich Grotian construal of human nature (and society) he does not recognize the need to account for its absence in Hobbes. While Tuck's Hobbesian translation of Grotius apparently removes the differences, I would like to stress that if the points that have been

raised in the second and third questions are valid then he does have to address this fourth question.

6.5 The Different Uses/Functions of 'Right' in Grotius and Hobbes

The fifth question points to the implausibility of translating or interpreting Hobbes in Grotian language. In this instance Tuck does the reverse in order to dissolve the differences and build a coherent narrative between Grotius and Hobbes. As mentioned above, Tuck understands Hobbes as building on Grotius and completing his task. In Tuck's reading, Hobbes keeps intact the two rights of self-preservation and their means. This assumes that Hobbes has the same understanding of 'a right' (*ius*) that Grotius constructs - a subjectivized right or moral power, which is also, the second definition of law. It is difficult to see how Tuck reads this into Hobbes. Hobbes does talk of right to self-preservation and to its means, but at the very beginning he distances himself from any connection that it may have with Grotius' construal. A right for Hobbes is simply a human act or motion in the absence of any impediment. According to Hobbes, right is synonymous with natural liberty, that is, unimpeded motion. Further, he makes clear that there are some who have used right (*ius*) and law (*lex*) interchangeably and synonymously, which he points out, is a contradiction as they involve contradictory acts. Right, described above as liberty, is contrasted by Hobbes to law, that definitively binds.

It is difficult to see Grotius's moral right in this mechanistic description of it in Hobbes. It is correct to say that self-preservation and their means are primary consideration for Hobbes, but these do not function as the primary laws of nature, as in Grotius, but instead, act as axioms, that allow Hobbes to move towards his first two laws of nature, which are, (the dictate of nature) to seek peace, and to make a contract towards it. And the condition of justice is the third law of nature, the dictate that we keep our covenants. In contrast, for Grotius the first two laws of nature were constructed from Ciceronian first principles of nature, (that is, self- preservation and the means to them), and by conjoining them with rights as moral powers, the moral qualities of a person. These were then situated within the first definition of law, a societal-form made possible by the rich construal of the nature of human agency. Moreover, in Grotius, the law of nature provides a normative justification for acts and states of affairs. By contrast, in Hobbes, the laws of nature are simply those acts or state of affairs that are functional towards peace. That is, strategically acting individuals can calculate the actions and state of affairs that would, in the long run, be in the interest of peace (the condition most conducive for their individual self-preservation). In Hobbes, this insight is the key to certain knowledge in the sphere of morality. The criteria that arbitrates between moral and

immoral acts is whether they are functional or dysfunctional to peace; and what is functional or dysfunctional, is in the end, determined by the Sovereign.

It is hard to see how this Hobbesian rendering of our moral world grows out of a straight forward building on Grotius' foundation. I would like to suggest that any account that seeks to relate Hobbes to Grotian foundations would have to sketch a far more complicated picture than any that has been attempted so far.

Let me try to fix two signposts pointing towards some of the conditions that would make such a claim plausible. First, Grotius' philosophy is grounded in, and not in opposition to, customary and conventional practices of society. Recognizing this customary and conventional character of Grotius' works is important not only to interpret them correctly but also to correct our understanding of Hobbes' relation to them. Also, it would provide a rather different picture of the seventeenth-century and its implications for understanding the present (modernity and post-modernity).

And secondly, it does seem to me that Tuck's understanding of the concept of foundation is partly the difficulty. He understands by it - at least for his claims on Grotius and Hobbes – an axiomatic structure, with initial premises, and deducible hypotheses. It is true that Hobbes possessed and championed just such a construal, but it is not clear whether Grotius did, and it is certainly not a picture we have to remain captive of. I would like to suggest that in order to get aright our understanding of the constitutive foundations, the Wittgensteinian metaphor of the house that supports the foundation, is a more accurate picture of the grounds of our knowledge-claims and practical actions. It is the four hundred years of building this house – this incredibly intricate, complex, multi-layered, motley of practices - that has, by rendering conventional and customary these seventeenth century construals, made them "foundational."[1] If we do not have the rationalist model in mind, but instead, the humanist insight into our customary practices (this need not involve another form of captivity, now to customs), we can surely talk of Grotius as being foundational, and also recognize the importance of these historical and customary foundations for the present. The fact that our history is in

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[1] No rational model, has ever provided the foundation, of our social and political world, so long as, it has sought to remain suspended outside (over and above), our practices. Such efforts, in our time, are being made most forcefully by Jurgen Habermas; but they are made at the cost of not recognizing their own conventionality (grounded in the long history of juridical practices), that is, the customary ways of thinking and acting that make them intelligible and plausible. It would be more correct to say that they are idealized systems issuing critically from, rather than, foundational to, our practices.

significant ways constitutive of the present has been brilliantly demonstrated by Charles Taylor in his magisterial work, *Sources of the Self: The Making of the Modern Identity*.

It is within this understanding that Tuck's work is so important. His deeply historicised philosophy has drawn, in an unsurpassed manner, two great biographical sketches of Grotius and Hobbes, and with them made perspicuous what they were doing, what practices they were intervening in, and how effective these interventions were. He has, through his meticulous under-laboring, further vindicated the truism that philosophy cannot be studied outside of its history. However, I believe his pioneering work needs to be supplemented and modified by scholarship that addresses these five questions.

Chapter 1

Hugo Grotius, Part I

1. War within the Universe of Law

Hugo Grotius wrote *The Laws of War and Peace* (hereafter *LWP*) in a period marked by political and personal crises. The Thirty Year War was raging in Europe and he was in Paris, living in exile after his escape from the prison fortress of Loevestein on March 22, 1621. Why did Grotius write this treatise? In the all important Prolegomena to the three books of *LWP* Grotius states quite straightforwardly his reasons. A systematic ordering of the laws of war was necessary to provide Europeans with a universal framework within which to adjudicate contentious issues that, as the history of the sixteenth century and of the first part of the seventeenth century had shown, would otherwise result in acts of extreme savagery. The purpose of the treatise was to address the breakdown in sociality among the people and nations of Europe. Section 28 of the Prolegomena is very explicit:

> Fully convinced, by the considerations which I have advanced, that there is a common law among nations, which is valid alike for war and in war, I have had many and weighty reasons for undertaking to write upon this subject. Throughout the Christian world I observed a lack of restraint in relation to war, such as even barbarous races should be ashamed of; I observed that men rush to arms for slight cause, or no cause at all, and that when arms have once been taken up there is no longer any respect for law, divine or human; it is as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes. (*LWP*, Prolegomena §28)

This passage clearly identifies the occasion for the systematic ordering of a body of laws "for and in war." Grotius points directly to the state of war he observed and, especially, to the manner in which wars were conducted, and decries the lawless character of the early part of seventeenth century in Europe. It should also be noted the wars of the early seventeenth century, to which Grotius is referring, had followed upon the heels of the wars of religion which had been fought with equal, if not greater, ruthlessness, and had devastated sixteenth-century Europe. One of the consequences of this series of bloody conflicts was to convince Europeans that war and the concomitant brutality were intrinsic to the nature of things, thus also re-enforcing the notion that law and war were mutually

exclusive. *LWP* is a direct refutation of this opinion which, as Grotius notes, was share by the "common people" as well as the "learned."

And yet *LWP* had also another target. While the notion that law and war were mutually exclusive was one extreme, at the opposite end of the spectrum were, Grotius claimed, those thinkers who, exercising an extreme virtue, forbid war all together and exhorted Europeans to love all human beings. [1] Though Grotius recognised that this pacifist stance stemmed from a devotion to peace, he was concerned by the fact that this extreme position, in addition to being ineffective, had in it the possibility of weakening even those arguments which, like his own, tried to bring wars within the sphere of law. The solution, then, lay in avoiding these opposites: "For both extremes therefore a remedy must be found, that men may not believe either that nothing is allowable, or that every thing is"(*LWP*, Prolegomena §29).

However, while conditions in Europe made it a necessity to regulate war through a body of laws wich would govern relations among states, no systematic ordering of such laws existed. Europeans did not yet possess a systematic compilation of the law of nations (*jus gentium*).[2] Grotius makes this point in the following passage:

> The municipal law of Rome and of other states has been treated by many, who have undertaken to elucidate it by means of commentaries or to reduce it to a convenient digest. That body of law, however, which is concerned with the mutual relations among states or rulers of states, whether derived from nature, or established by divine ordinances, or having its origin in custom and tacit agreement, few have touched upon. Up to the present time no one has treated it in a comprehensive and systematic manner; yet the welfare of mankind demands that this task be accomplished. (*LWP*, Prolegomena §1)

While it should be noted that this passage speaks of the law of nations and not of the law of nature (*jus naturae*), one should not be misled into thinking – as many scholars of international law have been – that *LWP* is simply a work of international law. Rather, what Grotius is emphasizing here is one – and only one – of the aspects of *LWP* and the

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[1] *LWP*, Prolegomena §29. Grotius here is referring to John Ferus and fellow-countryman Erasmus.

[2] Though indisputable in this case, the translation of the Latin terms *jus* and *lex* is sometimes problematic. In this dissertation, the usage indicated in the latest edition of *Black's Law Dictionary* has been adopted whenever applicable. The relevant Latin term is shown in brackets immediately after the English translation only once in each chapter.

passage should not be misread as referring to the entire content of the treatise. Grotius' undertaking has in fact a much wider compass and necessarily involves a through treatment of all the possible occasions of war. This leads Grotius into a meticulous study of all that comes under what we call the disciplines of the social sciences. For Grotius all the ensemble of these disciplines constitutes the subject–matter of political theory. Within political theory, international relations appeared to Grotius to be of primary importance, since a breakdown of relations between states led all too often to a dissolution of society that had debilitating consequences for human agency. Grotius was very firm on this point, which was sanctioned by his own first-hand experience as well as by his grounding in the Stoics. And here we encouter a first clear convergence between the ancients and Grotius – for both law of nations is crucial:

> Cicero justly characterized as of surpassing worth a knowledge of treaties of alliance, conventions, and understandings of peoples, kings and foreign nations; a knowledge, in short, of the whole law of war and peace. And to this knowledge Euripides gives the preference over an understanding of things divine and human.[1] (*LWP*, Prolegomena §2)

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[1] In order to substantiate his claim, Grotius embarks on a critical overview of the existing literature in this sphere of law. He points out that the works of the ancients – the Greeks, the early Christians and even the Romans – in this field have largely been lost. Grotius notes that specialized books concerning the laws of war had been written by theologians, such as Franciscus de Victoria, Henry of Gorkum, William Matthaei, and doctors of law, such as John Lupus, Franciscus Arias, Giovanni da Legnano, and Martinus Laudensis. However, he maintains that they said very little on the and, most importantly, worked without the help of history.

This last deficiency was somewhat mitigated in works of Faur and Balthazar Ayala who do have recourse to history. However, they were limited by their scope and a selective appropriation of history to form general arguments. As to Alberico Gentili, while admitting he benefited from his works, Grotius finds in it many weaknesses. To begin with, in treating controversial issues, Gentili relies on selective, unworthy examples, and on the judgments of jurists, which are shaped by the interest of their clients. Also, Grotius is not impressed by Gentili's "method of exposition, arrangement of matter, delimitation of inquiries, and distinctions between the various kinds of laws." With regard to reasons that make a war just or unjust, Ayala, is criticized for not discussing them at all, and Gentili for creating general classes which do not account for the vast amount of topics that are constantly emerging from recurring controversies.

According to Grotius, the law of nations derives in part from custom. However, it also derives from the law of nature. This takes him to the critical question of the Grotian quest – what is the law of nature? I will attempt to demonstrate below that the answer he gives fully justify the calim that Grotius is, in Wittgenstein's language, the bedrock which the spade hits and then turns.

Grotius contends that Europeans did not possess a systematic account of the law of nature. This contention is validated by Pufendorf, who maintains that Grotius was the first to construct a comprehensive system of the law of nature. In sections 30 and 31 of the Prolegomena, Grotius specifically states his intention to construct such a system and gives some of the reasons why others had failed in their efforts to build just such a body of laws:

> [T]hrough devotion to study in private life I have wished...to contribute somewhat to the philosophy of the law, which previously, in public service, I practiced with the utmost degree of probity of which I was capable. Many heretofore have purposed to give to this subject a well–ordered presentation; no one has succeeded. And in fact such a result cannot be accomplished unless – a point which until now has not been sufficiently kept in view – those elements which come from positive law are properly separated from those which arise from nature. For the principles of the law of nature, since they are always the same, can easily be brought into a systematic form; but the elements of positive law, since they often undergo change and are different in different places, are outside the domain of systematic treatment, just as other notions of particular things are. (*LWP*, Prolegomena §30)

To demonstrate that he was adequately equipped to take on this task, Grotius points to his immense scholarship (recognized by all of Europe) and to his years of experience in legal practice. Interestingly, these reasons are exactly the same as those given by Cicero before setting down his understanding of the law of nature in *On the Common–Wealth*, a discussion which is now mostly lost. This is quite appropriate as the two had key experiences in common: both Cicero and Grotius spent several years in the practice of law and held significant positions in the government of their respective republics.

The reasons for the failure of others to provide Europeans with a systematic body of the law of nature is bluntly attributed to the inability to distinguish positive law from the law of nature and situate each in its distinct sphere. This argument allows Grotius not only to explain the failure of others, but also to situate those who denied the viability of such a project in the realm of positive law, while at the same time shielding the law of

nature and its universal claim. In Grotius' words: "those who have consecrated themselves to true justice should undertake to treat the parts of the natural and unchangeable philosophy of law," after having removed all that has its origin in the free will of man; and "by assembling all these parts, a body of jurisprudence could be made up" (*LWP*, Prolegomena §31). This is the first indication of the surgical demarcations that Grotius will make in order to construct the modern language of the law of nature.

Writing in the middle of the Thirty Years war, after having witnessed the beheading of his mentor Oldenbarnvelt and his own imprisonment for life due to religious controversies, Grotius was concerned that the intent behind this work should not be misunderstood. He categorically rejected as incorrect and unfair any suggestion that this work was written in the interest of or shaped by any such 'controversies':

> If any one thinks that I have had in view any controversies of our own times, either those that have arisen or those which can be foreseen as likely to arise, he will do me an injustice. With all truthfulness I aver that, just as mathematicians treated their figures as abstracted from bodies, so in treating law I have withdrawn my mind from every particular fact. (*LWP*, Prolegomena §58)

This passage has misled scholars who have used it to demonstrate that Grotius adopted the model of mathematics to build his system, and argued that Hobbes and Pufendorf are indebted to Grotius for the deductive methods they employ. Stephen Buckle has quite rightly pointed out that in fact Grotius uses what could be called the historical method, a method for which he was rather severely criticized, later on in the seventeenth as well as in the eighteenth century, by scholars who were themselves attracted to the methods of geometry.[1] In this passage Grotius is using the analogy of mathematics in order to emphasize his objectivity and in an attempt to distance this particular work from the religious controversies of the period. Grotius is not identifying his method.

2. The Law of Nature Grounded in the Social Nature of Man

Grotius begins constructing his system of the law of nature and of the law of nations by putting in place his theoretical framework. This theoretical framework is grounded in the essentially social nature of man. He develops a rich conception of human agency via a refutation of all those for whom the law of nations was simply a matter of expediency and as such fell outside the realm of war. This Grotius' critique has two

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[1] Stephen Buckle, *The Natural History of Property* (Oxford, 1991).

targets. First he counters the Sceptics of the past, and then he takles his contemporaries.[1] For the latter, the very concept of international law seemed devoid of any content quite simply because law and war were understood to occupy distinct and mutually exclusive domains: law was always contrasted and held in opposition to war.[2] Grotius argues that in order to make his system of the law of nature and of the law of nations credible and possible, both these attitudes had to be rebutted. In addition, and perhaps more importantly, this refutation will give him the opportunity to set up new foundations for the law of nature.

As Cicero had done earlier in his own discussion of the law of nature, Grotius uses Carneades as his main contrasting interlocutor. Carneades represents those are opposed to the very notion that there can be laws of war and laws in war.[3] Carneades had argued against the possibility of such laws in his considerations on justice in general. For Carneades, all law was contingent and a matter of expediency. Human beings imposed laws upon themselves only as a means of obtaining their own ends. Not only were there no normative grounds for laws, but since laws were expedient and contingent, they also lacked necessity, as well as universal form or application. As such, they were different in different regions and even in the same place over a period of time. This was not simply a description of a contingent state of affairs. Rather, Carneades had claimed that it was essential to human nature as well as to animals to pursue their interests and unnatural to do otherwise.

It is clear that being informed by such a picture of human agency, law and justice, Carneades would have no room for laws that could govern in times of war. Again, Grotius attributes to Carneades exactly the same arguments that Cicero had. In Grotius' words , Carneades,

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[1] He writes that such a work is made "all the more necessary because in our day, as in former times, there is no lack of men who view this branch of law with contempt as having no reality outside of an empty name" (*LWP*, Prolegomena §3).

[2] Grotius writes: "That war is irreconcilable with all law is a view held not only by the ignorant populous; expressions are let slip by well–informed and thoughtful men which lend countenance to such a view."

[3] Grotius writes: "In order that we may not be obliged to deal with a crowd of opponents, let us assign to them a pleader. And whom should we choose in preference to Carneades? For he had attained to so perfect a mastery of the peculiar tenet of his Academy that he was able to devote the power of his eloquence to the service of

> having undertaken to hold a brief against justice, in particular against that phase of justice with which we are concerned, was able to muster no argument stronger than this: that, for reasons of expediency, men imposed upon themselves laws, which vary according to customs, and among the same peoples often undergo changes as times change; moreover that there is no law of nature, because all creatures, men as well as animals, are impelled by nature toward ends advantageous to themselves; that, consequently, there is no justice, or, if such there be, it is supreme folly, since one does violence to his interests if he consults the advantage of others. (*LWP*, Prolegomena §5)

This paragraph sets the stage for Grotius' consideration of justice and makes clear that simple expediency and self–love cannot provide the grounds for justice. Rather, justice is to be defined against all those who seek to ground it simply in the minimal premises of self–preservation and its means. We should note that, while this paragraph in Section 5 of the Prolegomena clearly indicates that Carneades opposes all possibility of justice, Grotius claims he is using Carneades primarily as an opponent in possession of the strongest arguments against the possibility of "that phase of justice with which we are concerned," i.e., the laws of nature and of nations. Indeed, for Grotius, Carneades' more encompassing contention "must not for one moment be admitted."[1]

In order to refute this instrumentalist understanding of laws and justice, Grotius first required a picture of human agency vastly different from the minimal one with which Carneades had worked. What Grotius needed was a conception of human agency rich enough to provide the grounds for a universal ethics and the law of nature, both in war and peace, and which would make it possible to articulate the rights and duties of sociality for the peoples and nations of Europe. Grotius does construct such a complex picture of human agency and sharply contrasts it to the self–interested/expedient and contingent picture drawn by Carneades.

Grotius begins his attack on Carneades in a crucially important paragraph of Section 6 of the Prolegomena:

> Man is, to be sure, an animal, but an animal of a superior kind, much farther removed from all other animals than the different kinds of animals are from

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falsehood not less readily than to that of truth."(*LWP*, Prolegomena §5).

[1] Richard Tuck reads this work of Grotius as being directed at overcoming the sceptical attack on the very possibility of a universal ethics. While that may certainly have been one of its effects, Grotius' intentions are clear: to provide a law for and in war.

> one another; evidence on this point may be found in the many traits peculiar to the human species. But among the traits characteristic of man is an impelling desire for society, that is, for the social life – not of any or every sort, but peaceful, and organized according to the measure of his intelligence, with those who are of his kind; this social trend the Stoics called 'sociableness'. Stated as a universal truth, therefore, the assertion that every animal is impelled by nature to seek only its own good cannot be conceded. (*LWP*, Prolegomena §6)

Grotius breaks in some respects but reinforces in other ways some central Aristotelian tenets. In Aristotle, it is 'logos', that is speech/reason, which separates humans from other animals. For Grotius, it is "an impelling desire for society" (*appetitus societatis*), an instinctive drive toward social life – therein lies the break with Aristotle. However, while the criterion for setting human beings apart from animals is different, the drive towards the social is also central to Aristotle's political theory – and therein lies the element of continuity between the ancient Greek philosopher and Grotius.

Grotius, describes the form of the social life he is referring to: it is peaceful and rationally organized. By grounding it in the Stoic notion of 'sociableness,' he hints at its character, which is fully developed in the course of the three books of *LWP*. The Stoic reason that is operative in the character of the Grotian 'social' involves instrumental as well as substantive forms of thought and action.[1]

In section 7 of the Prolegomena, Grotius adds to this core premise of sociableness the "disposition to do good" which originates in "some extrinsic intelligent principle." This "extrinsic intelligent principle" is also found in children, prior to any training or learning. That is why in children, Grotius contends, "sympathy for others comes out spontaneously," a conception that Rousseau would later develop.[2] The actions of human

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[1] In the first chapter of his *The Science of a Legislator: The Natural Jurisprudence of David Hume and Adam Smith*, Knud Haakonssen tries to present, rather unconvincingly, this Aristotelian/Stoic Grotian feature in the language of instrumentally rational agents who form communities in order to maximize their own interests.

[2] Jean-Jacques Rousseau, *On the Social Contract*. Grotius quotes several Stoic scholars to ground his claim, and it is illuminating to reproduce what Seneca says on the matter: "That the warm feeling of a kindly heart is in itself desirable you may know from this, that ingratitude is something which in itself men ought to flee from, since nothing so dismembers and destroys the harmonious union of the human race as does this fault. Upon what other resource, pray tell, can we rely for safety, than mutual aid through

beings as adults become informed by knowledge and training, and thus accord with the actions (in similar conditions) that were earlier guided only by the extrinsic intelligent principle.

Along with the "impelling desire for society" and the "disposition to do good," Grotius adds the other two Aristotelian/Stoic features: man's possession of speech and reason. The concept of reason that he has in mind here is described as the ability to "act in accordance with general principles." This 'instrument' (speech) and 'faculty' (reason) are, Grotius claims, unique to humans and are the necessary conditions for society and "law properly so called":

> The mature man in fact has knowledge which prompts him to similar actions under similar conditions, together with an impelling desire for society, for the gratification of which he alone among animals possesses a special instrument, speech. He has also been endowed with the faculty of knowing and of acting in accordance with general principles. Whatever accords with that faculty is not common to all animals, but peculiar to the nature of man.

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reciprocal services? This alone it is, this interchange of kindness, which makes our life well equipped, and well fortified against sudden attacks."

"Imagine ourselves as isolated individuals, what are we? The prey, the victims of brute beasts – blood most cheap, and easiest to ravage; for to all other animals strength sufficient for their own protection has been given. The beasts that are born to wander and to pass segregate lives are provided with weapons; man is girt round with weakness. Him no strength of claws or teeth makes formidable to others. To man [deity] gave two resources, reason and society; exposed as he was to danger from all other creatures, these resources rendered him the most powerful of all. Thus he who in isolation could not be the equal of any creature, is become the master of the world."

"It was society which gave to man dominion over all other living creatures; man, born for the land, society transferred to a sovereignty of a different nature, bidding him exercise dominion over the sea also. Society has checked the violence of disease, has provided succour for old age, has given comfort against sorrows. It makes us brave because it can be invoked against Fortune. Take this away and you will destroy the sense of oneness in the human race, by which life is sustained. It is, in fact, taken away, if you shall cause that an ungrateful heart is not to be avoided on its own account" (*LWP*, Prolegomena, § 8).

> This maintenance of the social order, which we have roughly sketched, and which is consonant with human intelligence, is the source of law properly so called. (*LWP*, Prolegomena §8)

It is important to note that, for Grotius, the "maintenance of the social order in accord with human intelligence is "the source of law properly so called." Here Grotius is pointing to social orders that accord with human intelligence – that is, right reason – and not to social orders imposed by human reason or intelligence, as Hobbes was to theorize later. In other words, the law of nature is the sum of those practices, institutions, customs or forms of life that maintain society: that is, the rights of human beings and the duties of sociality. The dictates of right reason, which are necessary for preserving society, are for the most part situated within customary practices. Right reason for Grotius is 'situated' and does not stand over and above and in opposition to conventional and customary practices, as it was to do later for Hobbes and Pufendorf.

Grotius considers these core premises, which bring together classical Aristotelian and Stoic conceptions, the constitutive elements of human agency, as well as the elements that make sociable relations among human beings possible. This rich picture of human agency is to be contrasted with the starkly impoverished conception which underlies the instrumentalist account of justice given by Carneades, and also with Richard Tuck's mistaken rendering of Grotius's human agency.[1]

While Grotius's construal of human agency is not quite complete (one important element remains to be added), the concepts so far expounded provide the cornerstone for the Grotius's 'sphere of law.' According to Grotius, "law properly defined" is that law that is upheld by the judicial systems in varied political arrangements that accord with right reason. Such law invovles:

> the abstaining from that which is another's, the restoration to another of anything of his which we may have, together with any gain which we may have received from it; the obligation to fulfill promises, the making good of a loss incurred through our fault, and the inflicting of penalties upon men according to their deserts. (*LWP*, Prolegomena §8)

To this narrow content of law are added those actions which 'concur' with the law of nature. These are the judgments and actions that follow upon the exercise of practical reason, i.e., upon the exercise of the ability to make the right judgment in practical

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[1] See the references in the bibliography and especially: "The 'Modern' Theory of Natural Law," *Philosophy and Government, 1572-1651*, *International Order and Political Thought from Grotius to Kant*.

circumstances and to pursue a course of action that accords with such judgment. These judgments, when 'well–tempered,' are considered to concur with the "law of nature, that is, to the nature of man." In order to establish the above, Grotius inserts (or rather slips in) another innate 'faculty' – "the power of discrimination":

> Since over other animals man has the advantage of possessing not only a strong bent towards a social life, of which we have spoken, but also a power of discrimination which enables him to decide what things are agreeable or harmful (as to both things present and things to come), and what can lead to either alternative: in such things it is meet for the nature of man, within the limitations of human intelligence, to follow the directions of a well–tempered judgment, being neither led astray by fear or the allurement of immediate pleasure, nor carried away by rash impulse. Whatever is at variance with such judgment is understood to be contrary also to the law of nature, that is, to the nature of man. (*LWP*, Prolegomena §9)

This "power of discrimination" completes the rich conception of human agency Grotius works with throughout his treatise. In the paragraph immediately following the one cited, he makes clear that, while Aristotelian distributive justice belongs to this sphere and, as he had said earlier, concurs with the law of nature, it does not fall within law as it is defined above and which is concerned with the non–violation of others' property and with the living up to one's obligations:

> Long ago the view came to be held by many, that this discriminating allotment is part of law, properly and strictly so called; nevertheless law, properly defined, has a far different nature, because its essence lies in leaving to another that which belongs to him, or in fulfilling our obligations to him. (*LWP*, Prolegomena §10)

On the one hand, the rich portrayal of human agency makes it possible to locate in the social nature of human kind the source of the law of nature and "law properly so called." On the other hand, the law of nature is one of the 'sources' for the derivation of civil laws. According to Grotius, to keep one's promises is a rule of the law of nature and it is from this rule that flows the municipal law of particular countries. The promises or 'pacts' referred to here are the ones through which people institute expressly or customarily and conventionally a civil society, and the corresponding obligations that arise from this association among the citizens and subjects:

> For those who had associated themselves with some group, had either expressly promised, or, from the nature of the transaction, must be understood impliedly to have promised, that they would conform to that

> which should have been determined, in one case by the majority, in the other by those upon whom authority had been conferred. (*LWP*, Prolegomena §15)

Grotius needs this connection with the law of nature to justify; (1) the keeping of agreements/promises/contracts both customary and express, especially those that bring about the institutions of civil society and private property; (2) to provide grounds to justify punishment by the sovereign when subjects/citizens infringe the rights of others or do not perform their duties of sociality; and (3) to establish the complex rights and duties to revolt against those governing that subjects or citizens possess.

How can mutable civil laws be grounded in immutable laws of nature? This question seems particularly urgent since Grotius has argued that the law of nature, being immutable, can provide human beings with a universal ethics, while positive law, being a product of man's will, could be different in different places, as well as different in the same place over time. Further, Grotius isolated the inability to keep separate in their distinct spheres the law of nature and positive law (of which the law of nation is a part, as we shall see), as the main cause for the failures of others to produce a systematic body of the law of nature and of nations.

Addressing this question in his *Natural History of Property*, Stephen Buckle tries to resolve what he sees as an apparent contradiction. I would argue, however, that this claim of Grotius does not involve a contradiction but is true to his intention, that is, to keep the law of nature and positive law in their relative sphere. Here Grotius is not deriving all particular civil laws from the universal law of nature but simply pointing to the various kind of overlap between the law of nature and some civil laws that must exist in practice. After all, some of the most important rights and duties that citizens have in civil society, the contravention of which is justifiably punished by the sovereign, flow directly from the law of nature. I think Grotius' statement can appear contradictory only if one assumes that the law of nature and positive law occupy distinct spheres by virtue of their particular and universal character. While this may be true in most cases it is not true in all. As stated above, for Grotius, these two forms of law occupy distinct spheres by virtue of their origin, one originating from human will, while the other from the social nature of man, and can certainly have overlapping subject–matter. Both are upheld by the judicial system of the state.

These are for Grotius some of the necessary conditions for grounding his compilation of the rights and duties of sociability. At the same time, these are the first elements of a refutation of the instrumentalist account of justice, which is fully completed only in the course of his three books, as well as of the thorough rejection of Carneades's

assertion that justice was nothing more than that which accorded with expediency or self-interest.

3. Rights and Duties of Sociality and Punishment

Grotius draws a distinction which apparently reflects a concern for Hobbesian forms of reasoning which were gaining some sympathy among Europeans and which maintained: "that laws were invented from fear of receiving injury and that men were constrained by a kind of force to cultivate justice" (*LWP*, Prolegomena §19).[1] Grotius does not reject this, he gives it a place. Some laws do serve this purpose, as for example, the "enforcement of right" by the sovereign:

> For that relates only to the institutions and laws which have been devised to facilitate the enforcement of right; as when many persons in themselves weak, in order that they might not be overwhelmed by the more powerful, leagued themselves together to establish tribunals and by combined force to maintain these, that as a united whole they might prevail against those with whom as individuals they could not cope.
>
> And in this sense we may readily admit also the truth of that saying that right is that which is acceptable to the stronger; so that we may understand that law fails of its outward effect unless it has a sanction behind it. (*LWP*, Prolegomena §19)

However, law is not just because it has force behind it. Rather, the relationship between law and force is that of mutual re-enforcement. The importance of punishment for the enforcement of the rights and duties of sociality is made evident in Grotius by the fact that he spends over a hundred pages in *LWP* dealing with precisely this topic. Some of the complexity of this discussion will be shown in the next chapter.

Grotius proceeds to claim that even without the re-enforcement of force and the imminent threat of sanctions law is not "entirely devoid of effect." The 'effect' is this: when an individual performs his duties, his conscience is at peace; conversely, the effect of non-performance of duties is that it "causes torments and anguish" in the mind of man. Grotius also brings to bear on this point the force of the consensus of mankind: "Justice is approved, and injustice condemned, by the common agreement of mankind." Most

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[1] This position is attributed to one of Plato's interlocutors in the *Republic* as well as *Gorgias*. He also quotes Ovid's, *Metamorphoses*: "You must confess that laws were framed / From fear of the unjust."

importantly, he fortifies this by summoning the justice of god and the twin disciplining concepts of heaven and hell corresponding to reward and punishment in the afterlife.[1]

4. The Role of Expediency in Justice

The passages already cited from *LWP* help us appreciate Grotius' position in relation to the role of expediency in justice. Grotius does give expediency an important function in his system of laws. What he rejects in Carneades' argument, and in the school of thinking it represents, is the simple reduction of all justice to expediency. Still, the critique of Carneades by no means implies that expediency does not have its proper function in juridical thought and practice. For Grotius the performance of one's duties of sociality is not only in the interest of society but also in one's self–interest. This view of the relation between the interest of society and one's self-interest leads Grotius to develop a rather complex understanding of the role played by expediency in the formation of laws.

Grotius begins his discussion of expediency by quoting a maxim that an ancient interpreter of Horace had written in opposition to Stoic doctrine: "expediency is, as it were, the mother of what is just and fair."[2] Grotius rejects this position, asserting that even if individuals were completely self-sufficient, "the very nature of man...would lead us into the mutual relations of society." As such the 'mother' of justice is to be found somewhere else: for the law of nature, it is the very 'nature of man'; and for civil laws, it is "that obligation which arises from mutual consent." Moreover, as "obligation derives its force from the law of nature," 'human nature' is ultimately the locus and source of justice. In other words, obligation derives its force from the rights and duties of sociality (the law of nature) which are necessary to the maintenance of the social order, and which arise and are in accord with the social and rational nature of man.

However, expediency does play an important role in Grotius's system. Expediency must be taken into consideration in order to ensure that conduct is governed by the law of nature (that is, the various rights and duties of sociality), and is also one of the occasions for civil laws:

> The law of nature nevertheless has the reinforcement of expediency; for the Author of nature willed that as individuals we should be weak, and should

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[1] For Grotius, god's judgments for acts that are just or unjust may also find expression in this life. However, in this section, he explains why the contrary is to be often observed (*LWP*, Prolegomena §20).

> lack many things needed in order to live properly, to the end that we might be more constrained to cultivate the social life. But expediency afforded an opportunity also for municipal law, since that kind of association of which we have spoken, and subjection to authority, have their roots in expediency. From this it follows that those who prescribe laws for others in so doing are accustomed to have, or ought to have, some advantage in view. (*LWP*, Prolegomena §16)

Here Grotius invokes a typical functionalist Stoic argument, whereby the 'Author' had intended a particular end (society), when he created humans with their weaknesses and many needs. Along with the compelling desire for society, these weaknesses and needs were intended to compel individuals into social groups. In a similar manner civil laws grounded in mutual consent are facilitated by instrumental and strategic considerations. Pufendorf was to use a similar argument, though grounded in a substantially different conception of human nature – an argument closer to Hobbes than Grotius.

Grotius extends his argument about the role of expediency to address the breakdown of sociality among European nations. Expediency is not just a 're-enforcement' for the law of nature, nor just an 'opportunity' for civil laws in relation to citizens and subjects. Rather, it is also an important consideration for the law of nations which, as we have seen, overlaps with the law of nature and arises through customary consensus among nations. In discussing this sphere of law Grotius makes an important theoretical point: just as in the case of civil laws within a state, so also in the law of nations the pursuit of self-interest by individual states aims at the common (interest) good:

> But just as the laws of each state have in view the advantage of that state, so by mutual consent it has become possible that certain laws should originate as between all states; and it is apparent that the laws thus originating had in view the advantage, not of particular states, but of the great society of states. And this is what is called the law of nations, whenever we distinguish the term from the law of nature.
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> This division of law Carneades passed over altogether. For he divided all law into the law of nature and the law of particular countries. (*LWP*, Prolegomena §17)

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[2] All quotes in this passage are from Section 16 of the Prolegomena of *LWP*.

Even in this context, that is, within the sphere of international relations (at least among European countries), Grotius introduces and dismisses Carneades' claim, that all "justice is folly." He contends that even by Carneades' own admission, an individual who obeys the laws of his country is not foolish, though doing so amounts to forfeiting one's own self–interest. So also,

> that nation is not foolish which does not press its own advantage to the point of disregarding the laws common to nations. The reason in either case is the same. For just as the national, who violates the law of his country in order to obtain an immediate advantage, breaks down that by which the advantages of himself and his posterity are for all future time assured, so the state that transgresses the laws of nature and of nations cuts away also the bulwarks which safeguard its own future peace. Even if no advantage were to be contemplated from the keeping of the law, it would be a mark of wisdom, not of folly, to allow ourselves to be drawn towards that to which we feel that our nature leads. (*LWP*, Prolegomena §18)

Three claims are being made by Grotius in this passage. First, he does not draw a distinction between the rights and the performances of the duties of sociability by subjects/citizens in the state and those of states in their relation with other states. Second, even though it is not instrumentally rational to obey the law at a given moment, in the long term to do so is consistent with the strategic interest of the individual and the state. Third, even if an individual's action in accord with law is not instrumentally or strategically rational, it is nevertheless wise to obey the law as it ultimately issues from the very 'nature of man' – the sociable and rational picture of human agency that Grotius has so richly painted.

Grotius further emphasizes this point in his argument against those who had claimed that the standards of justice applicable to individuals within a nation is inapplicable to the sovereign or to nations vis-à-vis each other. Here, Grotius begins by exposing the basic structure of the argument he is arguing against. On the one hand, it reduces justice to expediency: individuals obey laws because, given their weaknesses and frailty, they stand to gain from it. On the other hand, it maintains that this reasoning does not apply in the case of either states or their rulers since they do not suffer from these incapacities or weaknesses and thus have no reason to obey the laws:

> Many hold, in fact, that the standard of justice which they insist upon in the case of individuals within the state is inapplicable to a nation or the ruler of a nation. The reason for the error lies in this, first of all, that in respect to law they have in view nothing except the advantage which accrues from it, such

> advantage being apparent in the case of citizens who, taken singly, are powerless to protect themselves. But great states, since they seem to contain in themselves all things required for the adequate protection of life, seem not to have need of that virtue which looks toward the outside, and is called justice. (*LWP*, Prolegomena §21)

Predictably, Grotius counterargument is based first of all on the principle, which he has already established, that justice cannot simply be reduced to expediency. However, even if it could be so reduced, Grotius argues that no state is so powerful as to be completely self-sufficient. All states at some point or another need other states for commercial and military-strategic reasons. In this matter, Grotius strongly relies upon the claims of Stoic authorities who claimed that justice cannot be limited to and by national boundaries, but must necessarily embrace all of mankind:

> But, not to repeat what I have said, that law is not founded on expediency alone, [and] there is no state so powerful that it may not some time need the help of others outside itself, either for purposes of trade, or even to ward off the forces of many foreign nations united against it. In consequence we see that even the most powerful peoples and sovereigns seek alliances, which are quite devoid of significance according to the point of view of those who confine law within the boundaries of states. Most true is the saying, that all things are uncertain the moment men depart from law.[1] (*LWP*, Prolegomena §22)

Grotius claims that these laws apply not just in time of peace but more so in time of war – indeed, wars are to be fought precisely in order to enforce 'laws properly so called'. Just wars perform the same function as the judicial system in civil society, and they must therefore be undertaken with the same degree of probity toward rules:

> Least of all should that be admitted which some people imagine, that in war all laws are in abeyance. On the contrary war ought not to be undertaken except for the enforcement of rights; when once undertaken, it should be carried on only within the bounds of law and good faith. Demosthenes well said that war is directed against those who cannot be

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[1] In Section 23 and 24 of the Prolegomena of *LWP* Grotius brings to bear the authority of several ancients: Aristotle, who shows the necessity of laws within and among nations by his example of their existence even among brigands; Cicero, who argued against unvirtuous action even in the interest of one's country; Pompey, who stated that states bound by justice are indeed more fortunate than those bound by arms.

> held in check by judicial processes. For judgments are efficacious against those who feel that they are too weak to resist; against those who are equally strong, or think that they are, wars are undertaken. But in order that wars may be justified, they must be carried on with no less scrupulousness than judicial processes are wont to be. (*LWP*, Prolegomena §25)

To be sure, at times of war some laws are suspended by states, however, these are laws that pertain to particular states (*jus civile*) and are applied by their judicial systems in times of peace. The laws "which nature prescribes or the agreement of nations has established" (the law of nature and the law of nations) nevertheless continue to apply, in times of peace as well as in times of war:

> Let the laws be silent, then, in the midst of arms, but only the laws of the State, those that the courts are concerned with, that are adapted only to a state of peace; not those other laws, which are of perpetual validity and suited to all times. (*LWP*, Prolegomena §26)

5. Grotius' Demarcations of law

We have already discussed the first demarcation between natural law and positive law, the former originating in the social nature of human kind and the latter in human will (either customary or imposed). However, before moving on to the further demarcations of the various forms of law, it is appropriate to consider Grotius' method, which supplies the ground for the demarcations he effects. This analysis will provide further evidence that Grotius' moral framework did not grow out of a confrontation with the Sceptic.

Grotius states his method clearly. He begins by affirming that his system is built upon what we today would call a combination of the nomological–deductive and inductive methods (the latter being a loose historico–empiricist approach):

> First of all, I have made it my concern to refer the proofs of things touching the law of nature to certain fundamental conceptions which are beyond question, so that no one can deny them without doing violence to himself. For the principles of that law, if only you pay strict heed to them, are in themselves manifest and clear, almost as evident as are those things which we perceive by external senses; and the senses do not err if the organs of perception are properly formed and if the other conditions requisite to perception are present. (*LWP*, Prolegomena §39)

Interestingly, not only is there no evidence of doubt with regard to the certainty and validity of knowledge built through perception, but also, and further, evidence

through perception is used by Grotius as an exemplar for the kind of certainty that is 'almost' possible for 'axioms' of natural law.

The Grotian system of the law of nature also relies considerably on historical evidence, authority of philosophers, historians, poets and orators. Though Grotius' use of them is not 'without discrimination,' since these sources do not stand above their own particular interests, as a systematic body of law ought to. Still, when they are in agreement, Grotius claims that their conclusions are deduced from either the universal "principles of nature, or common consent" – the former is the source of the law of nature, while the latter of the law of nations:

> In order to prove the existence of this law of nature, I have, furthermore, availed myself of the testimony of philosophers, historians, poets, finally also of orators. Not that confidence is to be reposed in them without discrimination; for they were accustomed to serve the interest of their sect, their subject, or their cause. But when many at different times, and in different places, affirm the same thing as certain, that ought to be referred to a universal cause; and this cause, in the lines of inquiry which we are following, must be either a correct conclusion drawn from the principles of nature, or common consent. The former points to the law of nature; the latter, to the law of nations. (*LWP*, Prolegomena §40)

However, Grotius did not draw the distinction between the law of nature and law of nations from their works. According to him, these authorities were themselves rather confused on this point and tended to obfuscate rather than shed any light on this distinction. Here the separation of these two forms of law, by Grotius, is made on the basis of the "character of the matter" – "[f]or whatever cannot be deduced from certain principles by a sure process of reasoning, and yet is clearly observed everywhere, must have its origin in the free will of man" (*LWP*, Prolegomena §40). The law of nature is deduced from principles: the rights and duties of sociality can be established by right reasoning made possible by the essentially social nature of man. On the other hand, the law of nations is the product of human will over which there has developed a conventional and customary consensus. By this account, the two forms of law are demarcated not just by their particular origin, scope and subject matter, but also by their distinct reason–forms. In this instance, therefore, method is not just an instrument for these legal knowledge–forms, it is rather and at the same time constitutive of them.

Grotius proceeds to distinguish these two forms of law from particular civil laws which are neither deduced from certain universal principles nor grounded in the customary consensus of nations. But from this we should not make the wrong inference that, simply

because they originate in the will of man, the civil law may not overlap with first principles or not have a customary and conventional character. He further distinguishes the law of nature and nations from Aristotelian distributive justice which does not involve the "obligation of restitution":

> These two kinds of law, therefore, I have always particularly sought to distinguish from each other and from municipal law....
>
> With no less pain we have separated those things which are strictly and properly legal, out of which the obligation of restitution arises, from those things which are called legal because any other classification of them conflicts with some other stated rule of right reason. (*LWP*, Prolegomena §41)

This Grotius's system of jurisprudence was also kept distinct from theological principles or divine law. This feature, namely, the structuring of his system of the law of nature and of the law of nations without recourse to any grounding in divine principles or god's will, is another crucial reason that points to the break Grotius initiated with his predecessors, as well as with his own position in the *Commentary on the Law of Prize and Booty* (hereafter *Commentary*).[1] Grotius writes quite unequivocally that: "[w]hat 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 of no concern to Him" (*LWP*, Prolegomena §11).

However, Grotius does say that in the ultimate sense the law of nature does lead back to god, not because it is directly the product of god's will but because the right reason that dictates our actions is instilled in the nature of things in the first place by god. The law of nature, which allows human beings to apprehend their rights and duties of sociality so as to live sociably, is ultimately the result of the particular nature god gave to human beings. Accordingly, in the three books of *LWP* the systematic construction of the law of nature and the law of nations, Grotius carefully differentiates these forms of law from each other as well as from civil laws, divine law, and Aristotelian virtues. He occasionally does use various aspects of these law–forms to prop up the law of nature and the law nations (or mitigate some of their harsher features), but they perform this function from outside the system. This Grotian system is constructed as an autonomous, sharply differentiated (though overlapping in jurisdiction) body of laws.

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[1] This is discussed in Section 12 of the Prolegomena of *LWP*.

6. Externalizing the Sphere of Law

Having demarcated the law of nature from the law of nations, civil laws, Aristotelian distributive justice and divine law, Grotius introduces his most important theoretical innovation. By constructing the 'social' as the objective domain of legal and political analysis (and also of what today constitutes the subject–matter of most of our social sciences), Grotius effectively externalizes the object domain of law. The significance of this theoretical innovation was immediately recognized by all the philosophers that built upon his system in the seventeenth and eighteenth centuries. Today it provides the undisputed taken-for-granted terrain of law to which we still hold fast as we continue our varied critical investigations.

The structure of Grotius' argument it is revealing and it useful to follow it closely. He begins by claiming that, among the several philosophers he is indebted to, his work owes most of all to Aristotle. He then distances his understanding of Aristotle from what he took to be the dogmatic appropriation and propagation of Aristotle by the Scholastics:

> Among the philosophers Aristotle deservedly holds the foremost place, whether you take into account his order of treatment, or the subtlety of his distinctions, or the weight of his reasons. Would that his pre–eminence had not, for some centuries back, been turned into a tyranny, so that Truth, to whom Aristotle devoted faithful service, was by no instrumentality more repressed than by Aristotle's name! (*LWP*, Prolegomena §42)

Grotius' critical appropriation of Aristotle is such that it prepares the way for modern jurisprudence and much of the social sciences. Of critical significance in this instance is Aristotle's moral philosophy of which Grotius is sharply critical. The first point of contention was the Aristotelian description of virtue as a means between two extremes. This principle, according to Grotius, led Aristotle to situate 'truth' as a mean in a contrastive language of virtue and vice, thus allegedly uniting distinct and unrelated actions on the same spectrum. However, in so doing, Aristotle's mean was arbitrarily imposed between two extremes where "on any fair premise, there is no possible co–ordination." This incorrect procedure, Grotius charged, led Aristotle to label as vice, "certain things which either do not exist, or are not in themselves vices."[1]

Further, Grotius contends that while it is true that in some cases virtues do tend to hold the passions in check, this was not their 'essential' feature. On the contrary, Grotius

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[1] For example, "contempt for pleasure and honours, and freedom from anger against men" (*LWP*, Prolegomena §43). All the quotations in this paragraphs are from this Section of the Prolegomena.

argued, the extent to which individuals ought to pursue each action should be determined by the dictate of 'right reason', one's rights and duties of sociality. In some cases, it may be, as Aristotle claimed, that the middle is the proper course, but in others the proper course could be the fullest possible exercise of that action/duty. In some endeavours there may be no such thing as excessive exercise of virtue. This means that, in relation to some virtues, the fullest possible exercise does not turn them into vice but rather makes the agent even more virtuous.

Grotius goes further and denies – or at least weakens – the causal connection between intense passion and immoral acts. The strongest passions do not always lead to any overt immoral or illegal action, while the slightest may lead to the greatest crime. For Grotius, it is not passions as such that should be the target of control but rather their causes (*LWP*, Prolegomena §45).

In order to further demonstrate the incorrectness of the Aristotelian principle of virtue being a mean between two extremes, Grotius uses an illustration. He constructs an argument against the Aristotelian virtue of Justice to highlight the problematic nature of this principle, and claims that "this basic principle, when broadly stated, is unsound, [and this] becomes clear even from the case of justice." He then give his demonstration:

> For, being unable to find in passions and acts resulting therefrom the too much and the too little opposed to that virtue, Aristotle sought each extreme in the things themselves with which justice is concerned. Now in the first place this is simply to leap from one class of things over into another class, a fault which he rightly censures in others; then, for a person to accept less than belongs to him may in fact under unusual conditions constitute a fault, in view of that which, according to the circumstances, he owes to himself and to those dependent on him; but in any case the act cannot be at variance with justice, the essence of which lies in abstaining from that which belongs to another. (*LWP*, Prolegomena §44)

Grotius' criticism is twofold: first Aristotle is unable to situate the virtue of justice as the mean between two extremes. His contrastive language of virtue being quite inappropriate, Aristotle tries instead to apply that procedure to its constitutive parts – a stratagem that is incorrect even by Aristotle's own epistemology. Second, Grotius rejects what Aristotle takes to be the constitutive parts of justice. He argues that not claiming one's just deserts is not an act of injustice though it could rightly be censured as a fault in a man. And to this Grotius contrasts his own conception of the appropriate considerations of justice:

> By equally faulty reasoning, Aristotle tries to make out that adultery committed in a burst of passion, or a murder due to anger, is not properly an injustice. Whereas nevertheless injustice has no other essential quality than the unlawful seizure of that which belongs to another; and it does not matter whether injustice arises from avarice, from lust, from anger, or from ill-advised compassion; or from an overmastering desire to achieve eminence, out of which instances of the gravest injustice constantly arise. For to disparage such incitements, with the sole purpose in view that human society may not receive injury, is in truth the concern of justice. (*LWP*, Prolegomena §44)

It is in this passage that Grotius makes the move which, as I pointed out above, may rightly be considered one of the most significant contributions to the development of modern jurisprudence. The importance of internal factors such as passions, desires, motivations, which are constitutive elements in Aristotelian conception of justice, are minimized, at least with regard to law. It is the external acts of individuals that constitute the new domain of justice. These external acts are those that accord with the rights and duties of sociality, which individuals must perform in the interest of 'human society.' Law and its empire is thoroughly externalized, partly situated in the 'social' and partly constituting it as the new objective domain of law. This new construal is sharply distanced from and contrasted to the Aristotelian conception of justice.[1] The manner in which Hobbes and Pufendorf eventually built on this new 'social' domain of law further consolidated the rights and duties of sociality as the new foundations of modern political and moral theory.

Having corrected Aristotle on these counts, Grotius justifies his critical appropriation of him. As we saw previously, he retained from Aristotle the essentially social nature of man.

7. Grotius' Triadic Framework of Justice

Thus far my argument has mostly been devoted to laying out Grotius' complex understanding of human nature – the essentially social nature of man. This

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[1] The contrast between these two understandings of justice and the realm of law, involve an equally stark contrast in the interpretation of human agency. The distance between these two views is made clear by Charles Taylor's classic "What is Human Agency?" in *Human Agency and Language: Philosophical Papers, 1.* (Cambridge, 1985), pp. 15-44.

characterization of human nature, I have argued, was foundational for Grotius' rights and duties of sociality which are the dictate of right reason and constitute the law of nature. On this view of human nature also depended the role of expediency in reinforcing the compelling desire for sociable life. Further, following closely Grotius' line of argument, I discussed some of the key changes in moral and legal theory that he initiated, namely, his various demarcations of law-forms and his important externalization of the sphere of law. I will now turn my attention to Grotius' framework of justice.

Grotius starts to build his framework of justice by identifying his primary concern: the breakdown of sociality among the nations and peoples of Europe. His goal is to provide a system of laws pertaining to war but oriented toward peace:

> War... is undertaken in order to secure peace, and there is no controversy which may not give rise to war. In undertaking to treat the law of war, therefore, it will be in order to treat such controversies, of any and every kind, as are likely to arise. War itself will finally conduct us to peace as its ultimate goal. (*LWP* 1: 1.1)

We have already seen that for Grotius there are just reasons for war. Wars undertaken to ensure that the peoples and nations of Europe respect the rights and perform the duties which each of them has, since the non–performance of these duties or actions contrary to these rights lead directly to destructive consequences for society. Accordingly, war is just if it is conducted in order to correct transgressions of law/justice (the rights and duties of sociality).

However, the all important questions – Can there be a just war? What kind of war is just? – presuppose an available and generally accepted definition of justice, and Grotius states that such a universally agreed to definition of justice was simply not available. As a result, he sets out in the first chapter of Book I to construct his framework of justice. This framework undergirds the discussions in the entire treatise about the rights that human beings and states possess, and the duties to be performed by the peoples and nations of Europe. It represents Grotius' effort to provide Europeans with a comprehensive conceptual system capable handling the multiple and complex issues that normally led to the breakdown of society. This undertaking also provided Grotius with the opportunity to set down clearly the rights and duties of sociality and the rules that led to just violent action, whether taken by rulers of different states against each other, by the sovereign against the subjects/citizens; or by the subjects/citizens against their sovereign, as in justifiable revolutions.

Grotius focuses at first on the connection between war, law and justice. He puts the matter succinctly: law has war as its subject insofar as is it (i.e., law) dictates that

which is in accordance with what is just. In this first instance, Grotius places the emphasis on a negative definition of law:

> In giving our treatise the title "The Law of War," we mean first of all, as already stated, to inquire whether any war can be just, and then what is just in war. For law in our use of the term here means nothing else than what is just, and that, too, rather in a negative than in a affirmative sense, that being lawful which is not unjust.
>
> Now that is unjust which is in conflict with the nature of society of beings endowed with reason. (*LWP* 1: 1.3)

This negative account of justice is important since it allows Grotius to factor in the duties of sociality which a positive definition of justice or 'justice properly so called' would not have allowed. Injustice is defined by Grotius as that which is in conflict with the 'nature' of society. The 'nature' of this society is of a particular form and this form is peculiar to beings who possess right reason (understood in a substantive sense, as discussed above, and therefore in a way which includes instrumental rationality). The 'order' that this society, constituted by humans who are endowed with reason, would possess is meticulously elaborated upon in its diverse forms in the three books. But what is quite obvious here is that, though the arrangements of these social groups are varied, in all of them individual self–interest is subordinated to the common good. The justifications for this subordination are two: first, on the grounds of strategic rationality, in that an individual's self–interest can be best secured if the interest of all – i.e., of society – is also secure; second, for the reason that the common good, being the general interest of society, has a prior claim over the particular self-interest of an individual (i.e., because it is sociality that grounds the individual). The tenor of these justifications further validates the contention that Grotius works throughout with a complex and varied understanding of the word 'reason'.[1]

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[1] This feature of the nature of society is brought out clearly through the authority of Cicero, Florentinus and Seneca: "Thus Cicero declares that to take away from another in order to gain an advantage for oneself is contrary to nature; and in proof he adduces the argument that, if this should happen, human society and the common good would of necessity be destroyed. Florentinus shows that it is wrong for a man to set a snare for a fellow man, because nature has established a kind of blood–relationship among us." And later: "'Just as all the members of the body agree with one another,' says Seneca, 'because the preservation of each conduces to the welfare of the whole, so men refrain from injuring one another because we are born for community of life. For society can exist in

Having set up this bare structure, of law, justice and society, Grotius moves to its more specific explication. Law, previously defined as that which is in conflict with injustice is now made a condition for the second definition of law, which is now defined as a set of rights. This definition of law as a 'body of rights,' as moral qualities of the self, allows Grotius to ground 'law properly so called' within the social nature of man: "There is another meaning of law viewed as a body of rights, different from the one just defined but growing out of it, which has reference to the person. In this sense a right becomes a moral quality of a person, making it possible to have or to do something lawfully" (*LWP* 1: 1.4).

This is an exceptionally important statement. It accomplishes at a critical stage in the argument a conceptual redescription of rights which becomes one of the foundations of Grotius' system. Richard Tuck has drawn attention to this intellectual move as the great break that Grotius initiates with late mediaeval understanding of right.[1] According to Tuck, the language of right prior to Grotius was employed with reference to those actions or states of affairs that were in accordance with the law, not as the very definition and grounds of law itself. While the subjectivization of right is not an original Grotian move (contrary to Tuck's claim), it is important to note that, by situating them in his framework of justice, Grotius did set the conditions that were to shape the way in which the notion of right functioned from then on.[2] Moreover, by prominently grafting rights in human agency, Grotius made human agency a crucial element in the preservation of legal and political institutions, practices and discourses. In other words, the justice or rightness

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safety only through the mutual love and protection of the parts of which it is composed.'" Seneca is cited here as saying that: "This fellowship ought carefully and scrupulously to be cultivated; for it mingles us all with all men, and brings the conviction that there is a bond of right common to the human race" (*LWP* 1: 1.2.1).

[1] Richard Tuck, "The 'Modern' Theory of Natural Law"; *Hobbes; Philosophy and Government, 1572-1651*; *International Order and Political Thought from Grotius to Kant.*

[2] And undoubtedly such a notion, as elaborated by Hobbes, Pufendorf and Locke, has been extremely influential in the theoretical and practical engagements of Europeans in and outside of Europe, as well as in the great non-European liberation movements of the nineteenth and twentieth centuries. Today the language of right is being effectively deployed by hitherto subjugated people and groups – aboriginal peoples, women, gays and lesbians and others.

of the actions taken by the sovereign's power to enforce the duties of sociality was grounded in part in human agency (and its essential social nature).

Having subjectivized these rights, which are treated as properties of the self and as moral qualities that create their distinct sphere of legal action and possession, Grotius proceeds to further refine them. Rights, defined as moral qualities, are divided into those that are perfect and those that are imperfect. Perfect rights are called 'faculties', and imperfect rights are 'aptitudes.' Grotius' claim that perfect rights involve 'acts,' while imperfect ones are simply considered 'potency,' becomes clearer within the context of the distinction he draws between virtue and law, that is, between the internal factors that govern Aristotelian distributive justice and the external acts of individuals that are the concern of Grotian justice (properly so called). It is important to remind oneself of the importance of this division. It is the distinction between these two sources of law that allows Grotius to drive a wedge between rights and virtue, between external concerns of law (acts) and the Aristotelian internal motivational constituents of distributive justice (potency), to which Grotian law (properly so called) is indifferent: "When the moral quality is perfect we call it *facultas*, 'faculty'; when it is not perfect, *aptitudo*, 'aptitude'. To the former, in the range of natural things, 'act' corresponds; to the latter, 'potency'" (*LWP* 1: 1.4).

The perfect rights or faculties which are 'legal rights' are further divided into, "powers, property rights, and contractual rights":

> A legal right (*facultas*) is called by the jurists the right to one's own (*suum*); after this we shall call it a legal right properly or strictly so called.
>
> Under it are included power, now over oneself, which is called freedom, now over others, as that of the father (*patria potestas*) and that of the master over slaves; ownership, either absolute, or less than absolute, as usufruct and the right of pledge; and contractual rights, to which on the opposite side contractual obligations correspond. (*LWP* 1: 1.5)

It is this source of law, as a body of rights, as moral qualities or faculties, which constitutes legal rights. This 'right to one's own (*summ*)' is central to the Grotian system. It is <u>the</u> legal right in which is grounded law strictly so called. Involved in this 'right to one's own' are: first, the power over the self – a constituent condition of freedom of action (political and economic) and a necessary condition for relationships such as master/household and master/slave; second, material property rights; and third, contractual rights with corresponding obligations.

Following the same scheme, Grotius proceeds to divide in two categories the legal rights which are enforceable by the judicial system: the rights which are concerned with

the individual's self-interest and the rights of the community which involve the common good. The rights that refer to the community are 'superior' for they are exercised by society over their individual members (including their property) for the common good:

> Legal rights, again, are of two kinds: private, which are concerned with the interest of the individuals, and public which are superior to private rights, since they are exercised by the community over its members, and the property of its members, for the sake of the common good. (*LWP* 1: 1.6)

This schematic structure of the rights of individual and of society allows Grotius to further distance his conception of justice from Aristotle's distributive justice and proceed to a further subdivision between two types of justice, namely, expletive (*iustitia expletrix*) and attributive (*iustitia attributrix*). Expletive justice is concerned with legal rights of individuals and society, while aptitudes, that is 'worthiness,' are the concern of attributive justice. Ironically, Grotius claims that this division is comparable, with some qualifications, to Aristotle's distinction between restorative and distributive justice.[1] The domain of 'justice properly or strictly so called,' is expletive justice concerned with legal rights. In other words, that which concerns man's and society's legal rights and the duties of sociality is the only concern of justice properly so called. Grotius puts it crisply: "Legal rights are the concern of expletive justice (*iustitia expletrix*), which is entitled to the name of justice properly or strictly so called." On the other hand, aptitudes (worthiness), is the concern of attributive or distributive justice with its standard array of Aristotelian virtues which are not legally enforceable but are also within the domain of justice as per the first definition of law, even though are not enforceable through the judicial system: "Aptitudes are the concern of attributive justice (*iustitia attributrix*). This Aristotle called 'distributive' justice. It is associated with those virtues which have as their purpose to do

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[1] While this distinction had been made by Aristotle essentially on the basis of the different subject-matter that concerned these two forms of justice, he had, as Grotius reads him, also given a propositional criterion. On the basis of this criterion, expletive justice involved simple proportion (arithmetical), and attributive justice involved comparative proportions (geometrical). According to Grotius, this latter criterion while being true of some cases, does not always hold. (See *LWP* I.1.8.2). It would also be incorrect to say that expletive justice is concerned with private property and attributive justice with public property. *LWP* I.1.8.3.

Though Grotius felt it necessary to draw this connection with Aristotle, this seems to be a good example of the limitations from which all novel manipulations of conventions suffer (as Quentin Skinner has repeatedly demonstrated in his research).

good to others, as generosity, compassion, foresight in matters of government" (*LWP* 1: 1.8.1).

Having articulated the two definitions of law – the broader conception, namely, that which is in accordance with the 'nature' of society, and what grows out of it, namely, a set of rights that inhere in human beings and society – Grotius moves on to a third definition, namely, law is that which imposes an obligation to do what is right. This rule of moral action is differentiated from other forms of obligations that do not have the force of law, i.e., those that result from advice, training and guidance which discipline human beings into that which is and is not honourable. Also differentiated from this definition of law is the obligation that arises when individuals are given 'permission' to do what in normal circumstances is prohibited by law: this cannot be law as it is the suspension of the 'operation of law.'

Following upon this distinctions is a paragraph which reveals how difficult a task it was to build a framework of justice while demarcating it from the Aristotelian understandings of distributive justice. The difficulty may be summed up in this way: Grotius had taken upon himself to build a comprehensive system of justice grounded in the rights and duties of man and society, but this in turn involved separating these rights and duties from other aspects of justice, namely, that of virtue, which, at the same time, (because of the weight of the Aristotelian legacy) could only be grasped in the language of justice. It is clear that for early seventeenth-century Europeans, distributive justice was internal to the language of justice to such a degree that they appeared to be 'essential' constitutive parts of each other. By this I mean that this vocabulary of justice was so deeply conventional and customary, as well as so tightly interwoven with practices and institutions, that it was extremely difficult to make a clean demarcation between the two:

> We said, moreover, 'imposing obligation to what is right', not merely to what is lawful, because law in our use of the term here stands related to the matter not only of justice, as we have set it forth, but also of other virtues. Nevertheless that which, in accordance with this law, is right, in a broader sense is called justice. (*LWP* 1: 1.9.1).

Here Grotius is clearly using the concept of law for that which is right, as well as virtue. And then, what is right, i.e., what is done in accordance with law (in this wider sense), encompasses more than what is lawful, i.e., what is done in accordance with 'law properly so called.' However, even here within the broader considerations of justice only that aspect of law that is 'right,' can be upheld by the judicial system.

This law, that is, "a rule of moral actions imposing obligation to what is right," is of two kinds, 'natural law' and 'volitional law'.[1] Grotius defines the law of nature as the "dictate of right reason":

> The law of nature is a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God. (*LWP* 1: 1.10.1).

Five points are being made here. First, right reasoning points out for us the law of nature; second, the moral or immoral quality of human actions is determined by whether they flow from right reasoning; third, human actions directed by right reason possess moral or immoral qualities only if they are in accordance with their rational nature; fourth, human actions are in accordance with the rational nature of human agency if they conform to the law of nature; fifth, because human actions are moral or immoral as a result of being either in accordance or in opposition to right reason and the rational (social) nature of man, they are as a 'consequence' either "forbidden or enjoined" by god who is the author of nature.

In order to clarify this rather complex argumentation let us look at each step more closely. First, Grotian laws of nature are not situated in some dense theological or metaphysical region; rather, they are located within the realms of right reason. Right reason, clearly, in Grotius' understanding, possess some intrinsic content or value which is responsible for an act being moral or immoral on account of it. In other words, reason is not simply an instrument, more or less efficacious to obtain an end which may be moral or immoral, but instead constitutes the moral character of an act. Right reason is normative. Also, right reason is not to be misunderstood with another characterization of the moral agency (popular in contemporary theory) which would attribute a moral significance to the efficacious use of reason itself. In this latter case, while the end is still located outside of the agent's reason, the act of instrumental/strategic reasoning itself confers on the agent a kind of moral excellence. Grotius is definitely not talking of either of these two. The 'reason' that Grotius is operating with may involve strategic or instrumental action, but is necessarily and essentially substantive: it constitutes the act as moral or immoral – means and ends are internally related. His stress on "conformity with rational nature" connects this to the first two laws which, as we have seen, involve the

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[1] This division is again that of Aristotle. "The best division of law thus conceived is found in Aristotle, that is into natural law and volitional law" (*LWP* 1: 1.9.2).

primacy of society and the common good; and rights as the moral powers in human agency are instrumental toward the higher rights of society. These arguments reiterate once more Grotius' basic position about human nature, sociableness and the resultant character of society set forth in the Prolegomena and throughout the three books of *LWP*.

Secondly, the law of nature does not possess the moral quality because god, the author of nature, has willed it. Rather, god wills it because it possesses this moral quality. Here Grotius moves away from the voluntarism of the *Commentary* and puts himself squarely among the non–voluntarist in this long-standing debate. His statement is forceful and clear:

> The acts in regard to which such a dictate exists are, in themselves, either obligatory or not permissible, and so it is understood that necessarily they are enjoined or forbidden by God. In this characteristic the law of nature differs not only from human law, but also from volitional divine law; for volitional divine law does not enjoin or forbid those things which in themselves and by their own nature are obligatory or not permissible, but by forbidding things it makes them unlawful, and by commanding things it makes them obligatory. (*LWP* 1: 1.10.2)

This passage also emphasizes that the distinguishing criterion between the law of nature and volitional laws (human and divine) is the substantive character of the former which is discernible by the rational faculty, while the latter originate in human or divine will. While this is an essential point, it is also important not to see in this argument a limitation of the sphere of the law of nature. On the contrary, Grotius is pointing to the limits of volitional law, the source of which is human or divine will. The sphere of natural law partly overlaps and in part includes volitional law:

> It is necessary to understand, further, that the law of nature deals not only with things which are outside the domain of the human will, but with many things also which result from an act of the human will. Thus ownership, such as now obtains, was introduced by the will of man; but, once introduced, the law of nature points out that it is wrong for me, against your will, to take away that which is subject to your ownership. (*LWP* 1: 1.10.4).

Another feature of the law of nature is that when 'simple relations' change into complex arrangements new 'dictate of right reason' begin to operate, such as man's rights and duties with regard to the institutions of private property and the judicial system:

> Furthermore, some things belong to the law of nature not through a simple relation but as a result of a particular combination of circumstances. Thus the use of things in common was in accordance with the law of nature so

> long as ownership by individuals was not introduced; and the right to use force in obtaining one's own existed before laws were promulgated. (*LWP* 1: 1.10.7).

In this third definition of law, Grotius goes on to draw more distinctions between actions dictated by the law of nature, or in accord with it, and other similar actions. Grotius identifies two categories: (a) those actions that are in accord with natural law, even though they are not the dictate of right reason, by virtue of the fact that they are not in conflict with that dictate, and (b) those actions which properly belong to the sphere of honour and which, therefore, as we saw in the negative definition of justice, do not involve obligation:

> For the understanding of the law of nature, again we must note that certain things are said to be according to this law not in a proper sense but – as the Schoolmen love to say – by reduction, the law of nature not being in conflict with them; just as we said above that things are called just which are free from injustice. Sometimes, also, by the misuse of the term, things which reason declares are honourable, or better than their opposites, are said to be according to the law of nature, although not obligatory. (*LWP* 1: 1.10.3.)

Most importantly: "The law of nature, again, is unchangeable – even in the sense that it cannot be changed by God. Measureless as is the power of God, nevertheless it can be said that there are certain things over which that power does not extend" (*LWP* 1: 1.10.5.).[1] These things are the rightness and wrongness of action which are internal to the law of nature (right reason) grounded in the social nature of man.

8. The Proof of the Existence of the Law of Nature

According to Grotius, the existence of the law of nature is proved by reason and experience:

> In two ways men are wont to prove that something is according to the law of nature, from that which is antecedent and from that which is consequent. Of the two lines of proof the former is more subtle, the latter more familiar.

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[1] According to Grotius: "This is what Aristotle means when he says: 'Some things are thought of as bad the moment they are named.' For just as the being of things, from the time they begin to exist, and in the manner in which they exist, is not dependent on anything else, so also the properties, which of necessity characterize that being; such a property is the badness of certain acts, when judged by the standard of a nature endowed with sound reason."

> Proof *a priori* consists in demonstrating the necessary agreement or disagreement of anything with a rational and social nature; proof *a posteriori*, in concluding, if not with absolute assurance, at least with every probability, that that is according to the law of nature which is believed to be such among all nations, or among all those that are more advanced in civilization. For an effect that is universal demands a universal cause; and the cause of such an opinion can hardly be anything else than the feeling which is called the common sense of mankind. (*LWP* 1: 1.12.1).

Reason, on the one hand, and, on the other hand, consensus that is customary and conventional are the two pillars on which Grotius seeks to ground his law of nature and of nations. While Grotius maintains that he has himself given the proof grounded in reason (i.e., the law of nature made possible by the rational and social nature of man), he draws heavily from the ancients in order to substantiate and endorse his consensus-based, customary and conventional proof of the law of nature:

> "Those things which appear true to men generally are worthy of credence," Heraclitus used to say, judging that common acceptance is the best criterion of truth. Says Aristotle: "The strongest proof is, if all men agree upon what we say"; Cicero, "The agreement of all nations upon a matter ought to be considered a law of nature"; Seneca, "The proof of truth is the fact that all hold the same view upon something"; and Quintilian, "We consider those things certain upon which there is agreement in the common opinion of men." (*LWP* 1: 1.12.2)[1]

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[1] Grotius re-enforces these authorities with more citations in *LWP* 1: 1.12.2, namely, from Aristotle: "What seems to all to be so, this we say is so; and he who wishes to take away this belief will himself say things in no respect more worthy of belief"; Seneca: "Amidst so great difference of opinions, all men with one voice, as the saying is, will declare to you that gratitude is due to those who do kindness"; Quintilian: "The common usage of educated men I shall call custom in speech, just as in life we call the common practice of good men custom"; Josephus: "There is no nation which throughout maintains the same customs; in many instances customs differ very greatly in different towns. But the right is equally advantageous for all men, and as useful to barbarians as to Greeks. To right, at any rate, the laws of our nation pay the greatest heed, and so, if we but strictly observe them, they render us well disposed and friendly to all men. Such are the characteristics which it is fair to demand from the laws; and others ought not to think, on account of differences in institutions, that our laws, being foreign, are repugnant to

The consensus Grotius has in mind is that which pertains among nations who are 'advanced in civilization,' and by advanced in civilization Grotius means those nations whose values and morals have not been distorted and corrupted. Values and morals are distorted or corrupted if they do not acknowledge the existence of the law of nature. Interestingly, the demarcation between advanced and non–advanced civilizations is whether their respective ways of life and institutions are ordered according to the law of nature:

> Not without reason did I speak of the nations 'more advanced in civilization'; for, as Porphyry rightly observes, "Some nations have become savage and inhuman, and from them it is by no means necessary that fair judges draw a conclusion unfavourable to human nature." Andronicus of Rhodes says: "Among men endowed with a right and sound mind there is a unchangeable law, which is called the law of nature. And if men having sick or distorted mentalities think otherwise, that has no bearing on the matter. For he who says that honey is sweet does not lie, just because to sick people it may seem otherwise."
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> Consistent with these expressions is a remark of Plutarch, in his *Life of Pompey*: "By nature no man either is or has been a wild and unsociable animal; but man becomes brutelike when, contrary to nature, he cultivates the habit of doing wrong. By adopting different habits, however, and making a change of place and of life, he returns again to a state of gentleness." (*LWP* 1: 1.12.2)

To read this as justifications for European imperial designs would be a great mistake, at least in so far as Grotius is concerned. There is no evidence here of the stages view of history developed by John Locke and by all those writers within the juridical tradition who, drawing from Locke, used such view of history (a) to justify imposing imperial European 'modern' juridical institutions on non–European peoples; and (b) to expropriate, exploit, assimilate, slaughter and what have you non–European peoples and their cultures in the name of civilization. For Grotius the conduct of the peoples and nations of Europe, far from reflecting the pinnacle of civilized behaviour, was the paradigm of ultimate barbarism. As the passages cited indicate, for Grotius, savagery and barbarism are not a typical stage in the development of a people or nation. Rather, nations

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them, but they ought rather to see whether these are adjusted to a standard of virtue and upright conduct. For virtue and upright conduct concern all men in common, and are of themselves sufficient to safeguard the life of men."

become savage and inhuman, when they are not governed by 'right reason' – it is then that they begin to have 'sick or distorted mentalities.' No individual is naturally wild or unsociable but only becomes so when the habit of doing wrong is perversely cultivated.

Having given the definition, grounds of and the distinctions within the law of nature, Grotius moves to the second element in the third definition of law: the sphere of volitional law. Volitional law is that law which "has its origin in the will," and is divided into human and divine.

Divine law is further divided by Grotius into two categories: divine law that is universal, and divine law that is particular to a people. Unlike the law of nature which has a moral content independent of the will of god, divine law emanates from the will of god and has this moral character because god wills it: "It is, of course, that law which has its origin in the divine will; and by this origin it is distinguished from the law of nature." In another passage, the distinguishing trait of volitional divine law in relation to natural law is expressed as follows: "that God does not will a thing because it is lawful, but that a thing is lawful – that is obligatory – because God willed it" (*LWP* 1: 1.15.1).

Human volitional law is further divided into municipal law and the law of nations.[1] Municipal law is made by the government which is the repository of the civil power of the state: "Municipal law is that which emanates from the civil power. The civil power is that which bears sway over the state. The state is a complete association of free men, joined together for the enjoyment of rights and for their common interest" (*LWP* 1: 1.14.1).

The law of nations, on the other hand, is a law common to nations and which nations are obligated to obey. This obligation results from the fact that the law of nations issues from the "will of all nations, or of many nations." Unlike the laws of nature, the law of nations is not a 'dictate of right reason.' Rather, like municipal law it is a product of civil power – the law making authority of the state. The distinction between the law of nations and the law of nature in this instance concerns not the content but the origin of the law. Indeed, Grotius also argues that there are virtually no laws common to nations outside of the domain of the law of nature:

> The law which is broader in scope than municipal law, is the law of nations; that is the law which has received its obligatory force from the will of all nations, or of many nations. I added 'of many nations' for the reason that,

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[1] A further division creates a special category for laws which are narrower than civil laws. A father's or master's command and other acts of this nature fall within this third category (*LWP* 1: 1.14.i).

> outside of the sphere of the law of nature, which is also frequently called the law of nations, there is hardly any law common to all nations. (*LWP* 1; 1.14.1).

While the proof of the existence of the law of nature was found in reason and convention/consensus, Grotius looks for (and finds) proof of the existence of the laws of nations in long–standing custom and what the authorities on the matter have said about it: "it is found in unbroken custom and the testimony of those who are skilled in it"(*LWP* 1: 1.14.2).

The discussion of the law of nature and volitional law is the third element in Grotius' triadic definition of law and thus completes the complex and comprehensive Grotian framework of law which this section of this study has sought to retrieve. To briefly summarize, such framework comprises: (1) all those acts that are unjust to society; (2) a set of rights that are the moral powers of the individual; (3) rules that impose obligations – both, law of nature and volitional law. This framework remains for the moment rather abstract and its contents will be fleshed out in the three books of *LWP*. This is the reason Grotius begins by stating that it is difficult to define what justice is in the Prolegomena, for this is the task and subject–matter of the entire work – the three volumes of *LWP*.

9. A Critical Review of Richard Tuck's Story

Having minutely reconstructed Grotius' framework, it is now useful to analyse Richard Tuck's retrieval of what lies at the foundations of modern juridical institutions and practices.[1] Tuck has claimed that the Sceptics had called into question the possibility both of universal morality and of certainty in the claims to knowledge. They challenged universal morality by pointing to the obvious fact that different moral worlds existed beyond every mountain; and they challenged certainty by using standard Pyrrohnian demonstrations which drew attention to the fallibility of the faculty of perception – the extant ground of all claims to knowledge. Against this background, Tuck sees Grotius as being the first theorist to respond to the sceptical challenge about the impossibility of a common moral world. According to Tuck, Grotius accepted the strength of the sceptical attack on the Aristotelian scholastic universal moral–claims then dominant, but did not accept the stance of *ataraxia* recommended by the Sceptics. Rather,

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[1] Richard Tuck's main discussions of this topic are to be found in "The 'Modern' Theory of Natural Law"; *Hobbes*; *Philosophy and Government, 1572-1651*; *International Order and Political Thought from Grotius to Kant*.

he set out to provide Europeans with a moral framework immune to the sceptical arguments.

Grotius, Tuck maintains, accomplished this by appropriating Cicero's first principles of self–preservation and its means, and then proceeded to conjoin these principles with rights, which he subjectivized and made moral qualities of the self. In other words, he made foundational to his new moral framework the right to self–preservation and the right to the means of self-preservation, as well as the duty to abstain from that which is others'. Tuck goes on to say that Grotius claimed that these two rights and one duty could not be denied by any people of any culture. The rest of the framework grew from these initial premises.

This is a rather interesting interpretation, though one, as should be quite obvious by now, that a careful study of Grotius' work does not fully support. Let us begin by going to the first text in which Grotius constructs his language of the law of nature, this is only fair to Tuck for he too begins his claims by going to the *Commentary*. It is clear – and in another until now unpublished work, Tuck recognizes this – that the text was written not as a response to the sceptical crisis but as a justification for Dutch commercial ambitions. Grotius categorically states that the entire wealth of the Dutch people depended upon the successful outcome of the Prize Court case. The book is a collections of the arguments that he had prepared, as council to the Dutch East India Company, to defend the booty looted from the carack *Caterina* during hostilities between the Netherlands and Portugal. These first principles of natural law are not constructed as an intellectual response to the arguments of the Sceptics, but functioned as elements in the theoretical framework Grotius used for a very concrete and practical purpose: to legitimize the imperial commercial ambitions of East India Company and, more generally, represent the interests of the Dutch Republic.

The second and far more significant point is that Tuck does not fully take into account the crucial difference between the *Commentary* and *LWP*. In the former, Grotius lays out thirteen laws of nature, which are entangled with nine rules and which together with those rules provide the normative grounds for his arguments. It is quite clear that in the construction of these norms/rules/laws Grotius does not deviate in any significant manner from his predecessors. To put the matter bluntly, the new language of the law of nature was not constructed in 1604/5 at the time Grotius compiled his notes for the *Commentary* but in 1623–25 as he worked on *LWP* in Paris. In this critical work the previous framework of nine rules and thirteen laws of nature is entirely abandoned and a new framework is constructed. It is this new framework, and the impact it was to have on European political thought and practice, that makes Grotius the first significant political

theorist of modernity. These new foundations of the law of nature are, as we have seen, the social and rational nature of human kind, which is in accord with the dictates of right reason and which entails the rights and duties of sociability. Significantly, the 'social' had not been constructed in the earlier text as the objective domain of political and legal thought and action. The crucial importance of these new foundations will become clearer later on in this study. For the moment, it is important to note that the failure to appreciate the shift between the *Commentary* and *LWP* leads Tuck both to misapprehend the reasons for the modernity of Grotius.

On the basis of these observations, let us now look more closely at Grotius' texts and Tuck's retrieval. Tuck's argument is at odds with the framework constructed by Grotius, as laid out in the Prolegomena and Chapter 1 of the *LWP*. Tuck overlooks Grotius' construction of the social nature of man, which is the first step in his response to those who claimed that the law of nations was simply a matter of expediency. Also, Tuck neglects Grotius' triadic definition of law: first, injustice as that which is injurious to society; second, grounded in the first, a body of rights as moral qualities and within which the rights of society have precedence over individual rights; and, third, the law of nature and volitional law. The law of nature, which is the dictate of right reason, subordinates individual rights to the common good, on grounds of strategic rationality but also, more importantly, on the ground that the common good is a superior end. The demarcations among the various forms of law and their objective domains that Grotius effects as he constructs a new framework of justice are not discussed by Tuck.

In his account in the second chapter of *LWP* Tuck takes as core premises the right of self–preservation and its means, and a duty to abstain from that which is others. However, as I will show in the next chapter of this study, Grotius introduces these notions at this particular juncture in his text not in order to oppose Carneades, but to lay the grounds for a discussion of the question: Is a just war possible? Moreover, in the very next passage Grotius states in no uncertain terms that, while these are the first principles, they are only instrumental towards the higher rights of society – such a statement is understandable only if the Prolegomena and Chapter 1 are taken into account.

Tuck's pioneering work on Grotius is extremely valuable and its importance cannot be underestimated. It has renewed interest in this great Dutch philosopher who was considered to be the founder of modern political theory by all those who built upon him in the seventeenth and eighteenth centuries. However, Tuck's retrieval has not fully explored Grotius' political theory, what Grotius accomplished in writing *LWP* and the nature of his influence on the seventeenth and eighteenth-century thinking.

Chapter 2

Hugo Grotius, Part II

Introduction

In the first chapter of this study, I retrieved the three basic steps in Grotius' construction of the modern language of the law of nature. To restate them briefly: (1) the social nature of man within which the law of nature was situated; (2) the demarcation of the law of nature from other law-forms on the basis of their origin, character and point of reference (the external actions of men); and (3) the triadic framework of justice. I also argued that any retrieval of Grotius' work and purposes (as well as any claims with regard to what lies at the foundations of modern juridical thought and practice) has to take full cognizance of this complex new language in which Grotius articulates the modern law of nature, and upon which others critically built.

In this chapter, as well as in the following one, I will flesh out Grotius' framework. I will consider some of its uses and look at how it performed its most explicit function, namely, that of addressing some of the crucial issues raised by the horrors of religious civil wars. In the previous chapter we saw that law of nature was a dictate of right reason: it consisted of the rights of individual/society and the duties of sociality. What these rights of individual/society and duties of sociality are, or, in other words, what the law of nature dictates in the complex, multiple and varied practices and institutions in which men-in-society find themselves is the subject-matter of the next two books of *LWP*.

Within the context of the current study, it is impossible to deal exhaustively with all the rights and duties of sociality that Grotius lays down for Europeans. Accordingly, what I have tried to do is to follow Grotius in retrieving and analyzing critically the two main contexts of legal claims: the one for acts not yet committed and the one for acts that are committed. The former context leads to a discussion of the right of self-defence, while the latter takes us into the origin, limits and defence of the right to private property, as well as to issues of punishment. It is in these two contexts of legal claims, which also provide the background for a discussion of the justifiable use of force for the enforcement of rights and duties, that Grotius spells out his political theory. And it may be useful to note at this juncture that Grotius' political theory was the bedrock on which others such as Hobbes and Pufendorf built. My discussion will proceed via a treatment of the "three sources of our legal claims": defence of life, defence of property and punishment. The

questions raised within these domains are answered by Grotius from within the framework of justice, though he concentrates primarily on the law of nature.

Grotius first addresses the issue of whether the use of force is ever justified in order to defend one's life. It is at this point that he tackles the question of sovereign power, its varied character, original locations, possible transfers, and its transgressions by governors, and this in turn leads him to consider the law of non-resistance, the right of resistance and the limitation to alienation of sovereignty. Secondly, Grotius deals with the justified use of force for the defence of property. Within this discussion he treats the origin of private property and limits to individual ownership. Lastly, Grotius addresses the right to use force for punishment. This allows him to lay down the original location of the right of punishment, the purposes of punishment and punishment for crimes against god within the context of religious civil wars. In this chapter I will explore the first of these three lines of enquiry, while the second and third are discussed in the next chapter of this study.

Justifiable causes of war for Grotius are as numerous as the causes of lawsuits: "where judicial settlement fails war begins."[1] Among this plurality of causes, Grotius identifies two basic categories: actions occasioned by wrongs about to be committed and actions occasioned by wrongs that have already been committed. The former are those instances where preemptive action is taken by men and nations, while the latter are instances in which "reparation for injury, punishment of the wrongdoer is sought" (*LWP* 2: 1.2.1). Accordingly: "Authorities generally assign to wars three justifiable causes, defence, recovery of property, and punishment" (*LWP* 2: 1.2.2).

For Grotius, the primary justification of war is a wrong that is yet to be committed, namely, self-defence. What qualifies as "self-defence" is a preventive action taken in the face of an imminent threat to life and property. This right of self-defence does not arise as a consequence of the injustice of the act of the attacker, but rather arises in accordance with the law of nature which grants to all animals a right against any attack, just or unjust. Moreover, the right to slay one's assailant is granted by the laws of nature if any limb or one's chastity is threatened (*LWP* 2: 1.6 and 1.7).

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[1] Grotius distinguishes between the just use of force/war to uphold right and distances it from the use of force/war for reasons of expediency: "Let us proceed to the causes of war – I mean justifiable causes; for there are also other causes which influence men through regard for what is expedient and differ from those that influence men through regard for what is right" (*LWP* 2: 1.1.1).

This is the skeleton of Grotius' argument, which it is useful to keep in mind as I proceed to minutely reconstruct the various moves and steps that make Grotius' reasoning so complex and rich.

1. The Law of Nature: Reason and Right Reason

> Having seen what the sources of law are, let us come to the first and most general question, which is this: whether any war is lawful, or whether it is ever permissible to war. This question, as also the others which will follow, must first be taken up from the point of view of the law of nature. (*LWP* 2: 2.1.1)

The move carried out in this passage allows Grotius to speak about the contents of the law of nature.

Grotius situates himself squarely within the Stoic tradition, in particular Cicero's *On the Common-Wealth*, and claims that there are certain "first principles of nature," and he maintains that there are additional principles which, while not being "first according to nature," take precedence even over the first principles of nature. The first principles of nature are applicable to all animals: first, all creatures seek self-preservation, its conditions as well as its means; and, second, all creatures avoid doing harm, as well as that which may cause harm:[1]

> He [Cicero] calls first principles of nature those in accordance with which every animal from the moment of its birth has regard for itself and is impelled to preserve itself, to have zealous consideration for its own condition and for those things which tend to preserve it, and also shrinks from destruction and things which appear likely to cause destruction.[2] (*LWP* 1: 2.1.1)

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[1] These first principles or laws (*lexes*) of nature are very succinctly and systematically laid out in Chapter 2, of the Prolegomena to the *Commentary*. First, "It shall be permissible to defend [one's own] life and to shun that which threatens to prove injurious"; second, "It shall be permissible to acquire for oneself, and to retain, those things which are useful for life."; third, "Let no one inflict injury upon his fellow"; fourth, "Let no one seize possession of that which has been taken into the possession of another." In this book they are grounded in nine rules and are part of thirteen laws of nature.

[2] Cicero is quoted: "There is this law which is not written, but born with us;

These first principles apply universally to all creatures, humans and animals. They are, in the first instance, the instinctive actions of all animals, and perform two functions: (a) they are instrumental toward bodily care, which instinctively drives men to protect and nourish the body, and (b), more importantly, they are also instrumental in directing men toward the higher principles that constitute moral goodness. With correct teleological reasoning Grotius argues that the first principles, as they are merely instrumental toward the moral good, are subordinate to these other (higher) principles – i.e., reason is instrumental to right reason.

> But after these things have received due consideration [self-preservation and avoiding of harm], there follows a notion of the conformity of things with reason, which is superior to the body. Now this conformity, in which moral goodness becomes the paramount object, ought to be accounted of higher import than the things to which alone instinct first directed itself, because the first principles of nature commend us to reason, and right reason ought to be more dear to us than those things through whose instrumentality we have been brought to it. (*LWP* 1: 2.1.2)

This argument in which Grotius subordinates or instrumentalizes reason to right reason is not accounted for by Richard Tuck. The other more elaborate body of the law of nature can be known according to Grotius by reasoning from first principles in accordance with the principle of consistency. This, in turn, allows men to know the higher goods, that is, the rights and duties of sociality, which are more difficult to grasp.

Grotius can now ask the first question: can an act of war ever be just? This is tied to a second question: can this act of war be in accordance with the rational and social nature of man? Grotius' answer to the first question is quite straightforward: given the first principles of the law of nature, and since I have a right to self-preservation as well as

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which we have not learned, have not received, have not read, but which we have caught up, have sucked in, yes have wrung out from nature herself; a law regarding which we have not been instructed, but in accord with which we have been made; to which we have not been trained, but with which we are imbued – the law that if our life has been placed in jeopardy by any snare, or violence, or weapons either of brigands or of enemies, every possible means of securing safety is morally right."

"The law reason has enjoined upon the learned, necessity upon barbarians, custom upon nations, and nature herself upon wild beasts, that always, with whatever means of defence they possess, they ward off all violence from body, from head, and from life itself" (*LWP* 1: 2.3.1).

to the means of self-preservation, war is clearly justified, provided that it is fought toward this end. It is this conformity with first principles that justifies the use of force.[1]

Second, war is perfectly in conformity with right reason and the rational/social nature of man. The argument here is that one of the ends of society is the preservation and safeguarding of all its members, and therefore it is justified to bring together the collective resources of the community for this purpose; second, the preservation of society is a valid end in itself, insofar as it is a dictate of right reason that is grounded in the social nature of man. Reason and sociality (right reason) are against only that use of force which conflicts with this end – the preservation of society and the life, properties or possessions of its members. Grotius claimed that this would be true even prior to the institution of property ownership (in 'private property' Grotius includes "life, limbs, and liberty"[2]). By grounding his argument in this manner in the law of nature, Grotius is able to hold that not all wars are in conflict with justice, and, conversely, that some wars can be in conformity with reason and right reason.[3]

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[1]: Grotius states: "We have said above that if an attack by violence is made on one's person, endangering life, and no other way of escape is open, under such circumstances war is permissible, even though it involve the slaying of the assailant. As a consequence of the general acceptance of this principle we showed that in some cases a private war may be possible" (*LWP* 1: 2.1.4).

And he adds: "This right of self-defence, it should be observed has its origin directly, and chiefly, in the fact that nature commits to each his own protection, not in the injustice or crime of the aggressor. Wherefore, even if the assailant be blameless , ... the right of self-defence is not thereby taken away; it is enough that I am not under obligation to suffer what such an assailant attempts, any more than I should be if attacked by an animal belonging to another" (*LWP* 2: 1.3).

[2] Moreover, with regard to private property, an individual acquires a right to it if he is the first to take possession and make use of it, limited only by the extent of his need. If, under these circumstances, force is used to deprive him of his possessions, then this would most certainly constitute an unjust act. This matter is more easily decided now, according to Grotius, as private property has "by law and usage assumed a definite form," and Grotius also adds: "It is not, then contrary to the nature of society to look out for oneself and advance one's interest, provided the rights of others are not infringed; and consequently the use of force which does not violate the rights of others is not unjust" (*LWP* 1: 2.1.5).

[3] This is also true if one refers to the law of nations: "That wars, moreover, are not

However, in the light of the situation in Europe, Grotius qualifies this right of war. Grotius appeals first to the law of love (against the law of nature), to argue that this right exists only with regard to the attacker and not against an individual who may unwittingly come in the way of one's defence or one's escape from the assailant. This law of love, which places concern for individual life on the same footing as the concern for society, clearly does not permit the killing of the innocents even in conditions of self-defence. Also, killing in self-defence is counted as an unintentional act because killing the assailant is not the intended end but only a means to self-preservation. However, even here the one being attacked should protect himself by other means – by disabling the assailant or by ruse – rather than by killing the attacker. The second qualification is that war is allowed only insofar as the danger is "immediate and imminent," not if it is merely feared. Fear of an anticipated assault cannot be a just cause for waging a war. Rather, Grotius contends, this fear of the other has itself been responsible for and caused enormous injustice throughout history.[1] Nor is it permissible or justified to kill even that person of whom it

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condemned by the volitional law of nations, histories, and the laws and customs of all peoples fully teach us" (*LWP* 1: 2.4.2). Further, the law of nations lays down the rules that must be followed in conducting just wars. Grotius also argues that wars are justified according to sacred history (*LWP* 1: 2.2), divine volitional law before the Gospel (*LWP* 1: 2.5), not in conflict with the law of the Gospel (*LWP* I.2.6 and 7), or in conflict with the law of the Gospel (*LWP* 1: 2.8) – this last problem is resolved by going to the early Christian fathers who endorse the possibility of a just war.

[1] To support this position, Grotius quotes a number of authorities: Cicero, "that most wrongs have their origin in fear, since he who plans to do wrong to another fears that, if he does not accomplish his purpose, he may himself suffer harm"; and again "Who has ever established this principle, or to whom without the gravest danger to all men can it be granted, that he shall have the right to kill a man by whom he says he fears that he himself later may be killed?"; Xenophon, "I have known men who, becoming afraid of one another, in consequence of calumny or suspicion, purposing to inflict injury before receiving injury, have done the most dreadful wrongs to those who had no such intention, and had not even thought of such a thing"; Gellius, "When a gladiator is equipped for fighting, the alternatives offered by combat are these, either to kill, if he shall have made the first decisive stroke, or to fall, if he shall have failed. But the life of men generally is not hedged about by a necessity so unfair and so relentless that you are obliged to strike the first blow, and may suffer if you shall have failed to be first to strike"; Thucydides, "The future is still uncertain, and no one, influenced by that thought,

has been ascertained that he or she is definitely planning an attack on one's life – the danger, as it is still in the planning stage, should be averted by some other means.

Third, Grotius states that, while the law of nature allows for the killing of an assailant, it "is more worthy of praise who prefers to be killed rather than to kill"(*LWP* 2: 1.8.8). Furthermore, it is not justified to kill the assailant if he is more useful to society than the person under attack.[1] This holds not just in the case of the law of love, but even according to the law of nature. In the law of nature, the good of society takes precedence over the first principles of nature, i.e., self-preservation and its means. Therefore, the person attacked cannot legitimately kill the attacker if the latter is more useful to the society than the former, and this is commanded not simply by the law of love but also by the law of nature. The reason why this is a 'wrong' or an unjustified act is that:

> the law of nature, in so far as it has the force of law, holds in view not only the dictates of expletive justice, as we have called it, but also actions exemplifying other virtues, such as self-mastery, bravery, and prudence, as under certain circumstances not merely honourable, but even obligatory. And to such actions we are constrained by regard for others. (*LWP* 2: 1.9.1)

Fourth, though the law of nature permits killing the person who threatens to strike a 'blow,'[2] this is not permitted to Christians by the law of the Gospel. Grotius counters the arguments that slaying the assailant is necessary to recover one's honour. Such notions of honour, according to him, are contrary to both reason and religion. Moreover,

> it does not make any difference if some individuals of faulty judgment turn this virtue into a vice by applying to it names which they have made up; for

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should arouse enmities which are not future but certain"; Livy, "In the effort to guard against fear... men cause themselves to be feared, and we inflict upon others the injury which has been warded off from ourselves, as if it were necessary either to do or to suffer wrong" (*LWP* 2: 1.5.1).

[1] Pufendorf will pick up and develop this Grotian idea.

[2] "There are some who think that, if a man is in imminent danger of receiving a blow or a similar injury, he has the right to prevent it by killing his enemy. For my part, if expletive justice only be considered, I raise no objection. For although death and a blow are not on the same level, yet the man who makes ready to injure me by that very act confers on me a right, a sort of actual and unlimited moral right against him, in so far as otherwise I cannot ward off the injury from myself. Furthermore, in such a case regard for others does not in itself seem to impose on us the obligation to favour the one who attempts the injury" (*LWP* 2: 1.10.1).

> such faulty judgments change neither the thing nor the value of the thing. The truth in this case was perceived not only by the early Christians but also by the philosophers, who said, as we have shown elsewhere, that it is characteristic of a small soul not to be able to bear an insult. (*LWP* 2: 1.10.2)

Similarly, the 'authorities' were quite wrong when they argued that divine law permitted killing in self-defence there being great disgrace in flight, "[a]nd yet in such an act there is no disgrace; there is only a false notion of what is dishonourable, a notion deserving of contempt on the part of all true seekers after virtue and wisdom" (*LWP* 2: 1.10.3). Again, Grotius stands in opposition to some who permit killing those who "would hurt our standing in the estimation of good men" (*LWP* 2: 1.10.3). Both the law of nature and the law of love do not permit the killing of that person who tries to spoil or slander one's good name. Even more, attempts at smearing one's reputation "in reality do not in any degree affect our honour" (*LWP* 2: 1.10.3).

As Skinner has persuasively demonstrated in *Reason and Rhetoric in the Philosophy of Hobbes*, it was primarily in order to peg down the meanings of words in general, and in particular the meanings of words that referred to moral acts (i.e., vices and virtues), that Hobbes wrote the *Leviathan*. We can see the origin of this preoccupation in Grotius' discussion and the concern that incorrect judgement and incorrect the use of words can turn virtue into vice, and thereby causing all kinds of disturbances in society.

Grotius has now introduced the first principles and the higher principles of the law of nature. The first principle are seen to conform to reason and the higher principles to right reason to which reason is subordinate and instrumental. These theoretical propositions are introduced to ask the question whether war is ever justified and then to authorise an affirmative answer. Both, the first principles and the higher principles of the law of nature permit war under specific circumstances. The answer in terms of the first principles does not involve much difficulty, as self-defence is an instinctive response of all living creatures to threats on their life. The answer in terms of the higher principles, however, is not so obvious, as Grotius himself admits. Still, Grotius stresses that the preservation of society, though not so obvious, is of even greater importance and weight than the preservation of self. Society makes possible both bare self-preservation and the moral goodness of individuals. Securing conditions merely for self-preservation would do no more than secure an existence already enjoyed for the most part by animals, as they are born with natural capacities for self-preservation. Humans too are born with these natural capacities, but it is only via society that these natural capacities compel and make possible sociable life which, in turn, is a necessary condition for individual self-preservation. Further, and more importantly, the preservation of society and thus the

primacy of this goal over the first principles of nature lies in the fact that society alone makes possible that which is unique to humans in contrast to other species of animals – moral goodness. In this context, the higher principles of sociality – that which is conformity with right reason as distinct from that which is in conformity with reason alone – also clearly justify war in some instances.

On the basis of these observations is becomes clear that, for Grotius, the right of self-preservation is not an unqualified right but rather comes with several qualifications. To be sure it is unqualified when it comes to other animals, but not among human beings in society. Always the same principle is at play: if society is threatened in an act of self-preservation, that act is unjustified by the law of nature. It is clear that the extensive list of qualifications to justified killing in self-defence stems from Grotius' concern that the indiscriminate slaughter of populations was all to often justified as being necessary in the name of self-defence. And even in those instances where wars were in actual fact being fought for the sake of self-defence, the violent actions flowing logically from the first principles of nature were in a sense turning against themselves and making self-preservation of individuals and society impossible, and ultimately negating the possibility of living a truly human existence.

2. Private and Public Use of Force

The justifiable use of force falls into three categories: private wars by individuals who do not possess lawful authority; public wars which are waged by those who have legitimate authority; and mixed wars which are public on the one side and private on the other (*LWP* 1: 3.1.1).[1]

Grotius' argument that some private wars are waged lawfully can be easily deduced from his reconstruction of the law of nature. However, what was not settled or made clear was whether there could be a legal private use of force even after the judicial system (civil society) had been established. Grotius answers in the affirmative, but qualifies this conclusion by stating that the private use of force is justified only in certain and very limited circmstances since, once the judicial system has been established, the sphere of natural justice adjudicated by individuals is vastly reduced. The reason for this is that,

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[1] Public wars are further divided into formal (legal) and less formal. The war is formal if two conditions are met: first, if the war is conducted on both the sides by those who hold sovereign power; and second, if certain formalities are followed. It is less formal if formalities are suspended and it is waged by any official against a private individual and not necessarily the one who possesses sovereign power (*LWP* 1: 3.4.1 and 2).

while the judicial system is not the creation of nature, it is nevertheless in accord with moral standards dictated by the law of nature – i.e., sociality. Moreover, the judicial system is obviously a better instrument of peace and justice than the private use of force, given that in a court of law disputes are adjudicated by objective judges who do not have any personal interest in the matter (*LWP* 1: 3.1.2).

However, while the institution of states/judicial systems has considerably reduced the possibilities of justified private use of force, there are times when judicial procedures are no longer available. At such times, in accordance with the first principles of the law of nature, it is permissible to use force to secure one's rights. The key criterion here is the impossibility of recourse to judicial procedure, for if it were available it would make any private use of force illegal (*LWP* 1: 3.2.1).

The judicial procedures may be unavailable either 'temporarily' or 'continuously.' They cease temporarily when the matter cannot be referred to a judge because the danger to life is certain and immediate or because there is fear of imminent loss. The absence of judicial procedures can be continuous in law and fact; in law, in places where there are no inhabitants, as on the sea, in the wilderness or non-inhabited islands, or any other place where there is no state; in fact, where subjects as well as judges have turned indifferent to judicial procedure (*LWP* 1: 3.2.1)[1]– Grotius was a first hand witness to this in large parts of Europe.

In *All the World Was America: John Locke and English Colonization*, Barbara Arneil has argued that these arguments were later marshaled by John Locke and others to justify the wars and slaughter of Amerindian peoples. While some aspects of Grotius' reasoning may seem to justify this contention, we should also ask whether this was Grotius' intent in putting forward these arguments. And on this score the evidence is clearly inconclusive, and without further proof it would be hasty to jump to such a damning conclusion.

3. The Character of Sovereign Power

The discussion on justified public use of force by a state prepares the way for Grotius' treatment of sovereign power. This is a particularly interesting section of *LWP* since it brings together several concepts that we recognize as distinctly modern.

According to Grotius: "[t]hat power is called sovereign whose actions are not subject to the legal control of another, so that they cannot be rendered void by the operation of another human will" (*LWP* 1: 3.7.1). By "another" Grotius means someone

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[1] Grotius argues that this is also justified by the law of the Gospel (*LWP* 1: 3.3).

other than the exerciser of this power who has the right to change his will, as well as his inheritor, as they share in the same power. The subject of this sovereign power is either "common or special." The common subject of sovereignty is the state, while the special subject is the individual or individuals (*LWP* 1: 3.7.3). At the time of the extinction of those who possess/exercise sovereign power, "the right of government reverts to each people" (*LWP* 1: 3.7.2). Clearly, for Grotius, a 'people' (*populus*) exists prior to the state, which is not the case in Thomas Hobbes.

Grotius distinguishes between sovereign power and the possession and exercise of sovereign power: "we have tried to show that sovereignty must in itself be distinguished from the absolute possession of it. So true is this distinction that in the majority of the cases sovereignty is not held absolutely" (*LWP* 1: 3.14). While sovereign power understood abstractly is indivisible, its possession and exercise can be divided in any number of ways that a 'people' sees as appropriate to their particular condition, customs, conventions, preferences and, at times, more explicit instrumentally rational designs. It is within this understanding of sovereign power and of the varied manner in which its possession and exercise is divided in different political arrangements that Grotius situates his discussion of (a) what civil power is, (b) the legitimate and illegitimate division of the exercise of sovereign power, (c) the law of non resistance and the right of resistance, (d) the limitations to the alienation of sovereignty, and, finally, (e) what is a state and what brings about its dissolution.

3.1 Civil Power or the Moral Faculty of Governing

The proposition that justified formal wars are the ones that are waged by the possessor of sovereign power in the exercise of civil power leads Grotius to ask the question: what does civil power consist in? Grotius first defines it as the moral faculty of governing a state. This notion is further elaborated: civil power is held and exercised either directly by the governors or indirectly through other officials. The power exercised directly is itself further divided into the two categories of general and particular. The power that concerns general interest involves law-making and law-exercising functions, as well as the care of religious and secular matters, or matters that Aristotle terms as architectonic.[1]

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[1] Grotius states: "For he who governs a state governs it in part through his own agency, in part through others. He governs through his own agency by devoting his attention either to general interest or to particular interests. In devoting himself to general interests he concerns himself with framing and abrogating laws respecting religious

The particular interests that concern those who govern are either those that are public in nature or those that, though private, have public consequences. These include acts of peace, war, making of treaties, taxes, and including all those matters that are the concern of the state by virtue of having a 'right of eminent domain' over the citizens and their property for the public interest. These are concerns that Aristotle calls 'civil' and 'deliberative.'[1]

The private interest which have consequences for the public interest are in the nature of those that involve disputes among subjects/citizens which jeopardize the orderliness and peace within society and the state. This branch Aristotle called 'the judicial'.[2] Lastly, civil power is also exercised by public officials and the agents appointed for particular tasks (*LWP* 1: 3.6.2).

This is the exhaustive division, explicitly situated within Aristotlian thought, that Grotius constructs in order to clarify his notion of civil power. However, while civil power and sovereign power overlap, they are also qualitatively different categories. Grotius recognizes that the possessor of sovereign power, or at least some part of it, may not at the same time be the exerciser of civil power. This is largely determined by the constitutional arrangements consented to by the people. Accordingly, Grotius works throughout with an explicit distinction between sovereign power and its exercise. This distinction allows him to justify different political arrangements with regard to the exercise and sharing in of sovereign power, thus legitimating the different provisions made

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matters (so far as the care of religious matters belongs to the state) as well as secular. The branch of the science of government which deals with such matters Aristotle calls architectonic, 'the architectural'" (*LWP* 1: 3.6.2).

[1] "The particular interests, with which he who governs concerns himself, are either exclusively public interests, or private interests which have relation to public interests. Exclusively public interest are either actions, as the making of peace, of war, and of treaties; or things, such as taxes, and other things of a like nature, wherein the right of eminent domain, which the state has over citizens and over the property of citizens for public use, is included. The branch of the science of government which deals with such matters Aristotle designates by the general term 'political', that is 'civil', and 'deliberative'" (*LWP* 1: 3.6.2).

[2] "Private interests [as here understood] are controversies between individuals the termination of which by public authority is important for the tranquillity of the state. The branch of science of government concerned therewith is called by Aristotle 'the

in this respect by the varied constitutional arrangements then existing in Europe. The distinction between sovereign power and its exercise also allowed Grotius to lay down justifications for legitimate revolutions against unconstitutional acts by the possessors of civil power.

3.2 Misconceptions Regarding the Location of Sovereign Power

It is in this section of *LWP* that Grotius addresses probably the most important question thrown up by the religious civil wars: what is the theoretical nature of political power and government? Different answers to this question had mobilized vast sections of Europeans on grounds of political ideology, and not simply on the grounds of their favoured religious doctrine, though the two were normally tightly interwoven.

Grotius begins the discussion of the location of sovereign power by correcting alleged misconceptions prevalent in Europe with regard to the location and distribution of political power between the people and their governors. While accepting that, in a great many instances, political power resides ultimately in the people, and that the governors govern with the consent of the subjects/citizens, Grotius is keen to point out that this is not without exception. There are theoretical considerations and actual practices that point to the possibility for a people to have absolutely no legal rights left, that is, they completely alienate their political power (i.e., the right of self-preservation and its means which is the original source of political power).

In stating this Grotius is reacting against one of the main instruments that allowed for large scale mobilizations of people for revolutionary civil wars, namely, the conventionally dominant humanist view. According to this view, the people were always the repository of political power and they had a right to disobey and even punish their sovereign when he reneged on the agreement, explicit or tacit, with the people. In *Neostoicism and the Early Modern State*, Gerhard Oestrich has argued that the absolutist political philosophies of Justus Lipsius and Jean Bodin can only be understood against the backdrop of Machiavelli's republicanism and the role it played in justifying the involvement of the citizenry in the religious civil wars of sixteenth and the seventeenth centuries. These two philosophers – Lipsius and Bodin – held republican political doctrines responsible for the slaughter, devastation and breakdown of European society. A political theory that theoretically limited the justifications of popular revolt was squarely on the agenda of all those who lived through and immediately after these wars. The centralizing doctrines of Thomas Hobbes and Samuel Pufendorf, which forcefully

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judicial'" (*LWP* 1: 3.6.2).

endeavoured to limit the role of subjects/citizens, are clearly embedded within this pan-European concern.

However, Grotius' relationship to the theoretical nature of political power and government is more complex. In Chapter 5 of *Philosophy and Government, 1572-1651*, Tuck has demonstrated the young Grotius' firm commitment to the type of aristocratic republicanism practiced by the Dutch people. As a citizen of the Dutch republic, Grotius played an important political role in its government from a very young age. Also, all his early writings glorify the republicanism of the Dutch and of the Republic of Venice – the one state in Europe that most closely resembled the aristocratic republicanism of Grotius' native country. However, Grotius too had witnessed the destructive passions of populations mobilized by the warring sects in Europe. Furthermore, Grotius knew and greatly respected Lipsius who had been a teacher of his father. Grotius was attracted by the practical and theoretical reinforcement Lipsius gave to his absolutist and centralizing political doctrines, i.e., the exceptionally important role played by (a) disciplinary practices retrieved from Roman military drill manuals and (b) neo-Stoic morality, that was to infuse the soldiers/subjects. It is clear that Grotius greatly admired Lipsius' retrieval and of neo-Stoic ideology and of Roman manuals on disciplinary practices, both of which were used to build military academies first in Holland and subsequently across Europe. He was further very impressed by the results of the first disciplined modern army built by Prince Maurice of Nassau (Lipsius' nephew and later Grotius' nemesis), who used Lipsius' work as a blueprint for constructing the new military academies. What is not clear is Grotius' own preferred political arrangement for government. And yet it is clear that Grotius is not willing to reduce the diverse political arrangements and forms government to just one preferred type, though he does mention that the most perfect civic union is one which is brought about when citizens exercise their common rights in consenting to any particular constitutional arrangement. The emphasis here is on the exercise of their common rights.

In Grotius' view, then, the excellence of the form of government does not depend upon any particular form that the people choose but rather on whether the individuals were exercising free choice. This is the criterion that adjudicates between just and unjust arrangements:

> Just as, in fact, there are many ways of living, one being better than another, and out of so many ways of living each is free to select that which he prefers, so also a people can select a form of government which it wishes; and the extent of its legal right in the matter is not to be measured by the

> superior excellence of this or that form of government, in regard to which different men hold different views, but by its free choice. (*LWP* 1: 3.8.2)

Grotius is willing to endorse a plurality of political arrangements. As we mentioned earlier, Grotius was, from his youth, passionately drawn to republican forms of government. From this it could reasonably be inferred that he would tend to consider legitimate any form government just as long as citizens have some say in the matter. However, Grotius also endorsed political arrangements in which sovereign power was possessed and exercised absolutely. So the question remains: why did he endorse such a multiplicity of arrangements? What Grotius' intentions were or what purposes his justifications served can only be answered by employing a interpretive device recommended by Grotius himself. He argues that when the intentions of the author in writing a text (or a contract, for example) are difficult to interpret, recourse can be made to conjecture, as long as the conjecture does not contradict other passages of the text or lead to absurdity in relation to the practical context surrounding the text. My conjecture is that Grotius' theoretical arguments were intended to justify the varied and multiple political arrangements then existing in Europe, and that he did this in order to minimize the force of the arguments which various groups intending to overthrow their established governments may be able to marshal to justify their actions. This accords with the purpose of the whole text: Grotius' concern to counteract through and within the limits of law of nature, any action that could possibly hurt society. By providing theoretical justifications for a complex of government-forms, Grotius aimed at ensuring minimal disturbance of political arrangements within and among European states.

The first move in this endeavour was to invalidate the most frequently used principle for justifying revolt, that is, the argument that a 'people' always retains the power to replace their governors if they renege on the contract they have made with the people. Grotius rejects the contention that "everywhere and without exception" the sovereign power is always located in the individuals who, accordingly, possess the right to "restrain and punish" the rulers whenever they misuse their power:

> At this point first of all the opinion of those must be rejected who hold that everywhere and without exception sovereignty resides in the people, so that it is permissible for the people to restrain and punish kings whenever they make a bad use of their power. How many evils this opinion has given rise to, and can even now give rise to if it sinks deep enough into men's minds, no wise person fails to see. (*LWP* 1: 3.8.1)

Grotius argues that in extreme cases it is possible to alienate political power to the sovereign so completely that none remains in the individual. This is grounded in the

principle that a man has a right to all possible actions and means to ensure his self-preservation and this includes that every man may enslave himself to any person he wishes, thus becoming that person's private property. Accordingly, it is legally possible to alienate completely to another one's sovereignty. Grotius recognizes that such reasoning contained great dangers but argues that there is no system of government that is free of danger.

Grotius identifies the circumstance in which a people may choose to renounce all their legal rights to their governors: (a) when confronted by imminent destruction, in which case such a complete renunciation may be the only option; and (b) when this is the only means available for a people to secure desperately needed provisions:

> In truth it is possible to find not a few causes which may impel a people wholly to renounce the right to govern itself and to vest this in another, as, for example, if a people threatened with destruction cannot induce any one to defend it on any other condition; again, if a people pinched by want can in no other way obtain the supplies needed to sustain life. (*LWP* 2: 3.8.3)

Grotius also draws upon the Aristotelian argument that some people are by their very nature more likely to be ruled than to rule.[1] Finally, war is another means of acquiring this absolute right over the conquered who are left with none themselves: "Just as private property can be acquired by means of a war that is lawful (*iustum*), according to our use of the term above, so by the same means public authority, or the right of governing, can be acquired, quite independently of any other source" (*LWP* 1: 3.8.6). While it is possible to interpret this passage as a justification for the assimilation, expropriation and destruction of Amerindian, African and Asian peoples, it is also clearly possible that this passage and its reasoning, like others, were used by followers of Grotius to justify practices that Grotius himself never contemplated and never intended to justify. In this passage, and the others that follow, Grotius is more concerned with matters more immediately at hand – strife among the peoples and nations of Europe.

Grotius goes on to say that this right of conquest, as well as the other circumstances when a complete surrender of sovereignty by individuals takes place, may lead not only to a monarchies but also to other forms of government, such as aristocracies or republics:

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[1] "Further, as Aristotle said that some men are by nature slaves, that is, are suited to slavery, so there are some peoples so constituted that they understand better how to be ruled than to rule" (*LWP* 1: 3.8.4).

> What has been said, again, must not be understood as limited to the maintenance of the rule of a monarch, when that is the type of government concerned; for the same right and the same course of reasoning hold good in the case of an aristocracy which governs with the exclusion of the common people. What shall I say of this fact, that no republic has ever been found to be so democratic that in it there were not some persons, either very poor people or foreigners, also women and youths, who were excluded from public deliberations? (*LWP* 1: 3.8.6)

Grotius contends that history provides innumerable examples of many such nations where people had lived 'happily' for centuries under such a form of government. Further, Grotius claims that there have been times when the condition of a state was such that the safety of the people could only be assured by such an absolutist rule. The case in which a people subject themselves to their rulers by such a complete transfer of their political power that they retain no part of sovereign power, is not only a theoretical possiblity but also a historical fact that people have constantly done precisely this throughout the ages. In sum, Grotius' position on two fundamental points is unequivocal. It is incorrect to hold the view (a) that the right to govern is always subject to the judgment and will of those who are governed, and (b) that all sovereigns are clothed with authority by the people.

Grotius then proceeds to refute the arguments which posit that the governors are ultimately always subject to the people. The position that those who grant authority always remain superior to those to whom it is granted is true only of some constitutional arrangements.[1] Grotius also rejects the philosophical position of those who ague that, since the end is always superior to the means for the attainment of that end, and given that all associations are brought about in order to benefit those who are ruled, the ruled, being the end, are superior to the governors, who are only the means.[2] The unwarranted

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[1] "[T]he assertion, that he who vests some one with authority is superior to him upon whom the authority is conferred, holds true only of a relationship the effect of which is continually dependent on the will of the constituent authority; it does not hold true of a situation brought about by an act of will, from which a compulsory relationship results" (*LWP* 1: 3.8.13).

[2] "Another argument men take from the saying of the philosophers, that all government was established for the benefit of those who are governed, not of those who govern; from this they think it follows that, in view of the worthiness of the end they who are governed are superior to him who governs" (*LWP* 1: 3.8.14).

conflation of the benefit of those who are ruled with the ruled themselves voids this syllogism.

In all of this, it must be kept in mind that what Grotius is rejecting is the universality of the claim that the rulers are subordinate to the ruled or that they must always rule in the interest of the people. By and large, he accepts and endorses the view that this is true in most cases, i.e., that rulers rule in the interest of peoples and states where the benefits are shared by both the rulers and ruled. Though, even in those states where rulers govern in the interest of the people "it does not on that account follow, as our opponents infer, that the peoples are superior to the kings" (*LWP* 1: 3.8.14).

Moreover, he agrees that a people in some circumstances may justly disobey the governors. But in this he does not see the limitation of the power of the sovereign. The act of a people who makes the sovereign its 'subject' when he rules 'badly,' is simply an act against a sovereign who has transgressed the law of nature, and all valid sovereign power is limited by what is allowed by the law of nature. An exercise of power that resides 'outside' the just limits set by the law of nature was never within sovereign power in the first place.[1] Grotius also rejects the possibility of common and overlapping jurisdiction (which is not the same as sovereignty being possessed in part by different elements of the state). The people and the rulers cannot have an equal say in the rule-making and executing power of the state within the same jurisdiction. This can be understood as an argument against divided sovereignty, which is not what is being argued here. Rather Grotius works with several different arrangements and divisions of the manner of possessing sovereign power and Hobbes and Pufendorf were harshly critical of this "crazie house" that Grotian political theory sees as essential for peace in Europe.[2]

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[1] Pufendorf was to follow Grotius in this respect and understood Hobbes as imposing the same limitations on sovereign power, unlike Spinoza whom Pufendorf chastises severely for not doing so.

[2] "Some imagine that between king and people there is a relation of mutual dependence, so that the whole people ought to obey the king who governs well, while the king who governs badly should be made subject to the people. If they who hold this opinion should say that anything which is manifestly wrong should not be done because the king demanded it, they would be saying what is true and is acknowledged among all good men; but such a refusal implies no curtailing of power or any right to exercise authority" (*LWP* 1: 3.9.1).

"The moral goodness or badness of an action, especially in matters relating to the

3.3 The Multiple Locations of Sovereign Power

For Grotius, sifting through what he considers misconceptions about where sovereign power must in all states ultimately reside is an important process because it alows us to correctly identify who within each given state actually holds sovereignty. And indeed Grotius proceeds to examine the wide range of possibilities as to the locations or forms of sovereign power in individual states.

As we saw above, in some cases sovereign power is held absolutely with "full propriety rights," which include the right to transfer this power:

> What I have said, that in some cases sovereign power is held with full propriety rights, that is in patrimony, some learned men oppose, using the argument that free men cannot be treated as property. But just as the power of the master is one thing, that of the king another, so also personal liberty is different from civil liberty, the liberty of individuals from the liberty of men in the aggregate.... Just as personal liberty, then excludes subjection to a master, so civil liberty excludes subjection to a king and any other form of control properly so called. (*LWP* 1: 3.12.1)

Grotius allows as a justified form of government a political arrangement where the relationship between the people and sovereign are analogous to those that exist between master and slave – the absolute possession and exercise of sovereign power discussed above. However, in this instance there is no civil society, while, conversely, definitive evidence of civil liberty/society is the absence of this form of governing arrangement. And yet, even in this instance, the right to transfer sovereign power does not mean a transfer of people in the literal sense, but only "the perpetual right of governing them in their totality as a people" (*LWP* 1: 3.12.1).[1]

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state, is not suited to a division into parts; such qualities frequently are obscure, and difficult to analyse. In consequence the utmost confusion would prevail in case the king on the one side, and the people on the other, under the pretext that an act is good or bad, should be trying to take cognizance of the same matter, each by virtue of its power. To introduce so complete disorder into its affairs has not, so far as I know, occurred to any people" (*LWP* 1: 3.9.2).

[1] He also clarifies further that if, as a result of a war, a king acquires any people, they are the subjects of the king and not of the citizens who may have suffered casualties in the course of the war, the latter being a notion which Grotius considers to be "devoid of any foundations" (*LWP* 1: 3.12.3). In this case, the king exercises sovereign power in his

The second situation Grotius discusses is that of states where sovereign power may not be held absolutely. This is the case in those states where the king possesses sovereign power through the 'will' of the people, and it is to be assumed that such a manner of possessing sovereign power does not include the right to transfer or 'alienate' this power. "In the case of kingships which have been conferred by the will of the people the presumption is, I grant, that it was not the will of the people to permit the king to alienate the sovereign power" (*LWP* 1: 3.13.1).

Grotius, is trying to demonstrate that sovereign power does not imply at all times absolute power. Rather, he contends that in more cases than not sovereign power implies less than absolute power. As noted above, this is primarily the reason for drawing a clear distinction between sovereignty and its exercise or possession: "Up to this point we have tried to show that the sovereignty must in itself be distinguished from the absolute possession of it. So true is this distinction that in the majority of the cases the sovereignty is not held absolutely" (*LWP* 1: 3.14).

Continuing the same point Grotius argues that while sovereign power is normally single and indivisible, a distinction may be drawn between a potential' and 'subjective' component:

> In the fourth place it is to be observed that while sovereignty is a unity, in itself indivisible, consisting of the parts which we have enumerated above, and including the highest degree of authority, which is 'not accountable to any one'; nevertheless a division is sometimes made into parts designated as 'potential' (*partes potentiales*) and 'subjective' (*partes subjectivas*). (*LWP* 1: 3.17.1)

One of the circumstances in which this can happen is when a people do not alienate all their sovereign power to the king and retain some of it themselves. This may also come about through a "perpetual command" or "additional stipulation" of constraint imposed upon the governors. If it is in the form of a command, it clearly sets up a relationship in which the people are superior. But if an additional stipulation is added constraining those who possess the sovereign power, this does not normally set up a relationship of superiority but rather is a "recognition of parity" between the two. In either case the exercise of sovereign power is divided.[1]

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own right over peoples, and this right include with the right of transfer the sovereign power.

[1] "So, again, it may happen that a people, when choosing a king, may reserve to itself certain powers but may confer the others on the king absolutely. This does not take

Grotius, was quite aware that these arguments for the divided possession and exercise of sovereignty had its opponents, their objections chiefly being that such a concept would lead to confusion, disorder and unrest within the state. Grotius' response was simply to restate that there was no form of government which did not possess its particular disadvantages. And the 'legal provisions' which brought about a sharing of power were valid or invalid not on account of relative advantage or disadvantage, but on the basis of whether they were in accord with the will of those who established the state. It is the form of the contract struck among the people or between the people and the ruler that determines this issue. That Grotius' argument fell on dead ears can be easily deduced form the fact that Thomas Hobbes and Samuel Pufendorf were to sharply criticize and even ridicule Grotius' justification of divided sovereignty.

Grotius then turns his attentions to clarify the misconceptions that remain regarding what does and does not constitutes divided possession and exercise of sovereign power. It is not a case of divided sovereignty, Grotius clarifies, if the king decides that some act of his does not have the force of law unless approved by the people, since in this instance the limitation is imposed by the ruler in the exercise of sovereign power upon himself:

> They are greatly mistaken, however, who think that a division of sovereignty occurs when kings desire that certain acts of theirs do not have the force of law unless these are approved by a senate or some other assembly. For acts which are annulled in this way must be understood as annulled by the exercise of sovereignty on the part of the king himself, who has taken this way to protect himself in order that a measure granted under

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place, however, as we have already shown, when the king obligates himself by certain promises; it must be understood as taking place only in cases where either the division of power, of which we have spoken, is explicitly provided for, or the people, yet free, enjoins upon the future king something in the nature of a perpetual command, or an additional stipulation is made from which it is understood that the king can be constrained or punished. A command is, in fact, the act of one having superior authority, at least in respect to that which is commanded. To constrain is not, at any rate not in all cases, the function of a superior.... From the power of constraint, therefore, flows at least a recognition of parity, and in consequence a division of the supreme power" (*LWP* I.3.17.1). For extensive historical illustrations of what Grotius calls "true examples of mixed sovereignty," see *LWP* 1: 3.20.

> false representations might not be considered a true act of his will. (*LWP* 1: 3.18.1)

Alternatively, the exercise of sovereign power by the ruler upon himself can just as easily be annulled by "a later act of will" (*LWP* 1: 3.18.2). Moreover, Grotius contends that some writers who have in view the "outward form" of sovereign power, i.e., its expression in civil acts or in the day-to-day functionings of public officials, are liable to come to the wrong conclusion as to whether sovereignty is divided in a state. Rather, it is the "body of law which is the expression of sovereignty," and it is these that determine the nature of sovereign power in different states – that is, whether its possession is absolute or divided (*LWP* 1: 3.19).

Further, sovereign power does not cease to be such even when a promise has been made to either subjects or god by those who possess this power. However this is true only when a promise does not refer to laws (natural, divine, and of nations) to which the king is always bound, but to that sphere which falls outside these laws. On the contrary, when a promise is made in an area covered by these laws, it does limit the sovereign power, both its exercise and the power itself: the exercise of sovereign power is limited because a promise confers a legal right on to the promisee, while the sovereign power itself is limited by the lack of power created by the very promise. According to Grotius, this limitation is not effected by a superior power but by law itself, since the sovereign has no power that is contrary to the law of nature.

In the situation where possession of sovereign power is conditional upon fulfilling the promise, sovereign power does not "cease to be supreme." Rather, only "the mode of possessing it [i.e., the sovereign power] will be restricted by the condition, and it will resemble the sovereign power restricted in time" (*LWP* 1: 3.16.4). Here and throughout the discussion, Grotius maintains the distinction between sovereign power and its possession and exercise. Sovereign power understood in the abstract is always supreme (though we must always understand this statement as being qualified by the paramountcy of the law of nature), but the manner of its possession, on the other hand, differs in different political arrangements and as such the limits that are discerned in sovereign power are simply limitations in the form of possession and exercise

Having laid down these principles with regard to sovereign power, its origins, possible locations, and various forms of possessing and exercising it, Grotius discusses some issues that often arise in this area of political theory. First, does a state which is in an unequal alliance still possess sovereignty? By an unequal alliance Grotius does not mean an alliance between unequal states, but rather an alliance which "by the very character of the treaty, gives to one of the contracting parties a permanent advantage over

the other" (*LWP* 1: 3.21). For example a state may be "bound to preserve the sovereignty and majesty of the other"; or, a state may possess "certain rights ... of protection, defence, and patronage" (*LWP* 1: 3.21). Second, do those nations which pay various forms of tribute to other states still retain their sovereignty (*LWP* 1: 3.22)? Third, can sovereignty be possessed by those who are bound by feudal law (*LWP* 1: 3.23)? Grotius answers all these questions in the affirmative, using historical examples to show that even under these conditions a measure of sovereign power is retained. This varied and flexible understanding of 'sovereignty' is defended by the distinction he constantly has in mind between sovereign power and its possession, between the right of sovereignty and the exercise of the right. Interestingly, Grotius' arguments constantly draw analogies, between sovereign power and its varied possession, on the one hand, and, on the other hand, the various forms and relationships that had customarily emerged with the right and use of property in Europe.

With regard to the possible – theoretical and conventional – forms of political arrangements Grotius is not prepared to reduce them to any one preferred type, nor is he prepared to simply give us the conventional four forms, as done earlier by Aristotle and later by Montesquieu. The plurality of political arrangements that he sees in Europe cannot in his reasoning rightly be so reduced. At best, it is possible to set up a duality: absolute possession of sovereign power and non-absolute possession of sovereign power, be it monarchical or republican. But the complex and varied forms of political arrangements that are possible within the varied limited monarchies and republics is left unspecified. The reason for leaving this unspecified is that the form of a political arrangement is to be decided not by a theoretician but by the people who institute themselves into a state, and any number of and types of political arrangements are justified as long as the people are exercising their common rights in this exercise of constitutionalism. This is what Grotius repeatedly specifies and stressees : the fundamental question always is whether a political arrangement between rulers and ruled was constituted through the exercise of right possessed in common, that is, the right to consent or withhold consent to a particular distribution of power. It follows that any distribution of political power is just, provided it is within the framework of the law of nature, and as long as the people have exercised free choice. Further it is not to be assumed that such an exercise of constitutionalism is simply a matter of a formal contract that is drawn up at the moment of instituting the state. It may happen, just as in the case of the origin of private property, that long-standing customary political arrangements are to be taken as being endorsed by the people simply by virtue of their deeply customary character. For Grotius, long-standing custom accords not simply with the explicit act of

consent by the people toward a particular political arrangement, but also with the dictates of right reason. And this consent of a people to any political arrangement, in the majority of cases, is to be discerned via its customary and conventional character.

4. The Law of Non-Resistance

From within this multiple, plural and varied understanding of the distribution of sovereign power, Grotius asks whether it is ever legitimate to revolt, that is, can individuals or subordinates wage war against sovereign power. For Grotius this much is by now settled and beyond dispute: that wars are permitted, under certain conditions, when they are waged (a) by private persons against private persons, (b) by those who possess sovereign power against those who also possess sovereign power; (c) by private persons against those who possess sovereign power but not over them; (d) against subordinates by those who possess the authority of sovereign power. However, with regard to revolt, he poses the question as follows: "Our question, then, is to determine what action is permissible against the sovereign power, or against subordinates acting under the authority of the sovereign power" (*LWP* 1: 4.1.2).

Grotius accepts as an established first principle that those who possess sovereign power should not be obeyed if an order issued by them is contrary to the law of nature (and we may note in passing that for Pufendorf too this was a self-evident premise): "Among all good men one principle at any rate is established beyond controversy, that if the authorities issue any order that is contrary to the law of nature or to the Commandments of God, the order should not be carried out" (*LWP* 1: 4.1.3). However, this does not give subjects a right to resist by recourse to arms, but rather they must endure whatever punishment is meted out to them by the sovereign power.

Moreover, Grotius claims that, if the right of resistance were allowed, it would subvert the very grounds for the existence of the state, and thus the possibility of sociable relations among people and of the moral good sociality alone guarantees. In Grotius' view the state exists to secure "public tranquillity" and, accordingly, it has a prior right over the people and their property. Thus it can limit, though not eliminate, the right of resistance. In Grotius' words, "as a general rule rebellion is not permitted by the law of nature":[1]

> By nature all men have the right of resisting in order to ward off injury, as we have said above. But as civil society was instituted in order to maintain

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[1] Grotius also shows that this right to revolt is not permitted by Hebraic law (*LWP* 1: 4.3); nor by the law of the Gospel (*LWP* 1: 4.4); nor by the practice of the early Christians (*LWP* 1: 4.5).

> public tranquillity, the state forthwith acquires over us and our possessions a greater right, to the extent necessary to accomplish this end. The state, therefore, in the interest of public peace and order, can limit that common right of resistance. That such was the purpose of the state we cannot doubt, since it could not in any other way achieve its end. If, in fact, the right of resistance should remain without restraint, there will no longer be a state, but only a non-social horde. (*LWP* 1: 4.2.1)

This is one of the few passages where Grotius links the setting up of the state to the preservation of society. Here it appears that he is taking the position that the existence of the state is a necessary condition for society to exist at all – man's impelling desire for society not being a sufficient condition. It is true that, through most of his work, Grotius gives the impression that the state, rather than being one of the necessary condition for society, is an artifact that is added on to an existing society brought about by man's sociable nature. However, the section in which the sovereign's power of punishment to enforce rights and duties of sociality is justified provides more ammunition for the view that, for Grotius, the state is necessary for society to exist. This further makes clear the reasons why punishment performs such a crucial function in Grotius' work.

Grotius argues that the existence of so many laws which carry with it the force of punishment is indicative of the absence of a right to revolt: "Hence it comes about that everywhere the majesty, that is, the prestige, whether of the state or of him who exercises the sovereign power, is safeguarded by so many laws, so many penalties; this cannot be maintained if licence to offer resistance be free to all" (*LWP* 1: 4.2.3). Grotius is not just limiting the right of resistance of individuals but equally of public officials subordinate to sovereign power.[1] This is the case since whatever authority is possessed by the subordinate officials is vested in them by those who possess sovereign power. And if these officials were to act contrary to the orders given by the sovereign power, then they would immediately be divested of any authority. As a result, their actions would be no

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[1] "In our time there are to be met with men who possess learning, it is true, but being too much under the influence of time and place have persuaded first themselves (for so I believe), then others, that what has been said is applicable only to private individuals and not also to subordinate officials. They think that subordinate officials have the right to offer resistance to wrongdoing on the part of him who holds the supreme power; further, that these do wrong if under such conditions they do not offer resistance" (*LWP* 1: 4.6.1).

different than those of private persons. Therefore, there is no qualitative difference between the acts of insubordination by public officials and the acts of resistance by private individuals (*LWP* 1: 4.6.1).

However, having said all this against the right of resistance, and having laid down a 'law' of non-resistance rather sharply, Grotius begins to muddy the issue before giving a set of clear and unequivocal arguments in favour of the right of resistance, and thus making what on the surface may seem a full theoretical turnabout on this issue. He begins this manoeuvre by considering whether the law of non-resistance should apply in extreme situations. This concern points to those laws that order certain acts which threaten the very lives of citizens. Grotius argues that, in such instances, one has to be attentive to three considerations: (a) it must not be assumed that the rulers would intend to pass laws with such serious consequences for the subjects if they (i.e., the rulers) knew that the effect would be so drastic; (b) rulers make laws knowing that, outside of conditions of extreme necessity, a people would not have in the first place entered into a contract that could in all possibility jeopardize their very lives; (c) rulers normally formulate laws keeping the limitations of men in mind, so that excessive demands are not made or should not be made of them. These three considerations mitigate against the possibility of drastic laws that endanger the subjects' lives ever being promulgated by the rulers:

> I do not deny that even according to human law certain acts of a moral nature can be ordered which expose one to a sure danger of death; an example is the order not to leave one's post. We are not, however, rashly to assume that such was the purpose of him who laid down the law; and it is apparent that men would not have received so drastic a law applying to themselves and others except as constrained by extreme necessity. For laws are formulated by men and ought to be formulated with an appreciation of human frailty. (*LWP* 1: 4.7.2)

Grotius situates the law of non-resistance within the same framework as that of alienation of political power by the people to the sovereign. A people gives up its right or part of its share of political power to their governors in order to secure public order and tranquillity. This in turn provides security for each and allows for the various goods of life – primarily moral and material. The law of non-resistance flows out of similar conditions: an unlimited right to resistance is likely to lead to the dissolution of society – a condition where preservation of self and moral good would become impossible (which is at least one of the major reason why a people first enters into civil society).

All this notwithstanding, Grotius goes on to say that it is not viable to propose that men prefer death to resistance. Therefore, he argues, one must address the fact that

resistance is inevitable when a person's life itself is threatened. Having recognized this inevitability, Grotius insists that this resistance be undertaken keeping in clear view the destructive effects it could have on society as a whole. If the damage is not too great, then resistance in the face of imminent death is justified. However, in the interest of the larger good, resistance must not be undertaken if the whole society is endangered as a result of it, particularly since society is the bulwark that secures an individual's physical life as well as the moral life:

> Now this law which we are discussing – the law of non-resistance – seems to draw its validity from the will of those who associate themselves together in the first place to form a civil society; from the same source, furthermore, derives the right which passes into the hands of those who govern. If these men could be asked whether they purposed to impose upon all persons the obligation to prefer death rather than under any circumstances to take up arms in order to ward off the violence of those having superior authority, I do not know whether they would answer in the affirmative, unless, perhaps, with this qualification, in case resistance could not be made without a very great disturbance in the state, and without the destruction of a great many innocent people. I do not doubt that to human law also there can be applied what love under such circumstances would commend. (*LWP* 1: 4.7.2)

Grotius contends that it is wrong to assume that suffering death rather than seeking violent redress is a feature of divine rather than human law. It is civil society instituted by human will that is the source of the law of non-resistance; and it is this law of non-resistance that in turn safeguards civil society. As the state is instituted to preserve society the law of non-resistance flows directly from this act of institution.[1]

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[1] "Some one may say that this strict obligation, to suffer death rather than at any time to ward off any kind of wrongdoing on the part of those possessing superior authority, has its origin not in human but in divine law. It must be noted, however, that in the first instance men joined themselves together to form a civil society not by command of god, but by their own free will, being influenced by their experience of the weakness of isolated households against attack. From this origin the civil power is derived, and so Peter calls this an ordinance of man. Elsewhere, however, it is also called a divine ordinance, because God approved an institution which was beneficial to mankind. God is to be thought of as approving a human law, however, only as human and imposed after the manner of men" (*LWP* 1: 4.7.3).

5. The Right of Revolution

On the basis of the observations made thus far, it may seem that for Grotius there is only a limited right of resistance, since the consequences of this right for society are far too obviously devastating. In order to preserve the stability of society, Grotius seems to endorse unjust rule. However, and rather paradoxically, while, for Grotius, the preservation of society a primary end, it is not the only end and, indeed, in seven sets of circumstances, it is not even the overriding end.

Grotius is caught quite clearly in a dilemma – a dilemma that has a theoretical as well as factual basis. Theoretically the conundrum is created by his Stoic view of the individual and society, a view in which individual self-interest has a place but is also subordinate to the common good. The common good, while possessing value independent of individual self-interest, is nevertheless also a necessary condition for self-preservation. Within such a worldview, justice and virtue, the individual and the common good are intrinsically and undifferentiatedly tied to one other. In such a context, it makes no sense to speak of justice somehow standing outside of virtue or the common good. Thus, the right of resistance could not be granted without possibly forsaking the good of society. This justifies the law of non-resistance. On the other hand, Grotius locates justice properly so called in a set of individual and societal rights. Accordingly, if the right of self-preservation is one of the necessary reasons and origins of the state, then it logically follows that a state could not do away with this right but only secure it. The law of non-resistance, if upheld, violates one of the very reasons (grounds) for the existence of the state.

The politics of Europe through the sixteenth and early part of seventeenth century were such that conceding a natural right of resistance would have been seen as further contributing to the continuation of mutual slaughter. Grotius' project for a Europe devastated by the wars of religion, and desperately in need of peace and order which only the rule of law would secure, could not allow for an open-ended right of resistance. And yet, within the framework of law Grotius has constructed, it is impossible not to grant the right of resistance for it flows directly from the law of nature, and this law of nature binds society and individuals, as well as, for the most part, the sovereign power itself, imposing on all parties the rights and duties of sociality. That Grotius is aware of the dilemma can be gathered by passages like the following:

> I readily understand that in proportion as that which is preserved is of greater importance, the equity of admitting an exception to the letter of a law is increased. But on the other hand I should hardly dare indiscriminately to condemn either individuals, or a minority which at length availed itself of the

> last resource of necessity in such a way as meanwhile not to abandon consideration of the common good. (*LWP* 1: 4.7.4)

In the end, Grotius lays down an extensive list of occasions when sovereign power could justly be resisted. First, if the rulers, once elected by the people, "transgress against the laws of the state, [they] can not only be resisted by force but in case of necessity be punished with death" (*LWP* 1: 4.8). Secondly, the people have a right to make war against the "king or any other person" if he "has renounced his governmental authority, or manifestly has abandoned it," and, then, "proceedings of every kind are permissible against him as against a private person" (*LWP* 1: 4.9).

Third, when a king who has either been elected, or who is the legal successor of such a king, attempts to alienate or transfer the state to some other sovereign, such a move is legally null and void for such a king does not in the first place possess the right to alienate his power – this argument rests on Grotius' distinction between sovereign power and its possession and exercise. In this case, if the ruler nonetheless proceeds to this transfer, then the people have a right to resist him by force:

> If, nevertheless, a king actually does undertake to alienate his kingdom, or to place it in subjection, I have no doubt that in this case he can be resisted. For the sovereign power, as we have said, is one thing, the manner of holding it is another; and a people can oppose a change in the manner of holding the sovereign power, for the reason that this is not comprised in the sovereign power itself. (*LWP* 1: 4.10)

Fourth, a people may wage war against a king who has become an enemy of the people: "This I grant, for the will to govern and the will to destroy cannot coexist in the same person. The king, then, who acknowledges that he is an enemy of the whole people, by that very fact renounces his kingdom" (*LWP* 1: 4.11).

Fifth, the people have a right to resist if the king commits a felony or transgresses a clause in the original contract. In these cases, the king forfeits the sovereign power and the "subjects are released from all duty of obedience to him, in such a case also the king reverts to the position of a private person" (*LWP* 1: 4.12).

Sixth, in a state where the exercise of sovereign power is divided between the ruler and the people, the people may resist if the king attempts to acquire that part of power which he does not have:

> Sixthly, in case the sovereign power is held in part by the king, in part by the people or senate, force can lawfully be used against the king if he attempts to usurp that part of the sovereign power which does not belong to him, for the reason that this authority does not extend so far.

> In my opinion this principle holds, even though it has already been said that the power to make war should be reserved to the king. For this, it must be understood, refers to external war. For the rest, whoever possess a part of the sovereign power must possess also the right to defend his part: in case such a defence is resorted to, the king may even lose his part of the sovereign power by right of war. (*LWP* 1: 4.13)

Seventh, the people have a right to wage war against their ruler (even though they have no share in the exercise of sovereign power) if they had retained this right at the time of alienating their power to the ruler. For those who possess the right to alienate their power also possess the right to retain for themselves any part of it:

> Seventhly, if in the conferring of authority it has been stated that in a particular case the king can be resisted, even though such an agreement does not involve the retention of a part of the authority, some natural freedom of action, at any rate, has been reserved and exempted from the exercise of royal power. For he who alienates his own right can by agreement limit the right transferred. (*LWP* 1: 4.14)

The law of non-resistance and the right of resistance flow from Grotius' first premise: the overriding primacy of the preservation of society. Every effort must be made to live with or correct non-violently injustice by the rulers. This approach stems from Grotius' conviction that civil wars were the single biggest cause for the destruction of society and as such the greatest danger to human survival and, more importantly, the good life. In this respect, both Hobbes and Pufendorf were in complete agreement with Grotius. However, as we saw above, Grotius lists seven instances in which armed revolutions against the possessor of sovereign power is permitted. Though this may seem to amount to a contradiction, in fact it is no such thing. In the law of non-resistance Grotius is not eliminating the natural right to resist but merely limiting it. The right of revolution too flows from the initial and overriding premise of the preservation of society – in all the seven instances it is not simply individuals who are threatened by the wrong of their ruler but the existence of society itself is threatened. Accordingly, the seven circumstances in which the proper exercise of rights and duties justify revolution are clearly laid down by Grotius. It is precisely this complex approach that makes Grotius' *LWP* the most revolutionary treatise in political theory to be written in the seventeenth century.

To the question of whether the people ought to obey a ruler who had usurped power through illegitimate means, Grotius' answer is cautious. When the acts of the ruler do not have the force of right, they still ought to be obeyed if the alternative, i.e., not

obeying them, risks bringing harm to society.[1] However, according to Grotius, the people ought to resist those laws the disobedience of which would not lead to the dissolution of society or put society in great danger. It is within this context that Grotius asks the question: when do people have a right to resist a usurper? In the first place, the people may resist the usurper if he has acquired this power in an unjust war and in the absence of any agreement or promise to render obedience. In fact, when the sovereign power is exercised only by the threat of the use of force, the people still possess the right to wage (continue) war and kill the usurper.[2]

In the second place, the people can resist an usurper if, prior to the usurpation of power, a law is in force which authorizes the people to resist the possessor of sovereign power under certain conditions.[3] And finally, the people may lawfully resist the usurper if authorized by the legitimate possessor of sovereign power: "It will likewise be

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[1] "We have spoken of him who possesses, or has possessed, the right of governing. It remains to speak of the usurper of power, not after he has acquired a right through long possession or contract, but while the basis of possession remains unlawful. Now while such a usurper is in possession, the acts of government which he performs may have a binding force, arising not from a right possessed by him, for no such rights exists, but from the fact that the one to whom the sovereignty actually belongs, whether people, or king, or senate, would prefer that measures promulgated by him should meanwhile have the force of law, in order to avoid the utter confusion which would result from the subversion of laws and suppression of the courts" (*LWP* 1: 4.15.1).

[2] "In the first place, if the usurper has seized the governmental power by means of a war that is unlawful and not in accordance with the law of nations, and no agreement has been entered into afterwards, and no promise has been given to him, but possession is maintained by force alone, it would seem that the right to wage war against him still remains, and whatever is permissible against any enemy is permissible against him. Just as an enemy, so also the usurper, under such conditions, can lawfully be put to death by any one, even by an individual" (*LWP* 1: 4.16).

[3] "In the case that prior to the usurpation there was in existence a public law which conferred upon any man the right to kill a person who dared to do this or that which falls within its purview; who, for example, though a private individual, should have surrounded himself with a bodyguard and should have seized the citadel; who had put to death a citizen uncondemned, or without lawful judgment; or who had chosen public officials without regular election" (*LWP* 1: 4.17).

permissible to put a usurper to death in case the deed is explicitly authorized by the true possessor of sovereign power, whether king, or senate, or people" (*LWP* 1: 4.18).

These, Grotius claims, are the only cases in which the people can legitimately resist the usurper of sovereign power. Even in these instances, resistance is to be undertaken, as said above, only if it does not endanger society. An unlimited right to resist would threaten the society with far greater dangers than merely obeying the law of an usurper:

> Outside of the cases which have been considered I cannot concede that it is permissible for a private citizen either to put down by force, or to kill, a usurper of sovereign power. For it may happen that he who holds the sovereign power by right would prefer that the usurper should be left in possession rather than that the way should be opened for dangerous and bloody conflicts, such as generally take place when those who have a strong following among the people, or friends outside the country, treated with violence or put to death. At any rate, it is not certain that the king or the people would wish that matters should be brought to such extremities, and without their known approval the use of violence cannot be lawful. (*LWP* 1: 4.19)

In the event of a dispute with regard to who possesses the right of sovereign power, Grotius states that private individuals must not take any sides but should render obedience to those who are effectively in control of that power: "Above all, in case of controversy the private individual ought not to take it upon himself to pass judgment, but should accept the fact of possession" (*LWP* 1: 4.20).

It is Grotius' concern with the preservation of society which dictates that, even in this limit case, the usurper's laws are binding not because he has any right on his side but because the rightful possessor of sovereign power (whether people, king or senate) would prefer this to the chaos which would ensue from the subversion of the laws. Armed resistance to an usurper of sovereign power is qualified by the same overarching consideration: the degree of harm it would do to society. It is the potential harm to society that is here again the determining factor.

6. The Alienation of Sovereign Power and Its Limitations

Can a people or king alienate sovereign power? According to Grotius, sovereignty can be alienated by those who are in possession of it, be it a king (if he possesses it by inheritance), or by the people. Though the people can do so only with the consent of the ruler who "has a certain right as possessor of a kind of life interest which ought not to be

taken away against his will" (*LWP* 2: 6.3). Moreover, sovereignty over a part of the people cannot be taken away without the consent of the people concerned:

> In the alienation of a part of a people there is the additional requirement that the part whose alienation is under consideration also give consent. For those who unite to form a state form a kind of perpetual and lasting association by reason of the character of those parts which are called integral. From this it follows that these parts are not so dependent on their body as are the parts of a natural body, which cannot live without the life of the body, and, therefore, may rightly be cut off for the advantage of the body. This body of which we are treating is in fact of a different kind, since it was formed from voluntary compact. For this reason, again, the right of the whole over its parts must be measured from the original intent, which we ought not to believe was such that the body should have the right to cut off parts from itself and give them into the power of another. (*LWP* 2: 6.4)

Sovereignty can also be alienated over an uninhabited territory by the people or the king with the consent of the people. In this particular case, the king needs, in this case, the consent of the people because a "people possesses freedom of choice, so also it possesses the right of refusal;... the whole territory and its parts are the undivided common property of the people, and therefore subject to the will of the people" (*LWP* 2: 6.3). And even in the case of necessity or public advantage, a king does not possess the right to alienate – and this includes infeudation[1] – a part of his state without the peoples' consent (*LWP* 2: 6.3).

Moreover, a section of the people cannot, except in the case of extreme necessity, separate itself from sovereignty. The exception made in the case of extreme necessity is logical, since the right to self-preservation precedes the formation of the state: "For, as I have said above, in the case of all rules of human devising, absolute necessity seems to make an exception, and this reduces the matter to the strict law of nature" (*LWP* 2: 6.5), and the argument continues:

> Hence it can be clearly enough understood why, in this respect, the right which the part has to protect itself is greater than the right of the body over

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[1] See, LWP 2: 6.9 where is also stated that a part of the state cannot be given in pawn without the consent of the people for the reason given above, as well as for the additional reason that "the king is under obligation to the people to exercise his sovereign authority in person, and the whole people is likewise bound to its parts to preserve in entirety this exercise of that authority for the sake of which they united in civil society."

> the part. The part, in fact, employs the right which it had before entering the association, but not so the body. Furthermore, no one should say that sovereignty exists in a body as in a subject, and so can be alienated by it, just as ownership can. Just as the soul, in fact, exists in bodies that are suited to it, so sovereignty resides in the corporate body as in a subject which is entirely filled, and not divisible into several bodies. But necessity, which restores a thing to the law of nature, cannot exert its force here, because in the law of nature use indeed is included, as eating, and as keeping, which are natural acts, but not the right of alienating, because that was introduced by act of man, and so by that fact the extent of its validity is measured. (*LWP* 2: 6.6)

The king's rights are limited even with regard to alienating those powers (e.g., dispensing governmental offices) that "do not diminish the integrity of the state as a whole, or of its sovereignty."[1] He can only do so with the consent of the people, "if we are to remain within the bounds of the law of nature; because a temporary right, such as that possessed by elected kings, or those succeeding to sovereignty by the law of nature, can produce no effects except those which are equally temporary." However, express and tacit consent (assumed in the absence of opposition), has standardly given this power to the kings through convention.

Also the king does not have the right to alienate any part of the public domain (not even for public advantage), which was established in the first place to provide the state with the means of support. The right of kings over the public domain is that of usufruct: they may collect the income that accrues from the public domain, but do not have ownership of it. Sovereign power and ownership are "extinguished by abandonment, for the reason that, when the desire/will ceases, ownership does not continue" (*LWP* 2: 6.11). It also ceases when the possessor dies leaving no will or blood relatives. Similar rules apply in the case of a family. This also applies if a people ceases to exist.

7. The Civic Death of a State/People

Grotius begins the discussion of the civic death of a state or a people by describing the character of the body called state. States are artificial bodies constituted by several members that are classed under one name for they have an 'essential character' or spirit which expresses iteself in the founding of a the civil power and which binds together the whole state. Here, as in his characterization of civil power, which Grotius defined as the

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[1] The quotations in this paragraph are taken from *LWP*. 2: 6.10.

'moral faculty of governing,' the state is not reduced either to the people nor to the rulers but has an autonomy distinct from both. While Quentin Skinner sees the first appearance of such an abstract and autonomous concept of a state in Hobbes,[1] quite clearly Grotius too is working with precisely such a concept, which, admittedly, Hobbes was to articulate more explicitly.

Grotius goes on to say that: "These artificial bodies are clearly similar to a natural body; and a natural body, though its particles little by little are changed, does not cease to be the same if the form remains the same" (*LWP* 2: 9.3.1). Therefore, while the population is continually changing, in essence the state remains the same. Drawing on Plutarch, Grotius argues that "A people survives so long as that common union, which makes a people and binds it together with mutual bonds, preserves its unity" (*LWP* 2: 9.3.2). However, while a change in individual members over long periods of time does not constitute a cessation of the state, the people may indeed, in some circumstances, cease to exist. This can happen "either by the destruction of the body, or by the destruction of that form or spirit," that is, its essential character (*LWP* 2: 9.3.3). "A body perishes if the parts without which the body cannot exist have at the same time been destroyed, or if the corporate bond of union has been destroyed" (*LWP* 2: 9.4). A people/state perishes if its physical (collective) body is torn apart or if its political cohesiveness falls apart.

The first and most obvious instance of a people ceasing to exist is when the people are all destroyed. A 'people' is also extinguished when they withdraw from the association by their own consent or due to disease and civil war. Also external aggression may so disperse a population as to make it impossible to form a political association (*LWP* 2: 9.5).

Second, a people ceases to exist when their "form of organization is lost."[2] This happens when "its entire or full enjoyment of common rights has been taken away. In such cases the individual citizens may also become subject to personal slavery." Here, Grotius equates the non-possession of rights with civic death. In a republican spirit he continues: "Citizens, again, may be deprived of the right of government, though personal liberty is left to them."[3]

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[1] Quentin Skinner, "The State," 90-131.

[2] Unless otherwise indicated, the quotations in this passage are taken from *LWP* 2: 9.6.

[3] Similarly a people is destroyed when its state is reduced to a province and when

But the common rights of individuals are not destroyed if there is a change in the form of government, whether the governor is the king, aristocracy, or the citizens. For even if the sovereign power is situated absolutely in an elected king as head of state, it ultimately issues from and reverts back to the people. The reason for this is that the elected king is but a part and not separated from the body within which sovereign power is located:

> Furthermore, it makes no difference in what way a people is governed, whether by royal power, or by an aristocracy, or by popular government. The Roman people, in fact is the same under kings, consuls, and emperors. Nay more, though the king rules with absolute power, the people will be the same as before, when it was its own master, provided that the king governs it as the head of that people and not of another. For the sovereign power, which resides in the king as the head, remains in the people as the whole body, of which the head is a part; and so when the king, if elective, has died, or the family of the king has become extinct, the sovereign power reverts to the people. (*LWP* 2: 9.8.1)

This argument is made against Aristotle who had claimed that the state does not remain the same when the form of government is changed. For Aristotle the form is not something that is external to the state but rather constitutive of it. For Grotius, on the other hand, unlike Aristotle, the state is an "artificial thing" and there are different forms of such an artificial body. One form "is the association of law and government, another the relation to each other of those parts which rule and are ruled" (*LWP* 2: 9.8.2). It is important to keep these distinct. Grotius then recognizes and strongly endorses the several types of relationships that are possible within each of these archetypical forms. Even in the extreme case of a previously free citizens/people making themselves subject to a king, the people do note lose ownership over public property, for it is the same people ruled by a part of itself rather than by the whole body. Accordingly: "it [the people] even retains its sovereignty over itself, although this must now be exercised not by the body, but by the head"(*LWP* 2: 9.8.3).

When two 'peoples' join with mutual consent, neither loses any part of its rights, but instead they are "shared in common" (*LWP* 2: 9.9). However, when a people is divided either through mutual consent or war, then "several sovereignties exist in the place of one, with their respective rights over the individual parts"(*LWP* 2: 9.9). Moreover, in what may sound as an early defence of European colonisation, Grotius reasons that the

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the people comes under the control of another power.

same argument applies when some of the people, through mutual consent, are sent out to set up colonies. This results in distinct and separate sovereignties, for the people in the colonies, are in possession of their own rights: "The same reasoning must apply also in the separation of a people which occurs by mutual consent in sending out colonies. For thus also a new people arises, possessed of its own rights. The colonists, in fact, are not sent out as slaves, but possessed of equal rights" (*LWP* 2: 9.10).[1]

In sum a state is destroyed or ceases to exist by the destruction of the body, that is, individual members constituting a people. This can come about as a result of their own consent, disease, civil war or external war. Second, a state ceases to exist when its "essential character" and its forms of organization dissolve or are destroyed. This includes both the relationship between law and government and the political arrangements that fix the relationship between the rulers and ruled.

However, change merely in the form of government, either from a monarchy to a republic or within the possible types of republics does not constitute a the cessation of state. This kind of change is simply a change amongst several ways of organizing the politics of a state, and involves redrawing the relationship between the laws and government, as well as the relationships between the rulers and the ruled. As several and varied plurality of forms are possible within both, a change cannot be seen as the dissolution of a state for it continues to retain its "essential character" in diverse conditions. Moreover, when two 'peoples' join to form a new association, this does not constitute a dissolution of the two states but the formation of a new association which allows the peoples to continue enjoying and to share their rights. Conversely, when a people forms separate states through mutual consent there is no cessation of state but the formation of several sovereignties/states each possessing its essential characteristics, that is, their 'constitutive forms.'

Conclusion

In this chapter of this study, the first of the sources of our legal claims identifeid by Grotius, i.e., the right of self-defence, led us to the discussion of a number of crucial questions. First, we examined whether violent action is ever justified in the defence of self and society. Second, we considered the character of civil power, the definition of sovereign power, its varied locations and the multiple ways in which it can be possessed

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[1] This strong defence of the distinct sovereign status of the colonies is mitigated by the clause that these sovereign powers must show due respect for the parent state, and also by the conditions laid out earlier in *LWP* 1. 3.21.

and exercised. Thirdly, we scrutinized the law of non-resistance and the right of resistance, as well as, the limitations on the alienation of sovereignty; and lastly, we explored Grotius' definition of the state and his analysis of the conditions under which it either ceases to exist or multiplies into several states.

This is a comprehensive treatment by Grotius of what is understood today as the subject matter of political theory. Later Hobbes and Pufendorf were to build on some of these ideas, while condemning some of them as utterly misguided, and in the end construct theories that denied validity to the rich set of political institutions and practices which existed in Europe and which were so resoundingly endorsed by Grotius.

In the next chapter of this study, I will conclude my discussion of Grotius by taking up the two other sources of legal claims: (1) defence of property, which involves a discussion of the origin of the right of property, its transfer and just limitations; and (2) punishment, the grounds and limits of which are connected to the role it performs in reinforcing the dictate of right reason, that is, sociality.

Chapter 3

Hugo Grotius, Part III

Introduction

In this last chapter on Hugo Grotius, I will be retrieving the arguments the Dutch scholar develops as he tackles two additional sources of legal claims: the defence of property and punishment. In developing these arguments, Grotius keeps the overall purpose of his undertaking clearly in focus: to provide rules so that men-in-society may conduct their (external) actions, in their complex and varied dealings with each other, in a manner that maximally secures society and the goods (primarily moral and material) society makes possible. These rules of sociality are natural because they accord with human nature/right reason/right/habit/custom (keeping in mind that these different categories play different roles in establishing the rules of sociality).

Grotius' treatment of property is comprehensive and provides the foundations not only for political philosophers such as Samuel Pufendorf and John Locke, who were to borrow much from him, but also for the influential moral/economic theories developed by Adam Smith some hundred and fifty years later. Grotius' treatment of punishment is equally if not more thoroughgoing, and has led some late nineteenth century scholars to call it the heart of *LWP*.

It is not within the scope of this thesis to treat all of Grotius' arguments about property or punishment. Rather, with regard to property, I have focused on those arguments that deal with: (a) the origin of the right in ownership, and (b) limits to individual ownership. With regard to punishment, I have focused on three questions: (a) the original location of the right of punishment; (b) the purposes of punishment; and (c) and the justifiability of punishment for religious crimes. The primary reason for concentrating upon these questions is that they were the most important issues on the agenda of all seventeenth century European philosophers who regarded the controversies surrounding these issues, as well as the ones covered in the last chapter, as the root cause of civil/internal and external wars – the greatest curse of human society.

1. Property and Law of Nature

Is a man permitted to kill in defence of property? The answer in Grotius is quite clear: to defend one's property is in accord with the law of nature, even if it entails killing those who try to take it away illegally:[1]

> If we have in view expletive justice only, I shall not deny that in order to preserve property a robber can even be killed, in case of necessity. For the disparity between property and life is offset by the favourable position of the innocent party and the odious role of the robber, as we have said above. From this it follows, that if we have in view this right only, a thief fleeing with stolen property can be felled with a missile, if the property cannot otherwise be recovered. (*LWP* 2: 1.11)

This principle holds only outside the ambit of divine and human law. Moreover, regard for others too puts limits on this principle. Though he does state that cocern for

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[1] For Grotius, leaving aside divine law and human law, "regard for others" does not forbit this type of aciton. In Hebraic as well as Roman law the right to kill in case of attempted theft of property exists only when the life of the person defending the property is endangered (*LWP* 2: 1.12).

However, Grotius also holds that the law of the Gospel, whose standards are generally speaking more exacting than those of the mere law of nature, imposes a higher duty:

Wherefore, if a thing belonging to us can be saved in such a way that there seems to be no danger of causing death, it may rightly be defended; if not, then the thing should be given up, unless perchance it is of such a sort that our life and the life of our family is dependent on it and it cannot be recovered by process of law, since the thief is unknown, and also that there is some prospect that recovery will be made without slaughter. (*LWP* 2: 1.13.1)

Grotius contends that this was also true of the early Christians, even though he acknowledges that in his times almost all jurist and theologians held the view that it was permissible to kill in defence of property. Commenting further on the state of affairs in his time Grotius states:

In this matter, undoubtedly, as in many others, discipline has become relaxed with time, and little by little the interpretation of the law of the Gospel has begun to be adjusted to the customs of the age. Formerly, among the clergy, conformity to the ancient practice was ordinarily kept up; but finally even the clergy have been released from censure in this matter." (*LWP* 2: 1.13.2)

others is does not provide an impediment to this type of conduct, Grotius dismisses "regard for others" only in so far as it is applied as a general rule, not its importance in qualifying and limiting what is allowed by the bare law of nature. We have seen this same principle operating in the discussion of a man's right of self-defence, where Grotius limits this right by the claims of human society: it is in the interest of justice and human society for men to sacrifice themselves rather than kill an assailant who is a more useful member of society, or to submit to injustice if self-defence cannot be carried out without grave consequences to society. Given the entire thrust of Grotius' argument with regard to the primacy of society when the common good conflicts with immediate self-interest, it is clear that the right of defending one's property is limited by what is important for the preservation of society, which in any case is in the long-term interest of the individual members (though, to be sure, the reasons for the primacy of society cannot be simply reduced to this strategic thinking). For the sake of human society, men must have security in their possession of property, so this principle and, later, civil laws allow for the defence of property – at any cost in extreme cases – but at the same time this principle is qualified for the sake of the same end, i.e., the overriding interest of human society.

When civil laws are instituted, the right to put a subject to death does not arise for all crimes – though the killing of a thief to defend one's property is usually permitted. Furthermore, it is important to realize that, differently from the case of killings carried out in response to the most hideous crimes, the permission to kill a thief does not create a right. What is granted to private individuals is "freedom from punishment":

> In the first place, the law does not have the right of death over all citizens for any offence whatever, but only for offences so serious that they deserve death.
>
> Furthermore, the law ought not to confer, and ordinarily does not confer, upon private individuals the right to put to death even those who have deserved death, excepting only in the case of the most atrocious crimes; otherwise the authority of the courts would have been constituted in vain. Wherefore, if the law says that a thief is killed with impunity, we are to consider that it takes away a penalty but does not also confer a right. (*LWP* 2: 1.14)

The reasoning applied to the right of self-defence in the case of private individuals and their property also holds true in the case of public wars, albeit with some qualifications. In private wars, the right ceases when recourse to judicial process becomes possible. This is not the case in public wars. Second, public powers, in addition to the right to self-defence, also possess the right to inflict punishment, as I will show in the

next section.[1] This right to inflict punishment, however, does not extend to an action taken to forestall a threat, such as a public war initiated to weaken an emerging power, in the manner of a preemptive strike. This may accord with interest but not with justice.[2] Even less plausible, according to Grotius, is the doctrine that a state can fight a justifiable defensive war after having committed acts that justify war being waged against it.[3] However, once the injured party refuses to accept, from those who have committed the excesses, a satisfactory offer of compensation arrived at through the offices of a neutral arbitrator, then recourse to a defensive war would be just.[4]

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[1] "In private war the right is, so to say, momentary; it ceases as soon as circumstances permit an approach to a judge. But since public wars do not arise except where there are no courts, or where courts cease to function, they are prolonged, and are continually augmented by the increment of fresh losses and injuries. Besides, in private war, self-defence is generally the only consideration; but public powers have not only the right of self-defence but also the right to exact punishment. Hence for them it is permissible to forestall an act of violence which is not immediate, but which is seen to be threatening from a distance; not directly – for that as we have shown, would work injustice – but indirectly, by inflicting punishment for a wrong action commenced but not yet carried through" (*LWP* 2: 1.16).

[2] "That this consideration does enter into deliberations regarding war, I admit, but only on grounds of expediency, not of justice. Thus if a war be justifiable for other reasons, for this reason also it might be deemed far sighted to undertake the war; that is the gist of the argument which the writers cited on this point present. But that the possibility of being attacked confers the right to attack is abhorrent to every principle of equity. Human life exists under such conditions that complete security is never guaranteed to us. For protection against uncertain fears we must rely on Divine Providence, and on a wariness free from reproach, not on force" (*LWP* 2: 1.17).

[3] "Not less unacceptable is the doctrine of those who hold that defence is justifiable on the part of those who have deserved the war be made upon them; the reason they allege is, that few are satisfied with exacting vengeance in proportion to the injury suffered. But fear of an uncertainty cannot confer the right to resort to force" (*LWP* 2: 1.18.1).

[4] "He who has done injury to another ought first to offer satisfaction to him whom he has injured, through the arbitrament of a fair-minded man; if such an offer of satisfaction is rejected, then taking up of arms will be without reproach" (*LWP* 2: 1.18.2).

Having laid down that it is permitted to kill in case property cannot be defended otherwise (always subject to the imperative of the preservation of society), Grotius asks the prior question: What is the origin of private property? Is it sourced in the law of nature, the product of customary practices or instituted by human will/civil law? Is ownership in property limited by the same principle that allows defence of property? These questions take Grotius directly into an extensive discussion of property ownership, its origin, transfer and limits.

The second just cause for war as stated above concerns "an injury to that which belongs to us."[1] What belongs to us is further subdivided by Grotius into (a) those things that belong to us by virtue of a "right common to mankind," and (b) that which belongs to us by a right that we possess as individuals. The right common to mankind "holds good directly over a corporeal thing, or over certain actions." This right is held in common over corporeal things that are "either free from private ownership, or are the property of someone." The things that are not privately owned are those which either cannot be subject to private ownership or those that can be privately owned. In order to understand this distinction, that is, why some corporeal things can be privately owned and others not, Grotius contends that "it will be necessary to know the origin of proprietorship, which jurists call the right of ownership."

Grotius begins his account on the premise that God granted to the human race a general right over all things of a lower nature. This right is possessed in common and allows a person to take and use whatever is necessary for his needs. According to Grotius, it is the exercise of this inclusive right possessed in common that created the conditions for private ownership. The argument is this: even under natural conditions there were some things which by their very nature could only be appropriated exclusively, for example food. So while everyone did have a right in it, that is, while the right was inclusive, in fact it could only be exercised as an exclusive right. Grotius quotes Cicero's famous theatre seat example in order to shed light on how a private right can accrue where each has a right in common: a theatre is a public place and yet the seat one has taken can be properly said to belong to oneself (i.e., for the duration of the spectacle). Grotius uses this example to point to the fact that the right to private property seems to be in the nature of things, and so in accord with the law of nature. However, it may be pointed out in passing that the two examples are qualitatively different – the first is 'natural' in a way that the second is not. The theatre analogy effects the illusion of naturalness, given that this was the long-standing customary and conventional practice

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[1] All the quotations in this paragraph are taken from *LWP* 2: 2.1.

among Europeans. Moreover, at the same time, Grotius stresses that within this universal right, and even before the institution of private property, there were conventional and customary safeguards for individual possessions, which prepared the way for the legal right of private ownership. For example, property already in possession of a person could not be taken away from him without it constituting an act of injustice. Moreover, just possession was always circumscribed by need and consumption: (a) that could be justifiably possessed which was needed by the person, and (b) the extent of what could be justifiably possessed was determined by what the person could consume. There was no unlimited right to private property:

> In consequence, each man could at once take whatever he wished for his own needs, and could consume whatever was capable of being consumed. The enjoyment of this universal right then served the purpose of private ownership; for whatever each had thus taken for his own needs another could not take from him except by an unjust act. (*LWP* 2: 2.2.1)

In his concept of 'need' Grotius includes only what is necessary for physical survival only – other items are included in the category of luxury, as he makes clear when discussing specific issues regarding property such as value (*LWP* 2: 12.14.1).

This situation of 'community of property' would have continued had people lived in great simplicity like the natives of America, or in mutual affection as the early Christians and present-day ascetics. Those who shared in the community of property as a result of simplicity did so not because they had a knowledge of virtue but rather through ignorance of vices. Grotius gives several reasons why this state of affairs did not continue:

> Men did not, however, continue to live this simple and innocent life, but turned their thoughts to various kinds of knowledge, the symbol for which was the tree of knowledge of good and evil, that is, a knowledge of the things of which it is possible to make at times a good use, at times a bad use. This Philo calls the 'middle understanding.' (*LWP* 2: 2.2.2)

This rather important passage may appear to suggest that it is the acquisition of knowledge as such that brings an end to the life of simplicity and moves men toward corruption. While that is broadly correct, Grotius is specifically pointing towards the knowledge of 'good and evil' which can, through evaluative redescription, be employed for both good and bad actions. Grotius in this case is drawing attention to the 'dangerous' and 'important' role played by the technique of paradiastole in the formation of western civilization. Its importance is clear: it is this knowledge of right and wrong that moves men out of the life of simplicity; but its dangers are clear too, because of the proximity of virtue and vice (middle understanding), which are always in each others neighbourhood, an

action could easily be redescribed in order to fit whatever suited a person's interest. The problematic nature of this moral knowledge, that is, a practical wisdom where virtue and vice are so closely related, and the dangers that arise thereof, is expressed in a quote from Plutarch; "What will be the harm if evil shall be removed and there shall then be no prudence, but we shall have in the place of it another virtue, which is not the knowledge of good and evil, but of good alone" (*LWP* 2: 2.2.2n1). The very act of getting rid of vice at the same time amounted to getting rid of practical wisdom itself (a particular form of moral language) and replacing it by a different type of a knowledge of the good. As Quentin Skinner has demonstrated in *Reason and Rhetoric in the Philosophy of Hobbes*, Hobbes was to make this his agenda.

In the next passage, Grotius outlines this transition away from a life of simplicity where all had rights in common. The first ancient occupations involved farming and grazing and some exchange of commodities. Eventually, disparities emerged and this led to varying degrees of competitive and conflictual interaction among men. In due course, the good were "corrupted by contact with the wicked," and justice was reduced to the maxim, might is right (*LWP* 2: 2.2.2). However, the main cause for the breakdown of harmony was neither competition nor "contact with the wicked," but rather "a less ignoble vice, ambition, of which the symbol was the tower of Babel" (also *LWP* 2: 2.2.2). From then on, men divided the commons into different countries which they possessed separately. The land was still plentiful and so, within each country, it was still possessed by the people in common. Eventually, with the increase in population, common ownership came to an end and land was divided, though first among families and not individuals.

This account, Grotius holds, is not only true to sacred history but is also in accord with the testimony of philosophers and poets "concerning the first state of ownership in common, and the distribution of property which afterward followed" (*LWP* 2: 2.2.3). These same sources, according to Grotius, provide another cause for, and historical narrative of, the change from common ownership to that of private ownership which initially applied to movable objects and only later immovable objects (e.g., land). This cause was a desire for "a more refined mode of life," which eventually gave rise to diverse types of industry:

> From these sources we learn what was the cause on account of which the primitive common ownership, first of movable objects, later also of immovable property was abandoned. The reason was that men were not content to feed on the spontaneous products of the earth, to dwell in caves, to have the body either naked or clothed with the bark of trees or skins of

> wild animals, but chose a more refined mode of life; this gave rise to industry, which some applied to one thing, others to another. (*LWP* 2: 2.2.4)

The third cause for the institution of private property was that man had made his way to diverse and distant parts of the world and this made it virtually impossible to store food in common. Further, the difficulties of fair distribution among men of labour and consumption made it unfeasible to exercise this common right. Also, the exercise of this right possessed in common was made more difficult by the lack of "justice and kindness" (also *LWP* 2: 2.2.4) among the people. In sum, these were the conditions and processes that led to the abandonment of the life of simplicity where all had a right in common to take and use, limited only by the extent of their need and ability to consume.

However, the legal right to private ownership was instituted not by an act of will, but rather by a "kind of agreement" (*LWP* 2: 2.2.5). It could not be an act of will because individuals could not possibly know what is or is not also desired by others, and moreover, different individuals could make a claim for the same thing. When he states that private ownership was instituted by "a kind of agreement," Grotius includes in this both explicit and implicit agreements. The agreement is explicit when it is made and property accordingly divided; but it can also be implicitly agreed that those who already occupy that property acquire ownership of it. Moreover, this latter form of tacit or implicit manner of acquiring a right in property, i.e., ownership, pre-dated, according to Grotius, express explicit contracts dealing with the division of land, and as such it is to be assumed that it was the manner in which private ownership was first obtained:[1]

> At the same time we learn how things become subject to private ownership. This happened not by a mere act of will, for one could not know what things another wished to have, in order to abstain from them – and besides several may desire the same thing – but rather by a kind of agreement, either expressed, as by a division, or implied, as by occupation. In fact, as soon as community ownership was abandoned, and as yet no division had been made, it is to be supposed that all agreed, that whatever each one had taken possession of should be his property. (*LWP* 2: 2.2.5)

Further the lands that remained unoccupied could be acquired in two ways, as "undivided whole" by a people or their ruler and by dividing the lands into separate plots by individuals.

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[1] Grotius quotes Cicero and Quintilian in support of his conclusions that private ownership is instituted by the mere act of possession.

The origin of individual property ownership lie, then, either in division or occupation, and occupation itself could be either original or derivative (*LWP* 2: 3.1). However, division of land was possible only when people could assemble in one place. As this became increasingly difficult with the growth in population and its dispersion, original ownership was acquired only through occupation. Moreover, Grotius contends, ownership by occupation, in the past as well as the present, "remains the only natural and primary mode of acquisition" (*LWP* 2: 3.4.1). Pufendorf was to make this argument in Grotius clearer. The division of land by express agreement, which Grotius and Pufendorf point to, affects only that land over which people had not acquired customary or conventional ownership.

The important question here is what does Grotius mean by the concept of 'occupation' or 'take possession of,' for these are the acts that give rise to the original right in property. While Grotius does not explicitly define 'occupation' and 'possession' in the context of his discussion of the origin of private property, his rather minute discussion of property does give us a very good idea of what he meant by these terms.

First, Grotius holds with regard to deserts that they cannot become private property as they "are absolutely devoid of cultivable soil" (*LWP* 2: 2.3.2). This is connected to the reasons for the origin of private property: the land involved must be of value, that is, improve the material conditions of men and human society. Clearly, therefore, one of the conditions and means of occupation of land is its cultivation. Also, in his discussion about whether unproductive soil and desert land can be occupied by foreigners, Grotius states: "it is right for foreigners even to take possession of such ground, for the reason that uncultivable land ought not to be considered as occupied except in respect to sovereignty, which remains unimpaired in favour of the original people" (*LWP* 2: 2.17). Accordingly, cultivation is certainly one of the means of occupation or possession from which the right of property originates.

Does this mean that unproductive lands cannot become private possessions? Here we should note that cultivation is not the only condition for occupation. In his discussion of why the sea or ocean cannot be occupied, Grotius argues that according to 'natural reason' "occupation takes place only in the case of a thing which has definite limits."[1]

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[1] There is of course another reason why the oceans cannot become private property – they do not meet the two criteria that give rise to private property: (1) the 'scarcity' principle does not apply, and (2) the right to the ocean can be exercised as an inclusive right without diminishing it in any way for the others: "The cause which led to the abandonment of common ownership here ceases to be operative. The extent of the

Since a body of water, being liquid, does not have stable boundaries unless enclosed, as lakes and rivers are by their banks, the seas/oceans cannot come under private occupation. This points to the second way in which occupation or possession comes about, namely, through enclosure within boundaries. An additional means is the use of land for raising cattle. Therefore, there are at least three means of occupation in which original right to property accrues: cultivation, boundaries and pasturage. However, Grotius does not set any limits to the varied forms in which this right could be exercised. He maintains that there are many forms of property right, and relies on Seneca's authority to add that something can belong to you even if you cannot sell it, consume it completely, damage or improve it.

As a final point, we should note that original ownership by occupation of that which belongs to no one is different depending on the two types of possessors, i.e., whether it is owned by individuals and by the sovereign power. In the case of the sovereign power, possession extends to persons as well as territory (*LWP* 2: 3.4.1). While ownership and sovereignty are acquired by a single act, they are distinct. Ownership can, in due course and through derivative acquisition, be possessed by foreigners, but not sovereignty (*LWP* 2: 3.4.2). It must be noted that the right to ownership by the law of nature is restricted to those who possess reason (*LWP* 2: 3.6).

If property has been abandoned, or if the possessor loses his right over that property, it then reverts to its primitive condition and the principle of original acquisition is again a legitimate means of acquiring ownership (*LWP* 2: 3.19.1). However, if the original ownership was that of the sovereign and it was transferred by the sovereign to the individual who later either abandoned it or lost it, then ownership reverts not to the common but to the sovereign (*LWP* 2: 3.19.2).

Grotius then proceeds to discuss the right, possessed in common, that a person has to actions as opposed to things. This right of exchange and right in one's labour power must be understood, according to Grotius, as deriving from the force of natural liberty and as being in accord with the law of nature:

> The common right relating to acts is conceded either directly or by supposition. It is conceded directly in respects to acts indispensable for the obtaining of the things without which life cannot be comfortably lived. Here in fact the same degree of necessity is not required as for taking another's property; for it is not now a question of what may be done against the will

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ocean is in fact so great that it suffices for any possible use on the part of all peoples, for drawing water, for fishing, for sailing" (*LWP* 2: 2.3.1).

> of an owner, but rather of the mode of acquiring things with the consent of those to whom they belong; provided only that no obstacle be interposed by the passing of a law or by conspiracy. Such a hindrance, in fact, is at variance with the nature of society in relation to those matters of which I have spoken.[1] (*LWP* 2: 2.23)

Here an individual has the right to such actions that are required to live a life fit for human beings – family, community and material comforts.[2] This right does not come with the same limitations as the right to another man's property. This is the right to one's labour, including such matters as the exchange of commodities, and is not, as in the case of a right in things (e.g., land), exercised in opposition to another's right but instead is a product of mutual consent: in some cases, between those who buy and those who sell their labour power and in others as an exchange of goods in the market place.

2. Necessity and the Right of Ownership

The next question raised by Grotius is this: once private property had been instituted, do the people still retain any right in another person's property that would allow them, in case of extreme necessity, to use that which does not legally belong to them? Grotius answers affirmatively. His initial premise is that those who instituted private ownership intended toward that which accorded with 'natural equity.' Natural equity is derived in part from the two primary laws of the right of self-preservation and the right to the means of self-preservation, and thus is an aspect of the law of nature which could not possibly be obliterated by private ownership. Rather, the law of nature is what grounds this right. Accordingly, the primitive right to land and its products possessed in common remains even after the introduction of private property and, when in extreme need, this original right possessed in common reappears:[3]

> Some perchance may think it strange that this question should be raised, since the right of private ownership seems completely to have absorbed the right which had its origin in a state of community of property. Such,

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[1] It is at variance with the nature of society, whose important constitutive features are familial relations, common right to food and life of community (*LWP* 2: 2.18).

[2] This right includes the right to seek marriages outside of one's country (*LWP* 2: 2.21). As this right is a common right, it applies equally to citizens and foreigners (*LWP* 2: 2.22).

[3] Grotius again quotes Seneca: "'Necessity,' says Seneca the father, 'the great resource of human weakness, breaks every law'" (*LWP* 2: 2.6.4).

> however is not the case. We must, in fact, consider what the intention was of those who first introduced individual ownership; and we are forced to believe that it was their intention to depart as little as possible from natural equity. For as in this sense even written laws are to be interpreted, much more should such a point of view prevail in the interpretation of usages which are not held to exact statement by the limitation of the written form. (*LWP* 2: 2.6.1)
>
> Hence it follows, first, that in direst need the primitive right of user revives, as if community of ownership had remained, since in respect to all human laws – the law of ownership included – supreme necessity seems to have been excepted. (*LWP* 2: 2.6.2)

Once again, Grotius points to the fact that the ownership in property is the product of 'usage' and, further, considers usage as the commonly understood source of property. Here usage means the various customary and conventional practices in relation to property which are justified in the light of the law of nature and are in accord with it, as it is the case among sociable people.

The ground for the statement that "in direst need the primitive right of user revives" is made firmer when Grotius cites in support of his position the opinion of theologians, and explains that their reasoning is not based on the law of love but rather on the notion that private ownership is limited by what is just and fair, that is, the law of nature or, in other words, principles of equity:

> Even among the theologians the principle has been accepted that, if a man under stress of such necessity takes from the property of another what is necessary to preserve his own life, he does not commit a theft.
>
> The reason which lies back of this principle is not, as some allege, that the owner of a thing is bound by the rule of love to give to him who lacks; it is, rather, that all things seem to have been distributed to individual owners with a benign reservation in favour of the primitive right. For if those who made the original distribution had been asked what they thought about this matter they would have given the same answer that we do. (*LWP* 2: 2.6.4)

However, Grotius is careful to put limitations on to the exception he has just laid down. First, this right is to be exercised only in those cases when all other efforts have failed, i.e., only when it is completely unavoidable (*LWP* 2: 2.7). Second, this right is canceled when the owner himself has equal need of that which is being sought (*LWP* 2: 2.8). Third, there is an obligation that arises from the exercise of this right, that is, the person who has taken another's property in the case of extreme necessity must make

restitution of that property as soon as possible (*LWP* 2: 2.9). Given these qualifications, Grotius contends, "The first right then ... since the establishment of private ownership, still remains over from the old community of property, is that which we have called the right of necessity" (*LWP* 2: 2.10).

3. The Law of Nature and the Right of Punishment

Grotius' discussion of punishment, of its origin and usefulness is situated within his discussion of the justifiable use of force within and between nations. Grotius organises the discussion by setting up two broad categories. The first category, which we have already discussed, comprises actions that are undertaken in order to defend one's self and property, while in the second category fall those actions that are undertaken to punish those whose actions have caused damage within and among states.

Before developing his justifications of punishment, Grotius discusses the type of legal claim that underpins the right of punishment, i.e., the legal claim sourced in a 'wrong.' In Grotius' system, this is the last of the three basic "sources of legal claim" (see Chapter 2 of this study). The section of *LWP* which examines this type of legal claim is of crucial importance to the Grotian project, and it is no wonder that it occupies over more than a hundred pages of minute discussion. The reason for the importance of this aspect of the system is easy to see. While, in normal circumstances, the rights and duties of sociality are self-evident to all, insofar as they are the dictate of reason, and are interwoven into conventional practices whereby people are habituated to live in accordance to the dictate of right reason, the minds of Europeans had been distorted, in Grotius' view, by bad and vicious habits. Punishment became therefore a necessary complement to the dictate of right reason and the corollary to its transgressions. The important question that Grotius had to address in this case was what justified this form of violence, what was the original source of justification and, finally, what was the compass (i.e., the limits) of such justification. Grotius states that every wrong that leads to 'damage' (*damnum*) creates an obligation:

> By a wrong we here mean every fault, whether of commission or of omission, which is in conflict with what men ought to do, either from their common interest or by reason of a special quality. From such a fault, if damage has been caused, by the law of nature an obligation arises, namely, that the damage should be made good. (*LWP* 2: 17.1)

Drawing on the etymology of the term, Grotius notes that the Latin term derives from the Greek root *demere*, meaning 'being less' than that which is one's right.

Accordingly, damage is "that which conflicts with one's right"[1] or the state of having less than what is one's right. By right Grotius means both the right each possesses by nature and the rights that accrue to an individual through laws that have been institutionalized. Interestingly, among the rights to what is 'one's own,' he now includes reputation and honour along with life, limbs and the acts of one's will. In Grotius' own words there is damage

> when any one has less than belongs to him, whether by a right that accrues to him from the law of nature alone, or is reinforced by the addition of a human act, as by ownership, contract, or legal enactment.
>
> By nature a man's life is his own, not indeed to destroy, but to safeguard; also his own are his body, limbs, reputation, honour, and the acts of his will. The previous part of our treatise has shown how each man by property right and by agreements possesses his own not only with respect to property but also with respect to the acts of others. In a similar manner every one acquires his particular rights from the law, because the law has the same power, or greater power than individuals have over themselves or their property. (*LWP* 2: 17.2.1)

The next step in Grotius' presentation is a discussion of whether punishment is located in the domain of expletive, commutative or attributive justice. In this instance, as he has consistently done throughout (with few exceptions), Grotius slices off expletive justice from attributive and commutative justice, and makes punishment relevant only in the sphere of expletive justice (*LWP* 2: 20.2.1 and 2). He dismisses the justifications of punishment that were standardly used by Europeans with regard to attributive and commutative justice and situates the right of punishment within the act of the crime itself, from the wrong and damage done. Grotius' argument is that while all acts cannot be reduced to acts of contract, they nevertheless are akin in nature to contracts. Therefore, when an individual acts he must be taken to have accepted the consequences of that act and thus the individual who has committed a crime can be taken to have consented to his own punishment, which is a natural consequence of his wrong action.[2] Hobbes was to

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[1] However, "true ownership and the consequent necessity for restitution do not arise from aptitude alone, which is not properly called a right and which belongs to distributive justice; for one does not have ownership of that to which one has merely a moral claim" (*LWP* 2: 17.2.2).

[2] In *The Science of a Legislator: The Natural Jurisprudence of David Hume and Adam Smith*, Haakonssen has argued that Grotius cannot and does not account for the

reject this reasoning on the grounds that no one could reasonably be expected to obligate himself to pain no matter what the circumstances.

4. War as an Act of Punishment

According to Grotius there are two reasons for the cause of most wars: the first is that of punishment and the second is that of making good a loss. Often the latter is joined to the former. From these two causes two different types of obligations arise:

> We have previously shown, and histories everywhere teach, that wars are usually begun for the purpose of exacting punishment. But very often this cause is joined with a second, the desire to make good a loss, when the same act was both wicked and involved loss; and from these two characteristics two separate obligations arise. (*LWP* 2: 20.38)

However, obviously, since different punishment are meted out for different crimes, not all crimes lead to war. The intention to commit a crime, being only an inner act, is not liable to be punished by war. Still, Grotius adds the qualification that some intentions which can be seen as constituting the actual beginning of a criminal act do merit punishment: "the will which proceeds to external acts ... is usually liable to punishment" (*LWP* 2: 20.39.1). Here Grotius points only to those external actions which have been commenced and have serious consequences – not to every action *simpliciter*:

> Crimes that have only been begun are therefore not to be punished by armed force, unless the matter is serious, and has reached a point where a certain damage has already followed from such action, even if it is not yet that which was aimed at; or at least great danger has ensued, so that the punishment either is joined with a precaution against future harm (about which we spoke above in the chapter on Defence), or protects injured dignity, or checks a dangerous example. (*LWP* 2: 20.39.4)

Rulers as well as citizens of republics can justifiably wage wars for an injustice inflicted on others. Indeed, there is greater justice in an act to redress a significant violation of the law of nature when such violation is not committed against oneself but against others. This 'liberty' to inflict punishments on others in the larger interest of society derives from the original law of nature, and is a right possessed by all prior to its

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right of punishment within natural law, a task that is later completed by Adam Smith with his spectator theory. However, the importance of this right is more than fully understood by Grotius who spends more than a hundred pages (far more than on any other single concept) on the two chapters on punishment.

transfer to the appropriate authorities. In this, Grotius differs from other writers who were to follow him, such as Hobbes and Pufendorf. Grotius also differs on this point from writers who wrote before him (though for different reasons), such as Victoria, Vazquez, Azor, and Molina who had claimed that the right of punishment does not derive from the law of nature but instead results from civil law:[1]

> The fact must also be recognized that kings, and those who possess rights equal to those kings, have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any persons whatsoever. For liberty to serve the interests of human society through punishments, which originally, as we have said, rested with individuals, now after the organization of states and courts of law is in the hands of the highest authorities, not, properly speaking, in so far as they rule over others but in so far as they are themselves subject to no one. For subjection has taken this right away from others.
>
> Truly it is more honourable to avenge the wrongs of others rather than one's own, in the degree that in the case of one's own wrongs it is more to be feared that through a sense of personal suffering one may exceed the proper limit or at least prejudice his mind. (*LWP* 2: 20.40.1)

The importance Grotius attaches to the preservation of society is evident. To deter or inflict punishment on any nation that breaks the bounds of the law of nature is a right all European have, as well as one of the duties of sociality that a nation must perform pursuant to the law of nature. While sharing Grotius' goal, i.e., the preservation of society, Hobbes and Pufendorf were to come to the opposite conclusion. They would

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[1] "The contrary view is held by Victoria, Vasquez, Azor, and Molina, and others, who in justification of war seem to demand that he who undertakes it should have suffered injury either in his person or his state, or that he should have jurisdiction over him who is attacked. For they argue that the power of punishing is the proper effect of civil jurisdiction, while we hold that it also derived from the law of nature," and further "[these writers notwithstanding] many persons admit this right, which is confirmed also by the usage all nations, not only after the conclusion of a war but also while the war is still going on; and not on the basis of any civil jurisdiction, but of that law of nature which existed before states were organized, and is even now enforced, in places where men live in family groups and not in states" (*LWP* 2: 20.40.4).

argue against this broad right to punish other nations even when not directly harmed since, in their view, such a universal right could further contribute to the breakdown of society in Europe.

One of the key sentences in the passage quoted above concerns the location of this power to punish. Grotius situates this power of punishment within the individual prior to the institution of civil society. Accordingly, Grotius is able to differentiate it from other forms of law, especially civil law. In fact he goes further and contends that the right to punish which arises from the law of nature must be distinguished not only from the rights which arise from civil law, but also from the rights which arises from the law of nations[1] and from volitional divine law.[2]

However, the violations of the law of nature which justifies wars of punishment must be limited to contraventions of general principles in accord to reason and of those principles, related to the former, which are clearly evident:

> We should carefully distinguish between general principles, as, for example, that one must live honourably, that is according to reason, and certain principles akin to these, but so evident that they do not admit of doubt, as that one must not seize what belongs to another, and inferences. (*LWP* 2: 20.43.1)

Here Grotius seems to opt for mathematics as providing the correct picture of his conception: principles and what can be deduced from and proved by them, i.e., some clearly evident principles and others that are equally true but having to be carefully worked out.[3]

However, this justification for the infliction of punishment through war, which Grotius derives from the law of nature, is at the same time limited by the fundamental condition for the very existence of the law of nature, i.e., reason. Those who are subject to

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[1] "First, national customs are not to be taken for the law of nature, although they have been received on reasonable grounds among many peoples" (*LWP* 2: 20.41).

[2] "Second, we should not hastily class with the things forbidden by nature those with regard to which this point is not clear, and which are rather prohibited by the law of the divine will" (*LWP* 2: 20.42).

[3] "Here we have almost the same thing as in mathematics, where there are certain primary notions, or notions akin to those that are primary, certain proofs which are at once recognized and admitted, and certain others which are true indeed but not evident to all" (*LWP* 2: 20.43.1).

disabilities that adversely affect their rational capacities are not to be held responsible for their actions or if held responsible not to the same extent:

> Therefore, just as in the case of municipal laws we excuse those who lack knowledge or understanding of the laws, so also with regard to the laws of nature it is right to pardon those who are hampered by the weakness of their powers of reasoning or deficient education. (*LWP* 2: 20.43.2)

This Grotian argument, which situates within the framework of the law of nature the justification of war as a means of punishing those responsible, is further mitigated by the warning that "wars which are undertaken to inflict punishment are under suspicion of being unjust, unless the crimes are very atrocious and very evident, or there is some other coincident reason" (*LWP* 2: 20.43.3).

5. Punishment for Crimes Against God

The next question tackled by Grotius in his discussion of punishment is the one that had brought most strife to Europe in the previous one hundred years: the justifiability of waging wars for crimes that are committed against god. The standard argument made against such wars of punishment was that the right to punish could only arise within a given national jurisdiction, i.e., it was not part of the law of nations. Grotius rejects this argument and maintains instead that kings do not simply have the "particular care of their own state" but also have the "general responsibility for human society" (*LWP* 2: 20.44.1). A stronger argument against the justifiability of war for crimes against god is that he (i.e., god) can himself punish offences committed against him. However, this argument for Grotius is not very strong for the simple reason that while god is quite capable of punishing the crimes against men, he leaves it to them to do the punishing, and if punishing is left to men why should it not extend to the case of crimes against god (*LWP* 2: 20.44.2)?

Furthermore, while religion is necessary in order to win god's grace, it possesses "in addition important effects on human society" (*LWP* 2: 20.44.3). Grotius sees religion as the supportive structure of the juridical complex and a means of correct disciplining, or "the bulwark of authority and the laws and the bond of right training" (*LWP* 2: 20.44.3). This role played by religion is not just the concern of any one particular state but of all in human society. Cicero is quoted as saying "If piety is removed, with it go good faith and the friendly association of mankind, and the one most excellent virtue, justice" (*LWP* 2: 20.44.4),[1] and Grotius contends that, if religion was to be removed from considerations

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[1] In note 4 in the same section, Grotius also quotes approvingly from Seneca:

of justice, the possibility emerges of the validity of Epicurean arguments, where justice is seen as nothing other than laws founded on agreement for reasons of mutual advantage.[1] Furthermore, religion is not important merely for the effects it has on the people and the substantive content it provides for justice, but also because it acts as a check on the actions of the sovereign vis-à-vis the people (*LWP* 2: 20.44.5). And, in the realm of international relations, where law had for the most part given way to force, religion acquired an even greater significance (*LWP* 2: 20.44.6).

All this may lead one to believe that Grotius approved of wars of religion. However, this is not the case. He first sifts out the arguments which could easily be rebutted by the proponents of religious wars so as to make space for his own more powerful argument, though this did involve minimalizing the core premises of Christianity. Grotius' line of argument is also influenced by the fact that he was adamant about the positive role of religion in maintaining social stability, and thus wanted to sanction the positive effect of religion on society while ultimately arguing against war of religions. As a further important nuance, we should note that Grotius is not promoting the imposition of Christianity all over the world or for that matter even in all of Europe. Most of the arguments he draws on to demonstrate the important role of religion in maintaining social harmony are from pre-Christian, ancient Greek and Roman society. Nor is he allowing an open-ended right to wage war on grounds of religion. In keeping with the tenor of his entire work Grotius' position is considerably more complex. What he rejects are the arguments that have been made in order to oppose all religious wars, but he does not reject a more modest end, that is, to limit the wars of religion. To put it simply Grotius' project was this: given the crucial social and political role that it had performed in Europe, religion was a necessary institution for society's stability, and yet, at the same time, some of its effects were harmful to society and had to be countered. Grotius' problem, then, was to set limits on justifiable wars on account of religion but also to do so

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"Therein we differ from Epicurus, when he says that nothing is just by nature, and that crimes are to be avoided because fear cannot be avoided." Grotius' distance of from Hobbes' conception of justice is evident.

[1] "A clear proof of all this is that Epicurus, after having abolished divine providence, left nothing of justice except the empty name, so that he could say that it arose from agreement only and endured no longer than the common advantage therefrom endured; that one must then abstain from the things which are likely to injure another

without endorsing the above mentioned arguments which rested, in Grotius' reckoning, on weak, untenable premises.

Grotius begins his own argumentation by giving a definition of true religion which he holds is universal, i.e., common to all cultures and all ages. This true religion rests on four principles:

> Of these the first is, that God is, and is One; the second, that God is none of the things which are seen, but is something more exalted than these; the third, that God has a care for human affairs, and judges them with the most righteous judgments; and the fourth, that the same God is the creator of all things besides Himself. (*LWP* 2: 20.45.1)

This minimalist foundation of a true religion was an attempt to find a minimum common denominator among the several Christian sects – a common ground which all these feuding Christian sects could unproblematically accept. Then, rather than drawing on the Christian fathers to ground his conception of religion, which would have exposed him to the risk of being misunderstood as propagating the views of a particular sect, Grotius grounds this universal conception of god within Plato, Aristotle, Plutarch and Seneca. He argues that, unlike other acts of virtue, this belief in the existence and worship of god is not relative to region or open to paradiastolic manipulations, and is universally accepted. Moreover, these four premises of true religion are not simply products of speculation but can be drawn out from the "nature of things":

> Among such arguments this is the strongest, that our senses show that some things are made, but the things which are made lead us absolutely to something that is not made. But because all persons do not grasp this reason and others of a like nature, it is enough to say that in every age throughout all lands, with very few exceptions, men have accepted these ideas; both those men who were too dull to wish to deceive, and others who were too wise to be deceived. This agreement in so great a variety of laws and diversity in expressions of opinions regarding other matters sufficiently reveals the tradition that has been handed down to us from the beginning of the human race and has never been conclusively refuted; and that fact of itself is sufficient to cause belief. (*LWP* 2: 20.45.3)

This belief, according to Grotius, is universally held in the face of the great diversity of opinions among men, and this is evidence that it relates to something in us, and also that it is "brought about by reasoning" and 'acquired' by custom (*LWP* 2:

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solely through fear of punishment" (*LWP* 2: 20.44.4).

20.45.4). So if any one does depart from these four premises he may rightly be faulted: "Wherefore those are not free from blame who repudiate these ideas, even if they are too dull-witted to be able to discover or understand positive proofs thereof, since they have guides to the right path, and the contrary view rests upon no good reasons" (also *LWP* 2: 20.45.4).

However, as he was also addressing the question of proper punishment in relation to the severity of the crime, Grotius notes that these four ideas are not all of equal importance. The two most important, necessary and universal of these for the establishment of any religion and social stability are the existence of god and his concern with human affairs:

> These ideas that there is a divinity (I exclude the question of there being more than one) and that he has a care for the affairs of men, are in the highest degree universal, and are absolutely necessary to the establishment of religion, whether true or false. (*LWP* 2: 20.46.1)

The empirical universality of these two conceptions in all ages and among all people of whom there is any knowledge would lead to the conclusion that they were dictated "under the influence of necessity itself" (*LWP* 2: 20.46). As such those who seek to abolish these two premises "may be restrained in the name of human society, to which they do violence without a defensible reason" (*LWP* 2: 20.46.4). As mentioned earlier, Grotius is very aware of the function served by the second premise which provides for the vengeance of god if he is displeased with the conduct of men (*LWP* 2: 20.45.2). And the second premise is surely absurd without the first, that is, the fact of god's existence. Apart from the necessity of these two principles, Grotius argues for an extreme form of religious toleration. Even within his minimal four-premise conception of religion, people are not to be punished if they do not believe in the remaining two, i.e., the third and fourth premises:

> Other ideas are not equally evident, as, for example, that there are not more Gods than one; that none of the things which we see is God, neither the earth, nor the sky, nor the sun, nor the air; that the earth is not from all eternity nor even its matter, but that they were made by God. Consequently we see that the knowledge of these things has disappeared among many peoples through lapse of time, and is as it were extinct; and the more easily so because the laws give less attention to these ideas, seeing that some religion at any rate could exist without them. (*LWP* 2: 20.47.1)

Moreover, diverse forms of religious beliefs held by people result from 'affection' rather than reason, and therefore men cannot be held responsible for them to the same degree:

> Beyond doubt it was rightly said by Philo that to each one his religion seems the best, since this is most often judged not by reason but by affection. Not very dissimilar is the saying of Cicero, that no one approves any philosophical system except that which he himself follows. He adds that most men are held in bondage before they are able to judge what is the best. (*LWP* 2: 20.47.3)

Grotius' arguments for toleration are not limited to the various religious sects within Christianity, or even to other more established religions, but extends to pagan forms of worship and other cults. Grotius too, however, eventually does draw a line:[1]

> Just as those are worthy to be excused, and certainly not to be punished by men, who, not having received any law revealed by God, worship the powers of the stars or of other natural objects, or spirits, either in images or in animals or in other things, or even worship the souls of those who have been pre-eminent for their virtue and their benefactions to the human race, or certain intelligences without bodily form, especially if they themselves have not invented such cults, nor deserted for them the worship of the supreme God, so we must class with the impious rather than with the erring those who establish with divine honours the worship of evil spirits, whom they know to be such, or of personified vices, or of men whose lives were filled with crime. (*LWP* 2: 20.47.4)

Accordingly, wars cannot be justly waged against a people who is unwilling to accept the Christian religion. There are two reasons why such a people cannot be punished for not accepting Christianity:

> The first is that the truth of Christian religion, in so far as it makes a considerable addition to natural and primitive religion, cannot be proven by purely natural arguments, but rests upon the history both of the resurrection of Christ and of the miracles performed by Him and by His Apostles. This is a question of fact, proven long ago by irrefutable testimonies, and of fact already very ancient. Whence it results that the doctrine cannot be deeply received in the mind of those who hear it now for the first time, unless God

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[1] Acts involving human sacrifice were impious and were to be punished (*LWP* 2: 20.47.5).

> secretly lends His aid. This aid, when given to any persons, is not given as a reward of any work; so that, if it is denied or granted less generously to any, this occurs for reasons that are not unjust indeed but are frequently unknown to us, and hence not punishable by the judgment of man. (*LWP* 2: 20.48.1)

The second reason is that it was not acceptable to Christ that the people should be coerced into receiving "His law by punishment in this life, or by fear thereof" (*LWP* 2: 20.48.2).

Conversely, wars may be waged against those that persecute Christians for teaching and professing their religion, for there is nothing in Christian teachings (at least in those that have not been corrupted) that could endanger human society – rather human society could only benefit from such teachings. Moreover, punishment should not be inflicted upon those who possess new doctrines simply on the excuse that the new is to be distrusted, unless of course the new doctrines were either dishonourable or opposed legitimate authority (*LWP* 2: 20.49.1). On the contrary, those who do punish are themselves committing an unjust act and may be punished in turn (*LWP* 2: 20.49.2).

In strong and clear terms Grotius opposes wars that are fought due to differing interpretations of the scriptures among different Christian sects. Such wars cannot be just:

> Likewise those who oppress with punishment persons that accept the law of Christ as true, but who are in doubt or error on some points which are either outside the law or appear to have an ambiguous statement in the law and are variously explained by the early Christians, act most wickedly. (*LWP* 2: 20.50.1)

Even in those instances where an incorrect belief is persisted upon in the face of judgment against it by "impartial judges by sacred authority, or by the agreement of ancient writers,"[1] the force of habit and the power of belief over one's judgment must be taken into consideration: "Here we must take into account also the great power of habitual opinion, and the degree to which freedom of judgment is hampered by zeal for one's own sect." This being so, it is important to bear in mind "that the degree of guilt in this matter depends upon the method of enlightenment and other mental conditions, which is not given to men fully to know."

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[1] All citations in this paragraph are taken from *LWP* 2: 20.50.

Conclusion

I have tried to retrieve the salient segments of Grotius' discussion on property and punishment. The discussion on property is important as it provided Europeans with the first fully formulated arguments on property, arguments which were to become foundational to the philosophical and political enterprises of Samuel Pufendorf and John Locke. The discussion on punishment tries to highlight the importance Grotius assigns to punishment as a reinforcement of the law of nature. This reinforcement was seen by Grotius as a necessary to support the natural inclination toward society dictated by right reason and customary practices. Still, transgressions against the law of nature could and did happen due to corruption of habits and customs. The correct response to such transgression is punishment which therefore was necessary and indeed essential element in the Grotian system, as the scope of the section devoted to punishment in *LWP* amply demonstrates.

The next chapter of this study is devoted to Thomas Hobbes who, I will argue, begins his political theory in *Of the Citizen* (*De cive*) within the Grotian parameters so far discussed. Central to Hobbes' agenda (no less the Grotius') is sociality and the possibility of peaceful relations between the peoples and nations of Europe. Again like Grotius, Hobbes starts his project by investigating the nature of man from which he seeks to derive the law of nature or, in other words, his laws of sociality. The answers he gives to these issues, however, are drastically different from Grotius', and set the agenda for a particular kind of modernity.

Chapter 4

Thomas Hobbes

Introduction

In the previous three chapters I have laid out the salient features of Hugo Grotius' political theory. I attempted to show that the modern language of the law of nature was not premised and built upon only minimal rights, as Richard Tuck has argued, but also upon three irreducible principles: (1) the preservation of society; (2) self-preservation; and (3) consent. These three principles inform Grotius' account of just and unjust political and legal arrangements; his account of revolution; and his theory of property in land. Grotius was quite aware, as we have seen, that these three principles can and do come into conflict. While he attempted to resolve some of these conflicts, Grotius also realized that not all discrepancies could be ironed out conceptually and that some matters should be left to the practical judgment of individuals, a people or society. Thus the important role played by practical wisdom in Grotius' political theory. By leaving deeply problematic political decisions to the practical wisdom of an individual, a people or society, Grotius acknowledged the limits of deductive theorizing in political theory, and this provides further evidence for the contention that the Dutch philosopher should be seen as being engaged in a project that goes beyond the mere articulation of a deductive political theory and of a modern language of the law of nature based on two minimal rights and one duty.

In this chapter, I will attempt to argue that Hobbes' *Of the Citizen* (hereafter *OC*) and *Leviathan* attempt to counter and displace the political theory put forward by Grotius in *LWP*. Grotius built his arguments on three irreducible principles which then led to the justification of a plurality of political arrangements limited only by whether a people had exercised free choice, that is, given it its consent. Within this conceptual system a wide range of complex constitutional arrangements was permissible, including arrangements which resulted in the sharing of sovereign power, and irrespective of whether a given arrangement was arrived at customarily or through express contract. Grotius had also acknowledged that the right of self-preservation justified on seven occasions the right of revolt against one's governors – though this again was qualified by the extent of destruction that would be visited upon the society or the state if such right was exercised. While according priority to the right of self-preservation over the right of

the sovereign, the preservation of society continued to play an important role in determining whether revolutionary action was indeed legitimate. Still, the important fact remains that Grotius did hold that there are no less than seven circumstances when revolutionary action may be justified.

Irreducible plurality and, in particular, the concomitant potential for contestatory politics which such plurality contains are the main points of contention between Hugo Grotius and Thomas Hobbes. For Hobbes, such irreducible plurality is a sure recipe for unending conflict both within and among states. Hobbes opposes Grotius' political theory on two grounds. First, Grotius' arguments are theoretically flawed precisely insofar as they fail to resolve all of the issues they raise. Second, and perhaps more importantly, Grotius' plurality of principles has the effect of legitimating, in spite of Grotius' best intentions, the state of war between and within European nations. In opposition to Grotius, Hobbes sets out to provide a coherent, internally consistent, deductive theory of politics which left nothing unresolved and thus purported to eliminate the dangerous pluralities and contestatory potentials of Grotius' theory. One of the key effect of this move was to marginalize the need for and undermine the place of practical wisdom in political theory.

1. Grotius' Natural Sociableness Questioned

Hobbes begins to dismantle Grotius' political theory by calling into question the three irreducible principles which inform it. Hobbes does away with the right of society standing independent of and at times having priority over the right of individual self-preservation by calling into question the innate drive for society or "sociableness" that Grotius had claimed all men have by nature. Hobbes denies this presupposition and reduces society to a functional unit expedient towards self-preservation. Crucial to Hobbes argument against Grotius is a recharacterization of the nature of man. Also, the principle of consent is called into question as an independent principle which could come into conflict with the other two. Unlike sociableness, however, consent is not thrown out, but is rather subordinated to the principle of self-preservation: individual will be deemed to consent to what reason dictates is necessary in order to institute an undivided sovereign, which in turn is held to be the rational means of ensuring self-preservation. Also the principle of self-preservation does not have the same purchase for the individual as it did in Grotius. Self-preservation no longer provides justifications for revolution. Rather, it does the quite the opposite and allows Hobbes to present the most thoroughgoing theory of absolute sovereignty.

These moves allow Hobbes to build his theory of the moral virtues or duties to society – in other words, his political theory – on one irreducible principle, namely, that of a natural desire for self-preservation. We should note that, somewhat ironically, Grotius and Hobbes share the same goal: to explicate the theoretical conditions necessary for peace. And the commonalites do not end here. Hobbes begins his attempt at reconstituting the language of the law of nature by asking the same questions Grotius had asked: "what is the nature of man?" On the basis of a characterization of human nature Hobbes is able to deduce the duties that nature dictates to men so that they may enjoy sociable and peaceful relations amongst themselves. Grotius' project is clearly in the background.

Hobbes informs us of his own project most succinctly in the very first paragraph of Chapter 1 in *OC*:

> The faculties of Humane nature may be reduc'd to unto four kinds; Bodily strength, Experience, Reason, Passion. Taking the beginning of this following Doctrine from these, we will declare in the first place what manner of inclinations men who are endued with these faculties bare towards each other, and whether, and by what faculty, they are born apt for Society, and so preserve themselves against mutuall violence; then proceeding, we will shew what advice was necessary to be taken for this businesse, and what are the conditions of Society, or of Humane Peace; that is to say, (changing the words onely) what are the fundamentall *lawes of nature*. (*OC* 41)

As we saw in Chapter 1, Grotius began his response to Carneades' instrumental rendering of human nature and justice by painting a very different account of human nature. For Grotius, human beings are naturally impelled towards society, and more specifically toward a social arrangement that is peaceful and orderly, and thus consonant to beings capable of reason. He then went on to list the faculties and instruments possessed by humans which made them essentially sociable by nature. To restate them briefly, these were reason, speech, a disposition to do good made possible by the extrinsic intelligent principle and the faculty of discrimination. Grotius argued that men formed and lived in societies not only because they served some instrumental purpose but because their natures were so constituted that they were essentially social beings. For Grotius it was not a matter of choice or expediency – this was simply what it meant to be human.

As the quote above shows, Hobbes begins his account of the fundamental laws of nature which are necessary for peaceful coexistence by first listing human faculties. He then goes on to claim that an understanding of these faculties would make clearer to us the

kinds of relationships that are possible among men. This step allows him to pose the crucial question: are men born apt for society, as Grotius had claimed, or is society brought about by different causes? As we will see below, according to Hobbes, the faculties that humans have do not make them apt for society. However, before laying out his own conception of the natural human faculties and reformulate the laws of nature which flow from them, Hobbes confronts, renders absurd, and dismisses the premise critical to Grotius' understanding of the law of nature, i.e., that humans are naturally impelled to form societies and that they are born apt for it:

> The greatest part of those men who have written ought concerning Commonwealths, either suppose, or require us, or beg of us to believe, that Man is a Creature born fit for Society:...and on this foundation they so build up the Doctrine of Civill Society, as if for the preservation of Peace, and the Government of Man-kind there were nothing else necessary, then that Men should agree to make certaine Covenants and Conditions together, which themselves should then call Lawes. Which Axiom, though received by most, is yet certainly False, and an Errour proceeding from our too slight contemplation of Humane Nature. (*OC* 1.2)

Hobbes claims that a correct grasp of human nature would show that human beings are not born fit for society, and that is education and not nature that makes individual sociable. He adds that most human beings remain unfit for society due to lack of education. Further, not only are individuals not born equipped by nature for society, they could not possibly have desired society prior to knowing the benefits of living in one – prior to the existence of society one could only be ignorant of its benefits. Again, given that human beings do need each other "it followes not that, that he therefore were Born fit to enter into it; for it is one thing to desire, another to be in capacity fit for what we desire"(*OC* 44-45).

In order to further dissuade the reader of the possibility that human beings are naturally inclined to form societies, Hobbes asks us to observe what actually goes on in real life when individuals meet socially. He points out that people do not associate with each other simply out of affection, but "rather frequent those whose Society affords him Honour or profit." Accordingly, "[w]e doe not therefore by nature seek Society for its own sake, but so that that we may receive some Honour or Profit from it"(OC 42). But this is not all, Hobbes goes further and claims that society is the source of much that troubles humanity. He puts the matter bluntly: "For if they meet for Traffique, its plaine every man regards not his Fellow, but his Businesse; if to discharge some Office, a certain

Market-friendship is begotten, which hath more Jealousie in it than True love, and Whence Factions sometimes may arise, but Good will never" (*OC* 42).

Hobbes asks his reader to be observant about the kinds of things in which human beings find most pleasure even when they do meet simply to enjoy each other's company. For Hobbes, individuals find their greatest pleasure in ridiculing particular qualities of those who are not present. They also seek to impress their fellow men by relating fantastic tales or miracles which they seem to make up as they go along, not in order to entertain their fellows, but only to win their admiration. And lastly, when human beings meet to talk about philosophy it is not out of love of truth but to prove themselves wiser than the others. Accordingly, Hobbes concludes that all those who look closely at human affairs will find that men socialize only for gain or glory (*OC* 42).

In addition, Hobbes claims that what observation of human beings in society has disclosed can also be arrived at with the aid of reason:

> The same is also collected by reason out of the definitions themselves, of Will, Good, Honour, Profitable. For when we voluntarily contract Society we look after the object of the Will, i.e. that, which every one of those who gather together, propounds to himselfe for good; now whatsoever seemes good, is pleasant, and relates either to the senses, or the mind, but all the mindes pleasure is either Glory, (or to have a good opinion of ones selfe) or refers to Glory in the end; the rest are sensuall, or conducting to sensuality, which may be all comprehended under the word Conveniences. All Society therefore is either for Gain or for Glory; (i.e.) not so much for love of our Fellowes, as for love of our Selves... (*OC* 43)

These observations make clear that, in the opening section of *OC*, Hobbes is explicitly seeking to render absurd Grotius' characterization of essentially social nature of human kind. When seen through Hobbesian lenses, society is simply a collection of individuals who, out of self-love, use each other, social institutions and rules of conduct strategically to maximize their gain or glory.

In Chapter 17 of *Leviathan*, Hobbes returns to the fundamental question of sociableness in the context of why is it possible to discern that some animals "live sociably one with another" and "therefore some man may perhaps desire to know why Man-kind cannot do the same."[1] Hobbes gives six reasons why some animals are able to

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[1] All citations in this passage are from *Leviathan* 119-20. Unless otherwise indicated, from now on all references are to this book and only the page numbers are given in parenthesis in the text.

live by nature in seemingly social conditions and why men cannot do so without some overpowering authority over them. First, human beings are by nature constantly competing for "Honour and Dignity" and this competition leads of necessity to an unequal hierarchy among individuals which in turn causes "Envy and Hatred, and finally Warre." Second, among animals "Common good differeth not from the Private; and being by their nature enclined to their private, they procure thereby the common benefit" (119). However, for human beings, private good is necessarily at odds with common good. The primary private good is the seeking of eminence or honour which necessarily is at the cost of someon else's standing in society, since the latter also desire the similar good, eminence and honour. This striving for one's private good, which is honour, causes strife and thus stands in opposition to the common good. The third reason cited by Hobbes is that human beings are the only animals who possesse the faculty of reason. As a result, "there are many, that think themselves wiser, and abler to govern the Publique, better than the rest" which in due course leads to "Distraction and Civill warre." Fourth, because human beings have speech they possess "that art of words, by which some men can represent to others, that which is Good, in the likeness of Evill; and Evill, in the likenesse of Good; and augment, or diminish the apparent greatnesse of Good and Evill; discontenting men, and troubling their Peace at their pleasure." The possession of speech allows for the use of rhetorical techniques to manipulate the moral language and consequently disrupting the peace of societies. Fifth, men are to be feared not when they have been hurt or injured by others, as is the case for other animals, but rather when they live in conditions of peace as "Man is then most troublesome, when he is most at ease: for then it is that he loves to shew his Wisdome, and controule the Actions of them that governe the Common-wealth." And last of all, sociable relations among animals are possible because "the agreement of these creatures is Naturall: that of men is by Covenant only which is Artificiall." From all these reasons, it follows that human beings need an overpowering "Common Power, to keep them in awe, and to direct their actions to the Common Benefit." The only way to erect such a common power is by instituting a commonwealth.

Given this general unfitness of human beings for society, it is hardly surprising that Hobbes ridicules the notion that society could exist before the state. Rather, it is precisely <u>through</u> the state that men are <u>made fit</u> for society. In support of his argument, Hobbes also invites his readers to look more closely at existing societies and asks rhetorically whether anything good can ever come of them –then pronounces the judgment that contention may certainly arise from these social arrangements but good never will. Quite clearly, therefore, in his political theory society could not have value *per se* let alone at times a higher value than self-preservation, as it did for Grotius.

So far Hobbes has argued in the negative. He has challenged and ridiculed the Grotian model of human nature and shown us what human beings are not naturally fit for. Now, he has to flesh out his own view and provide the foundations for a political theory in which society, understood as civil society, plays nonetheless a critical role. After all, it is only if men perform their societal duties that peace can be secured.

2. Human Nature

How does Hobbes characterize human nature? Or, to state it in Hobbes' terms, what qualities or faculties do men have prior to their development of a commonwealth? Unsurprisingly, Hobbes' answer is very different from Grotius'. Not only are human beings not impelled towards society but they do not possess any natural empathy for one another. Grotius' extrinsic intelligent principle is nowhere to be found. Similarly they are not in possession of reason, that is, they are incapable of rational thought, a capacity that is acquired through education and hard work. Nor do they have a faculty of discrimination that equips them to be moral agents outside of civil society. Rather, prior to society human beings merely have "Sense, and Thoughts and the Trayne of thoughts" (23). The other capacities that are observable in human beings are acquired as a result of invention of speech, education and hard work.

Hobbes begins his account of human nature, or that which is natural to man, by explicating the concept of thought. Thought is the "*Representation*" produced by objects outside of us as they effect our "Senses." Thought is that motion which is effected by the outside world onto our senses. All thought, even when it is not immediately effected by the objects outside of us, is simply derivative of thoughts that have been so produced. However, the qualities that we see, hear, smell or feel in objects are not to be mistaken for properties possessed by these objects, or that which inheres in them. Rather, these are the products of the different motions of matter on our senses. With this account, Hobbes distances himself from the Aristotelians who taught that objects possessed these qualities we perceive in them, since these qualities were intrinsic properties of the object perceived by the senses (14).

In Hobbes' physics, matter needs an initial cause to get it into motion, but once in motion it moves perpetually unless stopped by some impediment. However, all motion, when it comes to an end, does so only gradually. In the context of thought this motion, once the senses are no longer being effected by external objects, is called imagination or in Hobbes' language "decaying sense." The objects of this decaying sense or imagination is "Memory" and memory of many things is "Experience." Imagination that finds expression through words or other acts is called "Understanding" which, at this stage of

development, is common to animals as well as humans. However, the type of understanding particular to men is the one which is an expression of their will and reason (19), but that is furthered only in civil society.

Having explicated his conception of thought in the singular, Hobbes devotes the third chapter of *Leviathan* to a discussion of "Trayne of Thoughts," i.e., to thought sequences. The pattern of human thought is based on some sequence of objects that affect the senses from the outside world. There is no sequence of thought that has not been previously received by the senses. However, as the objects in the world cohere in complex and different ways it is difficult to be certain of the particular sequence of thoughts.

Train of thought is of two kinds: first, that which is unregulated. By unregulated Hobbes means those thoughts that are not regulated by a governing passion as an end toward which the particular train of thought is directed. The second is regulated train of thought the essential character of which is to be ordered or directed by a governing passion that identifies not only the end but also the set of means necessary to obtain the desired end. This passion or desire possesses great force, strength and tenacity and models the thought of the particular means to obtain the end on previous experiences.

Hobbes further subdivides regulated chain of thought in two subcategories. To the first of these two categories belong thoughts that proceed from a possible effect to the causes or means to the effect, that is, for a possible end we conceive of the means. This kind of thinking is not a human prerogative, animals possess it as well. To the second category of regulated train of thought belong a faculty that is peculiar to human beings: that of discerning all the possible effect of what we conceive. This second faculty, however, is attained only once human beings have developed their rational capacities.

The ability of human beings to predict the effect of certain action on the course of future events is manifested in the virtues of prudence, wisdom and foresight. Prudence is based on the extensiveness of one's experience, i.e., on anticipating future effects of certain actions based on similar situations in the past. The greater the experience one possesses, the greater the ability to predict the course of action that would lead to a given event. Prudence or practical wisdom is by Hobbes reduced to what he calls the "best guesser" (22). Hobbes applies probability reasoning to the guessing of effects of action on future events. The success or failure of such prediction is relative to the number of correlations that have been observed between similar causes and effects. The greater the number of correlations the higher the probability of a prediction's success. However, Hobbes warns, there can be no certainty with regard to such wisdom or knowledge.

As far as natural human beings are concerned, this is all that Hobbes is willing to grant. And the first three chapters of this study make it possible to appreciate the full extent of the difference between this picture of human nature and Grotius' conception. Clearly the minimal capacities of sense, thought and train of thought, as well as the absence of a natural inclination toward social life, are inadequate for forming and sustaining society. Hobbes is then poised to argue that only through the institution of the state the conditions are created which lead to the development of "Speech, and Method," faculties that "may be improved to such a height, as to distinguish men from all other living Creatures," and that make the sustaining of a social order possible (23).

Prior to the institution of a commonwealth, then, there is no society but a state of nature, which is a state of war of each against each. It is Hobbes' description of such condition, in passages such as the following, that has haunted the Western imagination down to the present day:

> In such condition, there is no place for Industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth; no Navigation, nor use of commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short. (89)

3. The State of War

Contemporary scholarship has often dwelled on the fact that Hobbes does not possess a sociological theory for the development of individuals in the state of nature. In other words, Hobbes does not provide an account of what conditions prior to the institution of civil society prepare the individual for the commonwealth and lead to its institution by contract. This gap in the theory has spawned several different interpretations of the concept of state of nature in Hobbes and the function it performs in his system.

Those who take the description of the state of nature literally, and view it as a condition historically prior to the state, criticize Hobbes for working with an understanding of individuals which is conceivable only in the post-state of nature stage. Others who do not take the concept in its literal sense, and emphasize the analytical function it performs in instituting the commonwealth, go on to argue that such a device enabled Hobbes to slice off all that was customary in considerations of human nature in

order to found a commonwealth on purely rational grounds. Still others have argued that the concept of the state of nature was an effective device to remove from consideration the contentious issues in which Aristotelian and the Sceptics were embroiled, and freely construct an alternative, universally acceptable philosophical system grounded on principles of right and natural equity.

While mostly accepting the latter two interpretations, I would like to suggest a slightly different picture of the state of nature and of its function in Hobbes' political philosophy. But let us begin by making clear that the concept of the state of nature is not to be confused with an natural condition or state of affairs that actually existed prior to the institution of commonwealths. Rather, Hobbes uses it both in a metaphorical as well as analytical sense. Metaphorically, it stands for all the conditions that exist before the institution of a Hobbesian commonwealth becomes possible. A Hobbesian commonwealth is one which is grounded on rational foundations in accordance with pure human nature. Analytically, the state of nature can be understood as a conceptual category which provides the source of the rationality and logic of the institution of such a commonwealth. In other words, Hobbes' conception of human nature governs his description of the conditions which obtain in the absence of a commonwealth, and these conditions in turn provide the background against which it is rational and logical to establish the kind of commonwealth Hobbes prescribes.

It must also be noted that the pure human nature referred to above is not a quality possessed by men living in the state of nature but rather a picture of human agency obtained after conceptually stripping it off all the possible effects (positive and negative) of society. Again, this picture of human agency in its purest natural form serves the analytical purpose of sequentially and logically leading towards the Hobbesian state which, in this sense, stands purely on rational foundations.

Hobbes' account is based on the notion that throughout their lives individuals are locked in a competitive contest for power. And the reason for this is not just that men are obsessively driven towards excessive power, but rather that, even when they are happy with their moderate set of goods, they are locked into a logic that inevitably leads to this form of competitiveness:

> So that in the first place, I put for a generall inclination of all mankind, a perpetual and restless desire for Power after power, that ceaseth only in Death. And the cause of this, is not alwayes that a man hopes for a more intensive delight, than he has already attained to; or that he cannot be content with a moderate power: but because he cannot assure the power

> and the means to live well, which he hath present, without the acquisition of more. (70)

Undergirding the above is Hobbes' concept of equality in the natural condition of man. This equality refers to their natural abilities of body and mind. Whatever differences there may be between men in terms of the mental and physical abilities of each individual, they are insignificant in comparison to what human being have in common. Physically, whatever the variations in strength each has the ability to kill the other. And with regard to mental abilities, given equal experience, all men possess equal wisdom (i.e., prudence though not science which is acquired by training) (87).

Because of this physical and mental equality, the same ends seem to be within the grasp of each of them, and it is the realistic possibility of attaining these ends that locks men into conflict with one another. The competition and conflict for the same ends makes it right and rational that they anticipate and preempt the moves of the others. This constitutes – to put it in modern terminology – rationally strategic conflictual interaction among agents. This makes reasonable the acquisition of as much power as is necessary in order to secure oneself and one's material possessions from others. Even though some men may be satisfied with modest acquisitions, in the end these individuals as well have no choice but to acquire excessive power in a situation where they are always vulnerable to those who have aggressive and expansive inclinations: "And by consequence, such augmentation of dominion over men, being necessary to a mans conservation, it ought to be allowed him" (88).

Moreover, apart from competition and strategic interaction there is a third reason for conflict among men and that is the desire to be held in awe by others (i.e., what Hobbes calls "Glory"). This is obtained by destroying those men that are already held in awe by others. In summary, the first reason for conflict is acquisition, the second, security and the third, reputation. Accordingly, outside of the commonwealth men live in a constant state of war:

> Hereby it is manifest, that during the time men live without a common Power to keep them all in awe, they are in that condition which is called Warre; and such a warre, as is of every man, against every man. For WARRE, consisteth not in Battell onely, or the act of fighting; but in a tract of time, wherein the Will to contend by Battell is sufficiently known: ... So the nature of War, consisteth not in actual fighting; but in the known disposition thereto, during all the time there is no assurance to the contrary. All other time is PEACE. (88-89)

As we have seen, Hobbes paints a disturbingly graphic picture of this pre-commonwealth state of affairs. However, Hobbes is quite explicit that such state of affairs has never existed in a general way, and that as a general condition it is indeed a hypothetical construct which serves to elucidate his theory. However, Hobbes also claims that there are actual situations which provide proof of the fact that, given human nature and in the absence of the awesome power of the commonwealth, this state of affairs can in fact exist. As an example, he refers to the situation that in Hobbes' view prevailed among Amerindians in the seventeenth century. More convincing in our eyes is the second example Hobbes provides, namely, the conditions witnessed by Europeans during the religious civil wars of sixteenth and seventeenth centuries. And lastly, he points to the nature of relations among sovereign state which do not have an overarching power over them. The Amerindians were supposed to live outside of states and as a result to lack industry, culture, laws, knowledge etc., i.e., the wherewithal of civilization as defined by Europeans. The same conditions prevailed in the time of civil wars of which Hobbes' audience had direct experience. As to sovereign states, they are locked in a constant state of war, though in this last instance this state of war is mitigated by the fact that the bigger and better organized states are able to mobilize the immense power of an instituted commonwealth to secure citizens and industry, thus creating the possibility of prosperity:

> It may preadventure be thought, there was never such a time, nor condition of warre as this; and I believe it was never generally so, over all the world: but there are many places, where they live so now. For the savage people in many places of *Americu*, except the government of small families, the concord whereof dependeth on natural lust, have no government at all; and live at this day in that brutish manner, as I said before. Howsoever, it may be perceived what manner of life there would be where there were no common Power to feare; by the manner of life, which men that have formerly lived under a peaceful government, use to degenerate into, in a civill Warre....
>
> But though there had never been any time, wherein particular men were in a condition of warre one against another; yet in all times, Kings, and Persons of Soveraigne authority, because of their Independency, are in continuall jealousies, and in the state and posture of Gladiators; having their weapons pointing, and their eyes fixed on one another; that is their Forts Garrisons, and Guns upon the Frontiers of their Kingdomes; and continuall spyes upon their neighbours, which is a posture of War. But

> because they uphold thereby, the Industry of their Subjects; there does not follow from it, that misery which accompanies the Liberty of particular men. (89-90)

In the passage that immediately follows the citation, Hobbes distances himself sharply from Grotius: in the state of nature, which is a war of all against all, there is no such thing as justice or injustice. Grotius' complex theory of justice irrespective of whether people live in states or not has no purchase in Hobbes' account. For the latter justice is simply the keeping of contracts which no individual is obliged to do in the state of nature, due to the fear that others may not keep theirs. This fear can be rationally put aside only in civil society where the keeping of promises is enforced by the power of the sovereign. It also follows from this account that in the natural condition there is no private property.

And yet, these terrible conditions paradoxically contain the seed of their own overcoming since they ultimately lead individuals towards civil society. Hobbes employs here a form of reasoning that was to become pivotal for Kant and Adam Smith in the eighteenth century, that of unsocial sociability:

> To this warre of every man against every man, this also is consequent; that nothing can be Unjust. The notions of Right and Wrong, Justice and Injustice have there no place. Where there is no common Power, there is no Law: where no Law, no Injustice. Force and Fraud, are in warre the two Cardinall vertues. Justice, and Injustice are none of the Faculties neither of the Body, nor of the Mind. If they were, they might be in a man that were alone in the world, as well as his Senses, and Passions. They are Qualities, that relate to men in Society, not in Solitude. It is consequent also to the same condition, that there be no Propriety, no Dominion, no *Mine* and *Thine* distinct; but onely that to every mans, that he can get; and for so long, as he can keep it. And thus much for the ill condition, which man by meer Nature is actually placed in; though with a possibility to come out of it, consisting partly in the passions, partly in his Reason. (90)

The passions that move men to peace are fear of death and the desire of living comfortably through their industry.[1] However, it is reason that dictates the way out of

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[1] We should note that Grotius as well had included fear of death and desire for comfort among the reasons which move men from a life in the state of nature to civil society. However, in Grotius' account, the state of nature was exemplified by a life of simplicity, which was brought to an end by the emergence of disparities in knowledge,

the state of nature. By reason Hobbes means that process which "suggesteth convenient Articles of Peace"(90). In other words, the capacity that leads to an understanding of the laws of nature or the duties of society. Ultimately, men are compelled by the internal logic of the state of nature to seek a way out of it and form civil society – and to do so in spite of their natural unfitness for social life.

Let us now retrace step by step the structure of Hobbes' argument. The first premise is, as we have seen, that all human beings are equal in the state of nature. This equality stems from the fact that they are all physically capable of killing one another and second that basic intellectual skills are common to all. The intellectual differences that are discernible between individuals in society are produced in society, that is, due to varying forms of education and discipline. Hobbes' second premise is that human beings in the state of nature have an equal right to all things given by nature. In the state of nature, therefore, there is no private right of ownership. One individual could with right claim what another could with equal right defend. This physical equality and equal right to all things, Hobbes claims, leads to a situation whereby it is rational to seek as much dominion over others as is possible. This constant seeking of power over others is rational because this is the only means whereby human beings in the state of nature can secure their self-preservation. Hobbes' argument that human beings in the state of nature are constantly in pursuit of power should not be taken to mean that this desire for ever increasing power is a natural drive. Hobbes' human being is for the most part rather diffident and circumspect in his demeanour but since there are some men who due to their particular temperament seek dominion over others, all human beings are driven to acquire as much power as possible in order to secure themselves from others. This constant pursuit of power necessarily results in a state of war of all against all. This is the necessary dynamic of the state of nature.

However, this war of all against all in the end negates the very purpose of the pursuit of power since it makes self-preservation virtually impossible. This is he awful predicament of human beings in state of nature, and it is to break out of this predicament that they eventually come up with a rational plan put an end to the state of nature. This rational plan is the setting up of the Leviathan:

> The finall Cause, End, or Designe of men (who naturally love Liberty, and Dominion over others,) in the introduction of that restraint upon themselves,(in which wee see them live in Common-wealth,) is the

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material disparities, competition and conflict, as well as the desire for a more refined mode of life.

> foresight of their preservation, and of a more contented life thereby; that is to say, of getting themselves out from the miserable condition of Warre, which is necessarily consequent (as hath been shewn) to the naturall Passions of men, when there is no visible Power to keep them in awe, and tye them by feare of punishment to the performance of their Covenants, and observance of those Lawes of Nature set down in the fourteenth and fifteenth Chapters. (117)

4. Improvements in Human Capacities

The later chapters in Part 1 of *Leviathan* demonstrate that considerable 'improvement' does takes place in the individual prior to the institution of the commonwealth. The first of these improvements, and the one the provides the foundations for all the other, is speech which is not fully possessed by the natural man but initially and minimally taught by God to Adam. This minimal language is gradually expanded and diversified through use, experience and need by people all over the world. In the whole history of mankind speech is "the most noble and profitable invention" (24).

In its most general form the function of speech is to register our "Mentall Discourse, into Verbal" (25). Hobbes' understanding of language is strictly representational and instrumental; it makes possible the recording of our thoughts and also communication between human beings. In the first case they function as "Markes" of our thoughts and in the second as "Signes":

> The generall use of Speech, is to transferre our Mentall Discourse, into Verbal; or the Trayne of our Thoughts, into a Trayne of Words; and that for two commodities; whereof one is, the Registring of the Consequences of our Thoughts; which being apt to slip out of our memory, and put us to a new labour, may again be recalled, by such words as they are marked by. So that the first use of names, is to serve for *Markes*, or *Notes* of remembrance. Another is, when many use the same words, to signifie (by their connexion and order,) one to another, what they conceive, or think of each matter; and also what they desire, feare, or have any other passion for. And for this use they are called *Signes*. (25)

Language serves the purpose of constructing our knowledge by imposing names and drawing connection between causally related phenomena. Names are either particulars or universals, and universals vary in their scope of generality. A universal is simply the application of a name "on many things, for their similitude in some quality, or accident."

This then allows us to have knowledge of similar things under similar conditions (e.g. "*Every triangle hath its three angles equall to two right angles*" [27]). The enormous usefulness of such registration of thought in speech is, according to Hobbes, not discerned anywhere more than in the recording of numericals and all that it makes possible.

True and false are also terms that have a function only in language, outside of which there is neither truth nor falsehood; "For *True* and *False* are attributes of Speech, not of things. And where Speech is not, there is neither *Truth* nor *Falsehood*" (27-28). Accordingly, all scientific knowledge must proceed via the method of geometry where reason proceeds upon and after "settling the signification of their words" (28), that is after forming correct definitions. As such anyone who seeks sure truth must proceed very carefully by examining the available definitions, correcting them or making them anew. If definitional errors are not detected they multiply along with the various steps in reasoning (28-29).

Speech is foundational to all other developments in the individual as well as society in so far as it makes knowledge possible. Central and constitutive to Hobbes' conception of knowledge is reason which Hobbes defines as follows:

> Out of all which we may define, (that is to say determine,) what that is, which is meant by this word *Reason*, when we reckon it amongst the Faculties of the mind. For REASON, in this sense, is nothing but *Reckoning* (that is, Adding and Subtracting) of the Consequences of generall names agreed upon, for the *marking* and *signifying* of our thoughts; I say *marking* them, when we reckon by our selves; and *signifying*, when we demonstrate, or approve our reckonings to other men. (32)

Reason as such can never be in error. However, since it is men (lay and experts) who do the reasoning, mistakes may be made in the calculations and thus false conclusions reached. Human fallibility entails the notion that conclusions, whether reached by a single individual (no matter, how much of an expert he may be), or commanding the consensus of a great many people, can never be considered absolutely certain. In order to settle a matter "the parties must by their own accord, set up for right Reason, the Reason of some Arbitrator, or Judge, to whose sentence they will both stand, or their controversie must either come to blowes, or be undecided, for want of a right Reason constituted by Nature; so is it also in all debates of what kind soever" (32-33). This adjudication by an arbitrator is also made necessary because human beings are inclined to take their particular passions for right reason. And in the final analysis, it is

not the community of scientists nor the superiority of a method that decides the issue but the power to which people have agreed to submit, i.e., the Sovereign.

In this passage Hobbes gives us the first hint of the solution he is going to apply in other two important and contentious areas. Not only is a final adjudicator necessary to settle disputes in the contests of knowledge-claims in general but also, specifically, in politics and religion. And in all three the ultimate authority is the covenanted sovereign.

It is important to note that the abilities to reason and obtain truth are also the cause of all the "absurdities," as Hobbes calls them, of which only men among animals are capable. It is the philosophers who have committed most of them because they did not follow the proper (scientific) method: "For there is not one of them that begins his ratiocination from the definitions, or Explications of the names they are to use; which is a method that hath been used onely in Geometry; whose conclusions have thereby been made indisputable" (34).

This characterization of valid (scientific) knowledge clearly implies that the form of reasoning it demands is not an innate and natural ability of man (like sense or decaying sense, that is, memory), nor it is like practical wisdom or prudence which is the product of experience. Rather, it is an ability acquired by means of a great deal of hard work directed at two ends. The first of these ends is obtaining the correct signifiers or words, while the second is the application of the correct method. Together these procedures yield deductively structured scientific knowledge, that is a knowledge based not simply on fact but on causes:

> By this it appears that Reason is not as Sense, and Memory, borne with us; nor gotten by Experience onely, as Prudence is; but attayned by Industry; first in apt imposing of Names; and secondly by getting a good and orderly Method in proceeding from the Elements, which are Names, to Assertions made by connexion of one of them to another, till we come to a knowledge of all the Consequences of names appertaining to the subject in hand; and that is it, men call SCIENCE. And whereas Sense and Memory are but knowledge of Fact, which is a thing past, and irrevocable; *Science* is the knowledge of Consequences, and dependance of one fact upon another: by which, out of that we can presently do, we know how to do something else when we will, or the like, another time: Because when we see how any thing comes about, upon what causes, and by what manner; when the like causes come into our power, we see how to make it produce the like effects. (35-36)

According to this model, children do not possess this form of scientific reason. Children are not in full command of the first prerequisite to acquiring this type of knowledge, namely, language, and further it is only, in due course and with hard work, that the child can learn to apply the method this form of reason requires. Still, insofar as children have the potential for scientific reasoning, they are by Hobbes called "Reasonable Creatures" (36). Most men, however, never go on to acquire scientific reason or knowledge and in their daily activities they are guided by: "their differences of experience, quicknesse of memory, and inclinations to severall ends; but especially according to good and evill fortune, and the errors of one another. For as for *Science*, or certain rules of their actions, they are so farre from it, that they know not what it is" (36).[1]

Hobbes draws a distinction between prudence and science. This distinction is not based on the argument that different subject matters or knowledge-domains demand different forms of reasoning, as in Aristotle. Rather, the difference lies in method of reasoning. Prudence grows out of experience and therefore always has an element of uncertainty, while science, which grows out of the study of causes, is the product of deductive reason, and as such is infallible.[2] Knowledge from experience or prudence can never be demonstratively established because there are far too many empirical possibilities. In the absence of science made possible by deductive reasoning, it is this natural judgment grounded in experience that is a far superior guide for actions than any of the books of philosophers (37).

I have undertaken this rather extended retrieval of Hobbes' description of the intellectual abilities of mankind because it contrasts rather strikingly with Grotius' position. Grotius, we might recall, is content to state that all human beings are naturally born with intellectual faculties and takes it to be an obvious fact that these faculties are furthered by society. He does not find it necessary to elaborate. Also, Grotius relies upon

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[1] See David Johnston. *The Rhetoric of Leviathan: Thomas Hobbes and the Politics of Cultural Transformation.* (Princeton N.J: Princeton UP, 1986). Johnston reads this section out of context to argue that, for Hobbes, there is an absence of reason as such in men, which is acquired with great industry by some of them. Hobbes here is talking of reason in the context of science, and scientific reason is surely possessed only by a few. However, this is not a comment upon reason grounded on fact or experience, i.e., that reason which makes the move towards the commonwealth rational and natural.

[2] Hobbes qualifies this statement by adding that there are two forms of sciences: one that can be demonstratively proved; the other rests on probability which is validated more often than not (*Leviathan* 37).

a whole cluster of knowledge-forms: deductive, inductive, history, even the testimony of poets. Hobbes on the other hand seeks to remove this Grotian heterogeneity and replace it with one valid form of knowledge: the one obtained by applying the universal deductive scientific model of reasoning.

5. Natural Man and Virtue

In describing the faculties of natural man Hobbes has made a distinctions between the chain of thought that is unregulated and that which is regulated. The characteristic of the latter is that it is directed by the force of some passion or desire. He now proceeds to expands on this idea and provides a fuller account of the content of these thought-regulating passions.

All animals have two kinds of motion: vital and voluntary. Vital motions are such as flow of blood, breathing and the like in which our imagination does not play any role. Voluntary motion, on the other hand, is initiated in the first place by our imagination, which itself is decaying sense or motion. The voluntary motion which triggers our various activities Hobbes calls 'Endeavour.' When directed towards something, Endeavour is called 'Appetite' or 'Desire,' when it moves away from something it is called 'Aversion,' and appetites and aversion map on our concepts of love and hate. Apart from a few of them which are born with us, most appetites and aversions are acquired through experience. As we are constantly being effected by motion, it is natural that our likes and dislikes would constantly be changing. This account also entails that it is not plausible for all human beings to have similar preferences or desires for any one of the possible objects of experience.

This discussion of the appetites leads Hobbes to hold that good and evil are terms that simply function as signifiers of that which we desire and what we are averse to. He claims that there is no such thing as a universally valid good or evil. Nor is there a good or evil in the nature of things:

> But whatsoever is the object of any mans Appetite or Desire; that is it, which he for his part calleth *Good*: And the object of his Hate, and Aversion, *Evill*; And of his Contempt, *Vile* and *Inconsiderable*. For these words of Good Evill and Contemptible, are ever used with relation to the person that useth them: There being nothing simply or absolutely so; nor any common Rule of Good and Evill, to be taken from the nature of the objects themselves; but from the person of the man (where there is no Common-wealth;) or, (in a commonwealth,) from the Person that

> representeth it; or from an Arbitrator or Judge, whom men disagreeing shall by consent set up, and make his sentence the rule thereof. (39)

Good and evil are of three kinds:

> So that of Good there be three kinds; Good in the Promise, that is *Pulchrum*; Good in Effect, as the end desired, which is called *Jucundum*, *Delightfull*; and Good as the Means, which is called *Vtile*, *Profitable*; And as many of Evil: For *Evill*, in Promise, is that they call *Turpe*; Evil in Effect, and End, is *Molestum*, *Unpleasant*, *Troublesome*; and Evill in the Means, *Inutile*, *Unprofitable*, *Hurtful*. (40)

Pleasure is simply the "sense of good" and displeasure the "sense of Evill," and all appetites and aversions are accompanied by varying degrees of pleasure and displeasure. These passions have two sources; first, those that are sensed immediately from objects outside of us namely sensual pleasures (or "Payne"). The others are the pleasures ("Joy" and "Griefe") of the mind which is the expectation after deliberation of an anticipated end. These basic passions of *"Appetite*, *Desire*, *Love*, *Aversion*, *Hate*, *Joy*, and *Grief"* (41) have for several reasons diversified and multiplied considerably. Hobbes draws a rather extensive inventory of the passions, his intention being to examine their general causes and provide definitions of them (a task of great importance given that knowledge of causes and correct naming are the pillars of Hobbes' scientific reason). This list contains only acquired (but not unnatural) passions. The passions that we are born with, as he points out, are simply those that are functional to our bodies. The rest of the passions that regulate our thought and action, at least those he lists, are the natural products of experience.

Having set forth an inventory of the acquired natural passions, Hobbes moves on to deliberation. This is the process by which we consider a course of action – that is weighing the consequences (good or evil) of the diverse passions and the means to satisfy them. There are two possible results of deliberation: it either issues in action or the task is considered impossible and abandoned. Accordingly, Hobbes calls deliberation a "Voluntary Act." However, the end of deliberation involves at the same time a loss of "Liberty," i.e., the freedom to make a choice comes to an end when the choice is made and we commit to a course of action. This end of deliberation, whether it issues in action or not, is called by Hobbes "Will." Will is simply the last step in the act of deliberation. It is not to be confused with a human faculty, it is an act. Insofar as animals also possess the ability to deliberate, and since willing is the last act of deliberation, animals too possess a will:

> In Deliberation, the last Appetite, or Aversion, immediately adhaering to the action, or to the omission thereof, is that wee call the WILL; the Act, (not the Faculty,) of *Willing*. And Beasts that have *Deliberation*, must necessarily also have *Will*. The Definition of the *Will*, given commonly by the Schooles, that it is *Rational Appetite*, is not good. For if it were, then could there be no Voluntry Act against Reason. For a *Voluntary Act* is that, which proceedeth from the *Will*, and no other. But if in stead of a Rationall Appetite, we shall say an Appetite resulting from a precedent Deliberation, then the definition is the same that I have given here. *Will* therefore *is the last Appetite in Deliberation*. (37)

Accordingly, not just actions that issue from deliberation of Appetites (ambition etc.) but also those of Aversions (Fear) are *"Voluntary Actions."*

Intellectual virtues for which men are admired are of two kinds: natural and acquired. By the term natural, Hobbes does not mean the virtues human beings are born with, for they are born only with sense, but rather those that are gained through one's experiences. Acquired intellectual virtues are those that result from education and the application of the correct method:

> These *Vertues* are of two sorts; *Naturall*, and *Acquired*. By Naturall, I mean not, that which a man hath from his Birth: for that is nothing else but Sense; wherein men differ so little one from another, and from brute Beasts, as it is not to be reckoned amongst Vertues. But I mean, that *Wit*, which is gotten by Use only, and Experience; without Method, Culture, or Instruction. (50)

These natural intellectual virtues consist of the quickness of the flow of thought. The natural virtue of discerning, that is the ability to sift differences and similarities, is called 'good judgement.' When thoughts are applied, it is the firmness and constancy of the end which steadies the passion. Without this steadying effect the great force of the passions is nothing short of madness. Judgement is a virtue independent of quick thought and only adds to it, while quick thought itself is not an intellectual virtue without judgement.

The differences in intellectual virtues discerned among men is caused by the differences in their passions. And the differences in their passions results to a small extent from the differences in their physical attributes, and by far to the larger extent "from their difference of customes, and education" (53). The passions that are most responsible for these differences in the distribution of intellectual virtues among human beings are "more or lesse Desire of Power, of Riches, of Knowledge, and of Honour. All which may be

reduced to the first, that is Desire of Power. For Riches, Knowledge and Honour are but severall sorts of Power" (53). Conversely, men who have weak passions cannot possess great intellectual virtue.

Power is the means that procures a particular end. It is either "Originall" or "Instrumentall": original powers, also called by Hobbes "Naturall" power, includes the capacities of mind and body; "as extraordinary Strength, Forme, Prudence, Arts, Eloquence, Liberality, Nobility" (62).Though for the most part not innate but acquired through experience, these powers are natural and original for they can be exercised by all human agents. Powers that are instrumental, on the other hand, are those which are external to the self and are the means of acquiring further power (wealth, fortune, good name etc.).

What is it, then, that gives rise to different "Manners" or those actions and qualities that "concern their living together in Peace, and Unity" (69). This is answered by an analysis of the happiness sought by man. Such happiness is neither a "*Finis ultimus*" or "*summum Bonum*," nor is it the suspension of desires (which would involve the senses not being affected by motion, which is impossible at least while the person is alive). Human happiness for Hobbes involves the constant pursuit of desires, as one good leads to another good. And it is not just the possession of any single good but rather the possibility of enjoying what may be called a sure supply of goods in the course of one's life. The conditions necessary for such pursuit are what human beings constantly try to secure for themselves. The goods needed for happiness and the means to obtain them differ according to the various passions or desires of each individual. These differences results from the differences in knowledge and opinions among human beings as to the means to attain the sought-after ends (70).

According to Hobbes the only condition under which the pursuit of desired ends can take place in security is civil society, and, as we shall see, not any civil society but only a particular kind. For the moment we should note that this account of human abilities does not resolve a fundamental tension in Hobbes' theory that can perhaps be expressed in the following questions: how can the human faculties and virtues Hobbes describes be both the conditions precedent and the conditions subsequent to civil society? If human beings cannot understand the benefits of society before they are in it, how can they choose to institute it in the first place? The sharp divide between before and after, between the state of nature and the state of civil society makes it virtually impossible to provide a cogent account of the leap from one to the other, though this is precisely what Hobbes attempts to do in the subsequent section of *Leviathan*.

6. Self-Preservation as an Overriding Good

In the above section, we have canvassed in detail Hobbes' view of human nature and his wholesale rejection of the Grotian account of natural sociableness of human beings. Hobbes argued that, given human nature, the state of nature could only lead to a war of all against all. This war of all against all threatens the greatest good, that is, self-preservation, and this recognition dictates that human beings bring an end to their natural state. It is reason that informs them that this is only possible by instituting a commonwealth with power enough to overawe them all to obedience. However, we have seen that this pseudo-historical narrative contains a serious flaw: reason would have to develop and mature before human beings are able to realize that a commonwealth is the only satisfactory way to put an end to the state of nature, and yet, conversely, reason could only mature and develop in this way within the state of civil society. Hobbes seems to be caught in a chicken and egg paradox.

Hobbes obviously thought he had a solution to this conundrum, a solution which I now propose to explore. But in order to do justice to Hobbes, we must abandon what I have termed the pseudo-historical narrative and follow a new path: the path of deductive rationalism. The first principle on which the whole edifice of Hobbes' political theory rests is self-preservation:

> 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 anything, which in his own Judgement, and Reason, hee shall conceive to be the aptest means thereunto. (91)

The right of nature in Hobbes is the sum of all those actions that secure self-preservation. In the state of nature human beings are ultimately responsible for their own self-preservation and consequently the sole judges of what constitutes their security. Guided by their individual assessment of the situation they may do anything which in their reckoning is conducive to this end:

> And because the condition of Man ... is a condition of Warre of every one against every one; in which case everyone is governed by his own Reason; and there is nothing he can make use of, that may not be a help unto him, in preserving his life against his enemyes; It followeth, that in such a condition, every man has a Right to every thing; even to one anothers body. And therefore, as long as this naturall Right of every man to every thing endureth, there can be no security to any man, (how strong or wise

> soever he be,) of living out the time, which Nature ordinarily alloweth men to live. (91)

Hobbes then argues that, within the state of nature, the untrammeled natural right of self-preservation must necessarily turn upon itself and become the cause of the war of all against all. At this point, the law of nature intervenes to enjoin human beings from doing anything that would hurt their self-preservation and to dictate what must be done in order to preserve themselves: "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 of his life, or taketh away the means of preserving the same; and to omit, that, by which he thinketh it may be best preserved" (91).

Therefore, the laws of nature in the end must function against the right of nature. Unlike Grotius who speaks of the rights or moral powers of men as another way of defining laws, Hobbes understands rights and laws as signifying in the same matter differing and opposing actions. Right is defined not synonymously with law but with liberty which is simply the "absence of externall Impediments" (91). And law is defined as obligating or binding one to a particular action which, mindful of the discussion of "deliberation" and "will" in the previous section, we should recognize as constituting a taking away of liberty:

> 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 forbeare; Whereas LAW, determineth, and bindeth to one of them: so that Law, and Right, differ as much, as Obligation, and Liberty; which in one and the same matter are inconsistent. (91)

This is a crucial difference between Grotius and Hobbes' understanding of a right and significantly alters the language of the modern law of nature as I will show below.

As the law of nature is reason's dictate to do only that which is conducive towards self-preservation, the first "Precept or generall rule of Reason" is "*That everyman, ought to endeavour Peace, as farre as he has hope of obtaining it; and when he cannot obtain it, and when he cannot obtain it, that he may seek, and use, all helps and advantages of Warre.*" (92) From this flows the "first, Fundamentall Law of Nature" which is "to seek Peace, and follow it" (92). It is the right of nature to secure self-preservation at any cost that eventually leads to the first law of nature which dictates as a general rule of reason that one must secure peace. For Hobbes, to treat rights as moral properties which are synonymous with the laws of nature, as Grotius does, is the source of confusion.

The second law of nature is deduced from the first: "*That a man be willing, when others are so too, as farre-forth, as for Peace, and defence of himselfe he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himselfe*" (92).

Since the right of nature leads to war, and since war is the worst possible condition for human self-preservation, it follows that human beings must seek conditions of peace which alone can secure one against others. The first law of nature, therefore, is that all must do everything possible to secure and preserve peace. Moreover, since the cause of the war of all against all is the right to all things that all human beings in state of nature, it is precisely this right that must be limited in order to obtain peace. Furthermore, all men in the state of nature must accept the necessary limit to this right to all things, for if some men do and others do not then the condition of all would not change: peace requires general agreement. Accordingly, the second law of nature is that all men give up or lay down the right to all things that they possess in the state of nature only and in so far as the others are also willing to lay down their rights to all things.

Once this right has been renounced or transferred to another, the obligation arises not to obstruct the beneficiary of this abandonment or transfer. Then, it becomes the individual's "DUTY, not to make voyed that voluntary act of his own: and that such hindrance is INJUSTICE, and INJURY, as being *Sine Jure*" (93).

However, Hobbes admits an exception to this laying down of rights. Given that the primary good is the preservation of life, human beings can never to be understood to be willing to sacrifice themselves for a greater good – for the simple reason that there is no greater good than self-preservation. Accordingly, the only justifiable limit to the divestment of right is that no human being can ever by any sign be understood to renounce this right to self-preservation. For this is the fundamental right of nature to which the rationality of the whole system is anchored. The entire set of duties that men in society must perform in Hobbes' political theory are grounded in this one principle of self-preservation which, as a result, necessarily overrides all other considerations. While in Grotius the rights of society could override this right of self-preservation in some circumstances, in Hobbes the very structure of the argument make the Grotian position untenable as illogical. Human beings, then, are always justified in defending themselves whenever their lives are under threat even after civil society is instituted. As Hobbes puts it, "A Covenant not to defend my selfe from force, by force, is always voyd" (98).

The other laws of nature, or the duties men must perform to preserve peace and so secure themselves, flow logically from the first and second laws of nature. It is for this reason that Chapter 15 of *Leviathan* is absolutely central to Hobbes' argument. If men do

not perform these laws or duties then civil society would dissolve into that state of nature which it is the specific end of civil society to overcome.

Which, then, are these duties? The third law of nature is "*That men performe their Covenants made*" (100). Hobbes defines a duty as the performance of covenants, justice as the performance of duties and conversely injustice as the non-performance of one's duties. It follows that just act is a duty performed when human beings keep their contracts. These definitions of duties and justice are derived from this third law which Hobbes emphasises as the "Fountain and Originall of JUSTICE" (100).

However, Hobbes argues that these concepts of justice and injustice are only applicable once a commonwealth has been instituted, since prior to the institution of the commonwealth there is no coercive power to overawe men to perform their covenants. In the absence of this overawing power there is always the suspicion and fear that others may not perform their covenants. This suspicion and fear that the covenant has been made in less than good faith is sufficient condition for it to be invalid and non-obligating. As long as there is fear that others may not perform their duties as covenanted, nobody can be held to the performance of the duties covenanted. But then, since nobody can be held to the performance of their duties, and since the performance of duties is the definition of justice, there can be no injustice in the state of nature. Hobbes argues that: "Injustice actually there can be none, till the cause of such feare [of parties not keeping their promises] be taken away; which while men are in naturall condition of Warre, cannot be done" (100). This sufficient ground of justified fear or suspicion is only removed once a coercive authority has been erected that can "compell men equally to the performance of their Covenants, by the terrour of some punishment, greater than the benefit they expect by the breach of their Covenant" (101), and Hobbes goes on to reiterate that "the Validity of Covenants begins not but with the Constitution of a Civill Power, sufficient to compell men to keep them" (101).

Once civil authority has been instituted it is rational, both in one's immediate and long-term interests to perform one's duties of society, first because of fear of punishment but more importantly since non-performance would threaten the existence of the state, thereby jeopardizing individual self-preservation. The non-performance of one's duties frees others from the performance of their duties and thus conditions revert back to those of a war of all against all which is of little benefit to anybody. Hobbes can then maintain that the "Keeping of Covenant, is a Rule of Reason, by which we are forbidden to do any thing destructive to our life; and consequently a Law of Nature" (103).

The fourth law of nature is that of "GRATITUDE" and its non-performance is "*ingratitude.*" Hobbes argues that gratitude is the proper duty owed by the one who has

been a recipient of some benefit or free gift towards the benefactor. For if those who perform acts of benevolence towards other men and receive in return only ingratitude: "there will be no beginning of benevolence, or trust; nor consequently of mutuall help; nor of reconciliation of one man to another; and therefore they are to remain still in conditions of *War*, which is contrary to the first and Fundamentall Law of Nature, which commandeth men to *Seek Peace*" (105). It now becomes clear that, for Hobbes, coercive power that both removes fear and compels men to the performance of their duties is a necessary but not sufficient condition for the preservation of society.

The fifth duty or general precept of nature is that men must perform in society for it not to dissolve into the state of nature is that of "COMPLEASANCE" which means "*That every man strive to accommodate himselfe to the rest*"(106). This is the law of sociality. Hobbes argues that there is in "men's aptnesse to Society, a diversity of Nature" (106) by which he means that human beings have varying temperaments and capacities that equip them differently for a life in society. Some have abilities and temperaments that are conducive to the securing and betterment of society, while others possess the opposite or inadequate capacities that harm the interest of society. But in any event, since the preservation of society is a necessary condition for the preservation of individuals, it is necessary that everyone try and adjust as best as one can to the others in society. The metaphor he uses to explain himself is that of stones that are used for constructing a building. Just as in the construction of a building one has to work with stones of different shapes, so also in society there is a great diversity of natures. However, in order to erect a building these uneven stones are cut into appropriate shapes and those that cannot be so fitted are thrown away as not fit for use so also in society: "a man that by asperity of Nature, will strive to retain those things which to himself are superfluous, and to others necessary; and for the stubbornness of his Passions, cannot be corrected is to be left, or cast out of Society, as combersome thereunto" (76). Once again the duty to accommodate themselves to others is grounded in the fundamental law of Nature which commands human beings to seek peace and therefore to maintain the social order which guarantees peace. Those that observe this "Law may be called SOCIABLE" and those that do not "*Stubborn, Insociable, Forward, Intractable*" (106).

The sixth law of nature is that we pardon those that have repented for the offences they have committed. Pardon is nothing other than the granting of peace to those who repent. The seventh law of nature dictates that when in inflicting punishments for a crime one must only look to the future, that is "*the greatnesse of the good to follow*" (106). To inflict punishment simply for revenge without a good in sight is nothing other than vainglory which is a motive contrary to reason. If there is no good in sight,

punishment only "tendeth to the introduction of Warre: which is against the Law of Nature; and is commonly stiled by the name of *Cruelty*" (106-7).

As "all signes of hatred, or contempt, provoke to fight" it is a law of nature that "*no man by deed, word, countenance, or gesture, declare Hatred, or Contempt of another*" (107). Hobbes is keen to point out that men will lay down their lives rather than allow their reputations to be tarnished and, as this opens up the possibility of war, the eighth law of nature forbids unwrranted attacks on the honour of other members of society.

There is a clear connection between this prohibition against manifesting hatred or contempt for others and the ninth law of nature which dictates "*That every man acknowledge other for his Equall by Nature*" (107). This is the precept of nature against Pride. Here Hobbes argues, *contra* Aristotle, that all human beings are born naturally equal, none of them being more worthy than the other. The distinctions that are discerned are the product of civil society and its institutions and not of the law of nature. Hobbes also add a pragmatic dimension to his argument: even if all human beings were not born equal, since each individual believes that she/he is at least equal to others, it is in the interest of peace that all human beings be considered equal. In sum, since the notion of the natural equality of human beings is conducive to peace while the opposite notion is conducive to war, the law of nature commands that the former be adopted.

Deduced from the above is the tenth law or precept of nature against arrogance. By this Hobbes means that no one may retain any rights for oneself that others have given up. No one can arrogate to oneself any right that one does not allow to others, for inequality returns and with it return conditions of war. As Hobbes puts it: "*at the entrance into conditions of Peace, no man require to reserve himselfe any Right, which he is not content should be reserved to every one or the rest*" (107). The difference between pride and arrogance is fairly clear: the former is simply a refusal to acknowledge the natural equality of all human beings, while the latter is the aggressive assertion of one's superiority.

The eleventh law of nature is that of equity, by which Hobbes means that everyone acting in the capacity of a judge must treat all human beings equally. This precept of equity, now translated as the impartial application of the law to all, is what Hobbes calls distributive justice.

The twelfth and thirteenth laws of nature lay down precepts or general rules with regard to what is to be done when property cannot be possessed privately. The fourteenth law is that of primogeniture. And fourteenth to nineteenth are rules or duties regarding mediators, submission to arbitration, why one must not be a judge in a case

where one has reason to be partial and what is the proper role of witnesses in adjudication proceedings.

I have canvassed at some considerable lengths these laws of nature in order to show first of all that they are all deduced from the one fundamental law of nature (i.e., the dictate to seek peace), which is itself derived from the fundamental universal right of nature (i.e., self-preservation). Secondly, it is important to note that Hobbes makes the following strong claim: "Science of them [the laws of nature] is the true and onely Moral Philosophy. For Morall Philosophy is nothing else but the science of what is *Good* and *Evill* in the conversation, and Society of man-kind" (110).

As we have seen, in Hobbes, good and evil are mere names that signify that which is pleasurable or unpleasurable to someone, and these differ among different human beings according to their "different tempers, customes and doctrines" (110). Human beings, therefore, will differ with regard to "what is conformable, or disagreeable to Reason, in the actions of common life" (110). Not only do individuals differ amongst themselves with regard to what is good and evil, but also the same individual may have different and opposing opinions on the same matter at different times – calling evil good and good evil depending upon what is at that moment pleasurable or painful to her/him. According to Hobbes, it is this fluidity with regard to the knowledge of good and evil leads to "Disputes, Controversies and at last War" (111). In the state of nature good and evil stand for no more than each person's appetites or aversions which in due course must lead to a war. Having experienced the horrors of war, human beings realize that:

> Peace is Good and therefore also the way, or means of Peace, which (as I have Shewed before) are *Justice*, *Gratitude*, *Modesty*, *Equity*, *Mercy*, & the rest of the Laws of Nature, are good; that is to say, *Morall Vertues*; and their contrarie *Vices*, Evill. Now the Science of Vertue and Vice, is Morall Philosophie; and therefore the true Doctrine of the Lawes of Nature, is the true Morall Pilosophie. (111)

Hobbes offers us a picture in which one of the tasks and key accomplishments of civil society is to stabilize and de-relativize of the categories of good and evil. It is in this sense that the laws of nature are, for Hobbes, the sum total of moral philosophy: a knowledge of good and evil that is not reducible to individual preferences but stands outside of time and space and has a universal validity. As he says "The Lawes of Nature are Immutable and Eternall; For Injustice, Ingratitude, Arrogance, Pride, Iniquity, Acception of persons, and the rest can never be made lawfull. For it can never be that Warre shall preserve life, and Peace destroy it" (111).

And yet, the key to Hobbes' language of virtue and vice remains rooted in strategic thinking, i.e., in the consideration of whether an action causes war or peace. If a certain action causes war, it cannot be considered moral insofar as war is an enemy of self-preservation. On the other hand, those actions which make peace possible or secure its conditions are always moral. This kind of logic is dictated by the argument that made peace the fundamental precept of nature for it alone best secures individual self-preservation. The laws of nature are, then, the sum of the necessary and sufficient duties citizens must perform towards each other in order to preserve society and concomitantly themselves. This deductive structure of duties, the laws of nature set forth in Chapters 14 and 15 of *Leviathan*, constitutes the heart of a new moral philosophy which, in the last analysis, also provides the basic justification for the Hobbesian model.

This new language of moral philosophy constructed to promote peace and society is posited against that of the ancients. Hobbes argues that, while many of the virtues he has listed as necessary for *socialitas* are also to be found in the moral language of the ancients, the old authorities are wrong in obtaining them through the Aristotelian goal of finding the mean between two extremes:

> But the Writers of Morall Philosphie, though they acknowledge the same Vertues and Vices; Yet not seeing wherein consisted their Goodnesse; nor that they come to be praised, as the means of peaceable, sociable, and comfortable living; place them in a mediocrity of passions: as if not the Cause, but the Degree of daring, made Fortitude; or not the Cause, but the Quantity of a gift, made Liberality. (111)

Virtue , Hobbes insists, is not the mean but rather what causes peace. Looking for virtue in the mean between two extremes is not only conceptually indefensible but has the damaging effect of opening moral philosophy up for paradiastolic manipulation from which arise the conditions of war. One of the reasons why Hobbes constructs this deductive system of causally related virtues is to break out of a language of morals in which vice and virtue are too much in each others neighbourhood.

Hobbes ends his discussion of the laws of nature, and the virtues they entail, by pointing out that they are not binding in the state of nature as there is no supreme power to remove the fear that others may not obey them. And in such a context the "right of nature" gives every man the right to do or forego any action for self-preservation. Accordingly, it is rational that men in the natural state would <u>not</u> perform the duties necessary for the preservation of society for it could in some cases conflict with their right of self-preservation. It is only when a commonwealth is instituted that men are bound by the fundamental law of nature to perform their duties in civil society.

7. Absolute and Indivisible Sovereign Power

The commonwealth is instituted through the transfer/surrender by each and everyone of their natural rights to the sovereign authority. Such transfer makes the sovereign authority not only supreme but also indivisible. Hobbes develops one of the most powerful cases ever made for indivisible sovereign power by arguing that any other form of constitutional arrangement would frequently dissolve into a lawless multitude and threaten the life of all. For Hobbes, supreme and indivisible sovereign authority is the only sure foundation of a lasting commonwealth – and later in the seventeenth century, Samuel Pufendorf would endorse this argument and build on it a thoroughgoing critique of the plurality that we saw in Grotius.

> A *Common-wealth* is said to be *Instituted*, when a *Multitude* of men do Agree, and *Covenant, every one, with every one*, that to whatsoever *Man*, or *Assembly of Men*, shall be given by the major part, the *Right* to *Present* the Person of them all, (that is to say, to be their *Representative*;) every one, as well he that *Voted for it*, as he that *Voted against it*, shall *Authorise* all the Actions and Judgements, of that Man, or Assembly of men, in the same manner, as if they were his own, to the end, to live peaceably amongst themselves, and be protected against other men. (121)

Owing to his view that not a people but only a multitude could be said to exist before the institution of the commonwealth, Hobbes finds himself constrained to collapse two covenants into one. The difficulty may be stated as follows: the parties who covenant with each other to set up a single person or an assembly and institute the Leviathan are supposed to have at the same time brought into play the majority principle, which, as a multitude, they cannot yet rely on since the principle rests on the premise that there is a people whose majority can bind the minority. The difficulty may not be insuperable, but in any event Hobbes does not address it and simply proceeds to claim that the minority that opposes the sovereign so appointed is nevertheless bound by the majority decision.

Once the multitude has entered into the covenant and instituted the sovereign power, the actions and judgments of the sovereign are to be understood as emanating from all, who are now considered the sovereign's subjects. This is of critical importance for Hobbes, as the means to achieve the end of peaceful society. All the powers or rights of the sovereign result from this covenant among the multitude of human beings in the state of nature. Hobbes proceed to enumerate these powers.

First, the subjects are deemed the authors of the sovereign's actions and so cannot without the sovereign's authority and consent return to a multitude, or covenant anew to take away or set up a new sovereign. Once sovereign power is instituted all men are bound to yield to its authority. Subjects cannot change the form of government nor can they re-order power between the people and the possessor(s) of sovereign power. All such acts would be acts of injustice for they would be contrary to the authority of the sovereign which is to say contrary to the subjects' own wishes, as by the institution of the covenant they themselves are the authors of the acts of the sovereign. Further, if anyone is punished or killed attempting such a removal or reordering of power, it is to be assumed that she/he is the author of her/his own punishment or death.

Second, the covenant to institute a sovereign power is made only among the individuals themselves and no covenant is made between the people and the sovereign. As a result the subjects can never be freed from their sovereign on the pretext that the sovereign has broken the covenant. Furthermore, since all injustices and transgressions are premised on the existence of a covenant which has been broken, the absence of a covenant between the sovereign and the subjects means that the former can never commit a transgression or injustice.

These are rather startling claims and Hobbes attempts to cement them by observing that even if the people wanted to make the sovereign sign a contract it would be impossible for them to do it. He gives two reasons: first the sovereign would have to sign individual covenants with each member of the commonwealth to be since, before the institution of the commonwealth, the subjects to be are still a multitude and not a person or people. This is a task bordering on the impossible. However, even if the sovereign did sign a covenant with each individual, all these covenants would become void upon the institution of the commonwealth. For, by so covenanting, all the members of the commonwealth become the authors of the actions of the sovereign and thus all her/his actions are necessarily sanctioned by them irrespective of and superceding any previous covenant – the covenant signed by the sovereign and each individual becomes like a covenant signed by oneself with oneself, i.e., a void covenant since I must be taken to consent to and sanction any possible action I might myself take whether it respects the original covenant with myself or not.

Not content with these arguments, Hobbes uses his usual trump card: in the event that some are successful in claiming that the sovereign had breached the covenant, then matters would revert back to the state of nature, which is precisely what must be avoided at all costs. Also, Hobbes points out that those who insist that sovereign receive power from covenants do not understand that covenants by themselves are simply words and

have no force. A sovereign draws power not from covenants "but what it has from the publique Sword; that is, from the untyed hands of that Man, or Assembly of Men that hath the Soveraignty, and whose actions are avouched by them all, and performed by the strength of them all, in him united" (123).

Having liquidated the notion that the sovereign is bound by the covenant instituting the commonwealth, Hobbes proceeds to claim that once the majority of those who are assembled have consented to transfer their rights to a particular man or assembly, the others who may have dissented must now accept the verdict of the majority and are bound to the commands of the sovereign. Even though an individual may have dissented at the time of instituting the sovereign, once the sovereign power has been instituted the dissenting individual or individuals must acknowledge that they are the authors of the acts and judgments of the sovereign. This is so because someone who has not consented to the institution of the sovereign is still deemed to have "tacitly covenanted" to be bound by the verdict of the majority simply by virtue of having participated in the assembly. And, therefore, no one can defy the authority of the sovereign on the grounds that she or he had not consented to its institution, and anyone who does defy the sovereign on these grounds may justly be destroyed or be left in the condition of war which for Hobbes meant imminent death.

Given that the sovereign can never commit an injustice, the sovereign can never be justly punished or put to death as that would mean holding a person responsible for wrongs he has not committed. Moreover, as the "End of this Institution, is the Peace and Defence of them all" (124), the sovereign has the right to judge what is and is not in its interest and may use all possible means to obtain this end. This right extends both with regard to threats that may originate from within the state as well as from other states. This blanket right makes sovereign power supreme and absolute.

This analysis of the right of the sovereign power, leads Hobbes to consider the main causes of disturbances and threats to peace within a state, and what the sovereign must do to minimize them. Hobbes argues that the actions of human beings are caused by their beliefs and these beliefs result from the various doctrines that human beings espouse. As such, it is a right of the sovereign to censure and regulate the doctrines that are to be published. Accordingly, "it is annexed to the Soveraignty, to be Judge of what Opinions and Doctrines are averse, and what conducing to Peace" (124). Given this line of argumentation, it might seem that, when the imperatives of peace clash with the truth, Hobbes would uphold false doctrine as long as they promoted peace. But this is not how Hobbes saw it; for him the demands of peace and truth could never be at odds for "Doctrine repugnant to Peace can no more be True, than Peace and Concord can be against

the Law of Nature" (125). Where such opposition is to be observed it is only because "in a Common-wealth, where by the negligence, or unskilfullnesse of Governours, and Teachers, false Doctrines are by times generally received; the contrary Truths may be generally offensive" (125). Hobbes allows that sometimes, due to the inaptitude of the rulers, false doctrines are allowed to prevail and the people over time are habituated into accepting them as true. As a result, for example, the laws of nature seems difficult to grasp and to some may even seem offensive. But the fact that errors are sometimes made, does not affect the general validity of the principle that it "belongeth therefore to him that hath the Soveraign Power, to be Judge, or constitute all Judges of Opinions and Doctrines, as a thing necessary to Peace; thereby to prevent Discord and Civill Warre" (125).

The seventh right of the sovereign is the power to lay down all the rules that create and regulate private property. Prior to the institution of the commonwealth, as all men had a right to all things that they needed for self-preservation, there was no place for private property. As we saw earlier, it was precisely this right of all to all things that was the cause of constant war in the state of nature. With the institution of sovereign power this right to all things is for the most part given up or transferred by all subjects. Consequently the sovereign must have the power to lay down the rules that create private property, regulate its use and ensure its protection, so that subjects may secure themselves of the material means and goods of life:

> And this is it that men call *Propriety*. For before the constitution of Soveraign Power (as hath already been shewn) all men had right to all things; which necessarily causes Warre: and therefore this Proprietie, being necessary to Peace, and depending on Soveraign Power, is the Act of that Power, in order to the publique peace. These Rules of Propriety (or *Meum* and *Tumm*) and of *Good*, *Evill*, *Lawfull*, and *Unlawfull* in the actions of Subjects are the Civill Lawes. (125)

From this power to create, regulate and protect private property in order to ensure peace among men is derived the eight power of the sovereign, that of the "Right of Judicature" (125), without which the seventh power loses its force and is made pointless. Thus, the sovereign has the right to adjudicate any controversy that may arise "concerning Law, either Civill, or Naturall, or concerning Fact" (125). If this power were seen to reside elsewhere than in the sovereign, it would be impossible for the sovereign to enforce its laws, particularly when disputes arise that called them into question. And the closing argument is always the same: either the sovereign has this power or "to every man remaineth, from the naturall and necessary appetite of his own conservation, the right of

protecting himselfe by his private strength, which is the condition of Warre; and contrary to the end for which every Common-wealth is instituted" (125).

In describing the fifth right or power of the sovereign authority Hobbes tried to demonstrate that, since the "End of this Institution [of the sovereign] is peace and Defence of them all," the sovereign has the right to all those things that are necessary to secure his subjects from dangers that may arise from within and without the commonwealth. In the list of the sovereign's necessary powers, six, seven and eight deal with those powers necessary to maintain peace within the commonwealth. When we come to the ninth power, however, Hobbes is looking outward, namely to the "Right of making Warre, and Peace with other Nations, and Common-wealths" (126). This right includes all the raising of armies and deciding their size, raising expenditure through taxes, and so on. In all these matters the judgment of the sovereign is absolute. The sovereign is also at all times the supreme commander of the armed forces.

The tenth right of the sovereign is that of appointing all the counsellors, ministers, magistrates and officers necessary to ensure that the common good – that is peace – is secured. Eleventh is the power to reward materially or confer some honour upon those who further the interest of peace, as well as the power to punish those who break the law and so act against the interest of the commonwealth or of peace, which for Hobbes necessarily imply one another.

Last, but not of less importance, is the power of the sovereign to "give titles of Honour; and to appoint what Order of place, and dignity, each man shall hold; and what signes of respect, in publique or private meetings they shall give to one another" (126). Hobbes frequently observes that human beings are inclined to put a great deal of value upon themselves which they want recognized from others, and this necessarily involves recognizing the lesser worth of others. He argues that this is the internal logic of "vain-glory," the desire to achieve a superior hierarchical ranking among men, a desire which necessarily leads to jealousy, disputes, discord and consequently war. In order to stabilize this pursuit of honour and defuse the potential for discord, Hobbes make the sovereign the final authority on matters of honour and dignity. The sovereign decides and the subjects have to accept the decision.

Hobbes concludes this section of *Leviathan* with a statement that leaves no doubt as to the nature of the powers of the sovereign: "These are the Rights, which make the Essence of Sovereignty" (127) they are "essentiall and inseparable"(127). Without these powers or rights a sovereign authority would not secure the ends for which it was instituted: peace and ultimately the self-preservation of its members. Hobbes endeavours to demonstrate how all thirteen rights must be possessed by a single unified body, be that

one person or an assembly. The non-possession of any one of them, he argues, makes the possession of others inadequate: "the holding of all the rest, will produce no effect, in the conservation of Peace and Justice, the end for which all Common-wealths are instituted" (127). For example, if the sovereign transferred his power the control of the militia and retained the power of judicature, the power of enforcing the laws may be lost; a transfer of the power to censure doctrines might lead to civil wars as there would be no rigorous control of seditious doctrines; and so on. This is the basis for Hobbes' argument that divided sovereignty leads directly to civil wars and not to peace. He cites the civil wars in England as the ultimate proof of his arguments "*a Kingdome divided in it selfe cannot stand*" (127).

Hobbes is of course quite aware that he is treading on very dangerous grounds and proceeds to counter two possible arguments that may be brought against him. The first argument is that under such a form of absolutism the "Conditions of Subjects is very miserable" (128), given that the people have no recourse to the possible abuses by those who possess such unlimited and absolute power. His answer, similar to the one given by Grotius, is that "the estate of Man can never be without some incommodity or other" (128), and that the worst possible kind of harm that can be done to a people in any form of government is "scarce sensible, in respect of the miseries, and horrible calamities, that accompany a Civill Warre; or the dissolute condition of masterlesse men, without subjection to Lawes, and coercive Power to tye their hands from rapine, and revenge" (128). The second argument Hobbes puts forward in this context (and to which he later devotes a whole chapter) is that it is in the interest of those who hold sovereign power not to hurt or abuse their subjects. In fact it is in the interest of the sovereign to do just the opposite, i.e., to do all that is necessary for the health of the subjects since in the subjects' "whole vigor, consisteth their own [the rulers'] strength and glory" (128-29). This line of reasoning proceeds from Hobbes' argument that *inter se* commonwealths are in a condition analogous to that of men in the state of nature. Accordingly, as the security or preservation of each commonwealth or sovereign can only be assured through its own strength, it is necessary and rational, that is, in the interest of the sovereign, to ensure that the state is healthy and strong in all respects. From this Hobbes reasons that a sovereign is most likely to establish and enforce laws not for immediate private profit or lust but out of consideration for the long-term interest of the commonwealth of the sovereign which is its head. This means that these laws would be beneficial rather than injurious to its individual subjects.

The second argument that Hobbes seeks to counter is that in recorded history subjects have never renounced so much power to the sovereign. By custom, human beings

have never lived under such an extreme form of absolutism. Hobbes phrases the question as follows: "The greatest objection is that of the Practice; when men ask, where, and when, such Power has by Subjects been acknowledged" (145). His first rejoinder is to ask his critics to show him a "Kingdome long free from Sedition and Civill Warre" and if such state has existed it is because the "Subjects never did dispute of the Sovereign Power" (145). As to his main reply to those who point to the absence of any customary or conventional political arrangement that would endorse his arguments for the necessity of this extreme form of absolute sovereign power, it is worthwhile to quote it in full:

> But howsoever, an argument from the Practice of men, that have not sifted to the bottom, and with exact reason weighed the causes , and nature of Commonwealths, and suffer daily those miseries, that proceed from the ignorance thereof, is invalid. For though in all places of the world, men should lay the foundation of their houses on the sand, it could not thence be inferred, that so it ought to be. The skill of making, and maintaining Common-wealths, consistheth in certain Rules, as doth Arithmetique and Geometry; not (as Tennis-play) on practice onely: which Rules,neither poor men have the leisure, nor men that have had the leisure, have hitherto had the curiosity, or the method to find out. (145)

8. Two Languages of the Law of Nature: Hobbes and Grotius

Before we take up the question of how the Hobbesian laws of nature differ from those described by Grotius, it is necessary to make clear exactly how Hobbes uses certain key concepts and how Hobbes' usage differs from Grotius', since it is precisely this difference that lies at the heart of their different construal of the law of nature, and of the function it performs in political theory.

Briefly to recapitulate, for Hobbes the "Right of Nature" is that "Liberty" each man has in the state of nature, in accordance with their individual assessment of the situation, to use whatever means possible to ensure their self-preservation. Each person, relying primarily on his "Judgement, and Reason," has the right or liberty to any means whatsoever to ensure her/his self-preservation:

> 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 anything, which in his own Judgement, and Reason, hee shall conceive to be the aptest means thereunto. (91)

By right Hobbes does not mean, as Grotius did, a moral property of the self but referred simply to the unimpeded motion of man. The concept of right in Hobbes is more accurately defined as 'liberty.' And liberty is defined by Hobbes as:

> By LIBERTY, is understood, according to the proper signification of the word, the absence of externall Impediments: which Impediments, may oft take away part of a mans power to do what hee would; but cannot hinder him from using the power left him, according as his judgement, and reason shall dictate to him. (91)

The law of nature is a "Precept, or a generall Rule" of reason, which forbids us to do that which is harmful to one's life:

> 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 of his life, or taketh away the means of preserving the same; and to omit, that, by which he thinketh it may be best preserved. (91)

Hobbes carefully draws the distinction between a right and a law. In Grotius, on the other hand, right inheres in the subject as its property, a moral power, and is not only synonymous with law but in part its very foundations. In Hobbes, right is simply the liberty to do or not to do, while law signifies the opposite, that which determines and binds.

The difference between right and law corresponds to that of liberty and obligation. Right and law are opposites and therefore to speak of them as though they refer to the same is to fall into a contradiction or what Hobbes calls senselessness or non-sense.

> 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 forbeare; whereas LAW, determineth, and bindeth to one of them: so that Law, and Right, differ as much, as Obligation, and Liberty; which in one and the same matter are inconsistent. (91)

This is made even clearer in the context of civil society, probably with reference to Grotius:

> I find the words *Lex Civilis*, and *Jus Civile*, that is to say, *Law* and *Right Civil*, promiscuously used for the same thing, even in the most Authors; which nevertheless ought not to be so. For *Right* is *Liberty*, namely that liberty which the Civil law leaves us: but *Civill law* is an *Obligation*; and takes from us the Liberty which the Law of Nature gave us. Nature gave a Right to every man to secure himselfe by his own strength, and to invade a

> suspected neighbour, by way of prevention: but the Civill Law takes away that Liberty, in all cases where the protection of the law may be safely stayd for. Insomuch as *Lex* and *Jus*, are as different as *Obligation* and *Liberty*. (200)

It is this 'natural' right, conjoined with the fact that we are dependent upon our individual judgement and reason to assess how best to secure ourselves, that creates the terrible consequences of living in the state of nature.

By drawing attention to the very different function of right in Hobbes and Grotius, I am pointing to an aspect that has been neglected by contemporary scholarship. I am thinking in particular of the work by Richard Tuck, the leading scholar who has provided a ground-braking reconstruction of the modern language of the law of nature by knitting together the arguments of Grotius and Hobbes in a single narrative aimed at overcoming the sceptics (see, "The Modern Theory of Natural Law"). Tuck's reconstruction may be correct, if we do a Grotian translation of Hobbes and a Hobbesian translation of Grotius. But this approach does not take into full account that fact that the social nature of man is foundational to Grotius' discussion of right. There are two absolutely central concepts in Grotius' account. First, human beings have an impelling desire for society, and not for just any society, but one that is peaceful and ordered around the primacy of the common good. Second, human beings possess (a) a disposition to do good, which is grounded in an extrinsic intelligent principle, (b) a faculty of speech, which is an instrument of reason, and (c) a faculty of discrimination between right and wrong.

Moreover, while Tuck does note that Grotius subjectivizes of rights, he does not view this move as conferring on human agency a foundational character in relation to law properly so called. This blindspot, then, allows Tuck to present Grotius' first two laws/rights of nature as a response to the sceptical crisis. However, on these minimal terms the sceptical challenge is not met. Even if all could agree with this minimal base for ethics (self-preservation and its means), the uncertainty of all knowledge based on perception would make it impossible to be certain as to what constituted a threat to self-preservation. And this again has the consequence of leading to insecurity among human beings and ultimately to a return to the state of war. And so it is Hobbes, according to Tuck, who takes the final step in resolving the crisis created by the sceptics. He takes Grotius two laws as his foundation but goes on to institute a sovereign who would be the ultimate adjudicator in what counted as a threat to one's preservation. In order to argue this, however, Tuck reads into Hobbes a Grotian conception of 'right' and sees Hobbes as building on it. As we have seen above, the right of nature to self-preservation and the

means thereof, is neither a 'moral right' nor a 'law of nature,' as it was for Grotius. It is simply the liberty that we have in nature to preserve ourselves using any means whatsoever.

Rather, Hobbes' conception of right could not have been more contrary to that of Grotius. The right of nature, instead of being foundational to an ethic on which all could agree (even assuming it did that in Grotius), is what causes the state of war. In the state of nature each individual uses her/his judgment to secure her/himself. Each individual's judgment regarding her/his security, whatever it may be, is as valid as that of any other. Moreover, as in the ultimate analysis human beings can count on no one but themselves, they are allowed whatever means that they deem appropriate. As we saw argued above, this leads inexorably to the war of all against all, with all its concomitant effects. And it is 'right' that is liberty of action that is constitutive of this condition.

It is obvious that the law of nature in Grotius and Hobbes rests upon very different first principles. While both have the concepts of the natural right to self-preservation and its means, the use that each makes of these concepts is quite different. For Grotius, this right constitutes the first principles of the law of nature and is one of the foundations of law; in Hobbes this right is the necessary mechanism of unsociability among human beings that logically moves us towards the first principles (peace and alienation of right) and civil society.

The giving up of this natural right, according to Hobbes, is essential in order to bring an end to the condition of war and everyone must give up this right in proportion to the amount given up by others:

> For as long as every man holdeth this Right, of doing anything he liketh; so long are all men in the condition of Warre. But if other men will not lay down their Right, as well as he; then there is no Reason for any one, to devest himselfe of his: For that were to expose himselfe to Prey, (which no man is bound to) rather than to dispose himselfe to Peace. (92)

The principle on the basis of which this law of nature is to be operationalized is "*Whatsoever you require that others should do to you, that do ye to them*" (92).

The next question is, what does it mean 'to give up' this natural right? It is obviously not an object and, as we have seen above, it is not a moral power that can be transferred by contract. By giving up this natural right, Hobbes simply means, that each puts restriction on his own natural liberty/right. This restriction on one's right amounts to allowing the others the liberty/right that is left over after they have laid similar restrictions on themselves:

> To *lay downe* a mans *Right* to any thing, is to *devest* himselfe of the *Liberty*, of hindring another of the benefit of his own Right to the same. For he that renounceth, or passeth away his Right, giveth not to any other man a Right which he had not before; because there is nothing to which every man had not Right by Nature: but only standeth out of his way, that he may enjoy his own originall Right, without hindrance from him; not without hindrance from another. So that the effect which redoundeth to one man, by another mans defect of Right, is but so much diminution of impediments to the use of his own Right originall. (92)

This right is given up in two ways: either by renouncing it in general or by transferring it to somebody in particular. By transfer Hobbes means that it benefits some individual or assembly of individuals – though he is not very clear on this and perhaps for good reasons, since the discussion of transferring a liberty is rather awkward. Once the right is given up the person is obligated not to put any impediments in the way of the benefits that accrue to the other after its voluntary renunciation or transfer. In other words, it is that person's "Duty" not to act in opposition (with regard to the means as well as the ends) to his voluntary act of renouncing or giving up his natural right. One of the interesting aspect of Hobbes' theory is how far this duty goes, particularly in comparison to the much more nuanced and prudent understanding of Grotius.

It is now possible to note the differences and commonalities with Grotius' concept of justice. For Hobbes, in the final analysis, justice is that which makes self-preservation possible. Thus justice dictates that covenants once made must not be broken and on this basis a set of necessary (though not sufficient) conditions for mutual trust are established. These conditions are fully operationalized (and made sufficient), only when the sovereign is instituted. The sceptic is held in check only to the extent that his instrumentalist account of justice is countered by a strategic account directed at securing what is to the advantage of the individual in the long run. While the Aristotelian division and Stoic language of justice is taken into consideration, terms are redescribed to fit this account.

Grotius operated with a quite different and more complex understanding of justice grounded in the social nature of human agency and his three definitions of law. Justice exists before the institution of the state, and provides the legitimate grounds of the state. Further, while strategic and functionalist accounts of justice are given a place in Grotius' work, his concept of justice is not exhausted by it. There are higher goods that those secured by instrumentalist considerations, and those other stand over and above self-interest.

The seventeenth-century theorist who will confront most rigorously and seek to arbitrate between these opposing views of justice according to the law of nature, is Samuel Pufendorf. His work will be the subject of the next two chapters in this study.

Chapter 5

Samuel Pufendorf, Part I

Introduction

The last of the thinkers this study will consider is the German philosopher, jurist, historian and statesman Samuel Pufendorf.[1] He was acclaimed by his contemporaries, as well as by thinkers well into the next century, as the greatest philosopher of seventeenth and eighteenth centuries. Unfortunately, in the twentieth century he is remembered only by those who still study the first principles of international law, and even then he is considered merely someone who followed in Grotius' footsteps.

Pufendorf's contributions were so many and of such immense importance that it is only possible to skim the surface within the context of this dissertation. However, I do provide a list of Pufendorf's publication in chronological order so that the reader will have an idea of the scope of his studies and of the areas in which he made his most incisive interventions.

1. Pufendorf's Intellectual Landmarks

Samuel Pufendorf was born in 1632 in the village of Dorchemnitz-bei-Thalheim, in the Erzgebirge region of Saxony. In 1650, he entered the University of Leipzig in order to study Lutheran theology, but later shifted his interest to the humanities, natural science and jurisprudence. He spent six years at Leipzig and finished a work on ancient constitutions and the origin of states. In 1656 he entered the university of Jena where he began a master's degree. He studied natural law and moral philosophy under the tutorship of Erhard Weigel (1625-99) and like another famous student, Leibniz, he was to be greatly influenced by Weigel's deductive method.

In the mid 1600s, a scholar's employment opportunities were rather bleak in German principalities, which were still recovering from to the devastations of the Thirty

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[1] Biographical information is derived from: Walter Simons, "Introduction", in Samuel Pufendorf, *On the Law of Nature and of Nations in Eight Books* (hereafter, *LN&N*), 2: 11a-62a; James Tully, "Editor's introduction", Samuel Pufendorf, *On the Duty of Man and Citizen According to Natural Law* (hereafter *ODM*), ed. James Tully, trans. Michael Silverthorne (Cambridge: Cambridge UP, 1991) xiv-xxxvii.

Years War. Accordingly, in 1658, after graduation Pufendorf found a job as a tutor in the family of Peter Julius Coyet, Sweden's minister in Copenhagen, Denmark. His employment was cut short when war broke out between Sweden and Denmark and he was imprisoned along with the Coyet family.

During his eight months of captivity he wrote his first work on the law of nature, *Elements of Universal Jurisprudence*. This was published at The Hague in 1660. In 1659, along with the Coyet family, Pufendorf moved to Holland. Here he was recommended to Elector Palatine Karl Ludwig by Hugo Grotius' son Peter de Groot. He dedicated this first work on the law of nature to Karl Ludwig who in 1661 rewarded him with an associate professorship in the law of nature and of nations at the university of Heidelberg. In 1663 he wrote *On the History of Philip of Macedon*. In 1664 he published at Heidelberg the very controversial *On the Constitution of the German Empire*, which was banned in German universities as well as by the Pope. In this work, he tried to analyze the conditions in Europe, and Germany, in particular after the Thirty Years War and the establishment of a new order. The book was published under the pseudonym Severinus de Monzambano – allegedly a noble man from Verona who had taken upon himself to instruct his brother Laelius.

In 1670 Pufendorf accepted the offer made in 1667 by the King of Sweden Charles XI (1660-97) to a full professorship at the University of Lund in the law of nature and nations. It is while in Lund that he publishes his magnum opus *On the Law of Nature and Nations* in 1672 and dedicated it to king Charles XI in gratitude for the benefits conferred upon him by the Swedish sovereign. In 1673 he publishes *On the Duty of Man and Citizen according to Natural Law* – his compendium to the larger work. In order to respond to his critics Pufendorf published in 1675 a book entitled *Select Scholarly Essays*. In 1677, as a further response to his critics and to clarify his position, Pufendorf wrote *A Sample of Controversies*, which was not published until 1686.

In 1677 war between Denmark and Sweden forced once again Pufendorf to change his residence. When Lund fell to Danish forces, he moved to Stockholm. As secretary of state and official historian of Charles XI, he was now close to the centre of power. In 1679 he published his first major contribution to the religious controversies *A Historical and Political Description of the Spiritual Monarchy of Rome*.

Between 1682-86 Pufendorf moved away from the study of the law of nature became interested in the reason of state tradition. It is in this area of jurisprudence that he published his monumental *Introduction to the History of the Principal Realms and States as they currently exist in Europe*. In 1687 Pufendorf published *On the Nature of Religion in Relation to Civil Life* which contains his theoretical considerations on the relationship

between the church and the state. In 1688 he moved to Berlin to the court of Frederick William I (1640-1688) and served as the official court historian and as adviser to the Prussian sovereign and later to his son Frederick William III (1688-1713). In Berlin he started work on the histories of these two kings and wrote the *Law of Covenants, or On the Consensus and Dissensus Among Protestants*, published in 1695. In 1694 he was forced to return to Sweden in order to publish his historical work on Charles XI. There he was conferred a Barony by the king. On his way back to Prussia, in a fate startlingly similar to that of René Descartes, Pufendorf fell ill and died on 26 October 1694.

2. Sociality and Political Philosophy.

In the preface to the first edition of *LN&N*, Pufendorf states that the first compilation of the universal laws of nature and nations was carried out by Roman lawyers. However, this compilation had mixed with it a treatment of those laws which properly belong to particular positive law (Grotius had made similar comments with regard to Roman law). According to Pufendorf, the first person who correctly distinguished the law of nature from positive and divine volitional law was Hugo Grotius. He writes that Grotius was without doubt the first builder of a comprehensive law of nature and nations. Moreover, Pufendorf claims that it was Grotius who was responsible for focusing the attention of his generation on the study of the law of nature grounded in the social nature of man. Further praise comes for Grotius from Pufendorf when he states rather sweepingly that Grotius had covered the subject matter so thoroughly that he left little for others to contribute.

However, this praise notwithstanding, Pufendorf asserts that Grotius "entirely omitted not a few matters, some he has accorded but a passing touch, and introduced some matters, which prove that after all even he was only a man". (*LN&N* v-vi). Their intellectual kindredness was seen by their contemporaries to be so close that many called Pufendorf Grotius' "son." It is clear from his entire oeuvre, that Pufendorf saw himself as sharing and pushing forward Grotius' project. It is quite right to claim, as Tuck has, that Grotius gave Europeans a 'modern' language of the law of nature, but, as I have argued in previous chapters, Grotius' modernity did not lie so much in the articulation of minimal subjectivized rights, but rather in a rich notion of sociality which replaced Thomistic premises. The question for us then is: did Pufendorf really pick up the baton Grotius held or did he rather move in the quite different direction which, as we have seen in the previous chapter, was Hobbes' contribution?

In fact, Pufendorf explicitly addresses this issue by stating that the next significant contributor to the tradition of the law of nature grounded in sociality is none other than

Thomas Hobbes. He praises Hobbes for his unique grasp of human nature and his deep understanding of the mechanisms governing civil society. Those who are most critical of Hobbes, Pufendorf claims, are also the one's who understand him the least.

Throughout the text of *LN&N* Pufendorf is either contesting, appropriating or building on the arguments of Grotius and Hobbes. These two philosophers were the most important contributors to European thinking about the law of nature and as such Pufendorf wove his arguments within these inherited frameworks:

> But I have felt it fitting also to point out that I have made the basis of all natural law the social life of man, because I have found no other principle, which all men could be brought to admit, without violation of their natural condition, and with due respect to whatever belief they might hold on matters of religion. (*LN&N* ix)

In a manner similar to Grotius, Pufendorf points to the social nature of man as his foundations and starting point of the law of nature. Indeed in the passage immediately following the citation, Pufendorf sounds even more like Grotius:

> For the nature of man has ever been determined by God for social life in general, but it was left to the choice of men to establish and enter particular societies under the guidance of reason, which fact does in no way make the law of nature arbitrary. What, furthermore is more obvious than this? that the nature of man, in so far as it was made by the Creator a social one, is the norm and foundation of that law which must be followed in any society, whether it be universal or particular. (*LN&N* ix-x)

To Pufendorf it is inconceivable that anything other than relations among men in society could provide the foundation for ethical and political conduct.

In order to articulate his system of the law of nature and understand them unambiguously Pufendorf begins by first defining some of the key terms that he uses and the natural conditions men find themselves in. These he analyses in Book I of *LN&N* and as they inform his entire project they provide an excellent starting point for an analysis of Pufendorf's thought.

Following Aristotle, Pufendorf holds that it is the essential qualities in things that distinguish them from each other. Our physical world and actions are differentiated in accordance with what inheres in them by nature or imposition. The essential feature of man apart from particular physical attributes is his intelligence. The faculty of intelligence is described by Pufendorf as: "the distinctive light of intelligence, by the aid of which he can understand things more accurately, compare them with one another, judge the unknown by the known, and decide how things agree among themselves" (*LN&N* 1: 1.2).

This innate faculty of intelligence allows human beings to deliberate and order their actions accordingly. It follows from this that, unlike other animals, human beings are freed from the stimulus-response mechanism – there is no built in necessity dictating their actions. This also allows human beings to discover, invent and make various instruments that may be to their and society's advantage. Further, this intellect allows human beings to form concepts that class together a variety of phenomena on the basis of certain 'attributes' that they possess. More specifically, these attributes demarcate moral from immoral or amoral action and thus are a necessary tool for the will in undertaking morally correct action. In other words, by differentiating classes of actions on the basis of distinct attributes, these concepts (and the capacity to form them) make possible the moral order evident in the life of men. Attributes (sometimes referred as modes and qualities) are also called "Moral Entities" by Pufendorf and act as standards in accordance with which human beings regulate their morals and actions:

> We seem able, accordingly, to define moral ideas most conveniently as certain modes [qualities], added to physical things or motions, by intelligent beings, primarily to direct and temper the freedom of the voluntary acts of man, and thereby to secure a certain orderliness and decorum in civilized life. (*LN&N* 1: 1.3)

Some of the moral entities are in the "nature of things" for the Creator could not have wanted men to live in any other way than morally. However, most of the moral entities are imposed upon actions and things later by men in accordance with what is functional or pleasing. After discussing how modes can exist in the nature of things, Pufendorf adds:

> Moral Entities also are of the same kind. You may justly call the Great and Good God their maker, who surely did not will that men should spend their lives like beasts without civilization and moral law, but that their life and actions should be tempered by a fixed mode of conduct, which was impossible without moral entities.
>
> Nevertheless, the majority of them have been superadded later at the pleasure of men themselves, according as they felt that the introduction of them would help to develop the life of man and reduce it to order. (*LN&N* 1: 1.3)

From the above it is evident that Pufendorf cannot easily be labeled a moral non-realist, as all commentators on Pufendorf (Knud Haakonssen is a possible exception) would like us to believe. He clearly states that some moral entities are in the "nature of things," though most are superadded by men. Perhaps some scholars have been misled by

Pufendorf's use of the word "imposition" as it applies to moral terms. According to Pufendorf, the word used for physical entities is creation, while for moral entities the appropriate word is imposition for this type of entities are imposed on substances. This imposition is made not just by man but by all intelligent entities, and included in the intelligent entities is god. This is made clear in the following passage:

> Now as the original way of producing physical entities is creation, so the way in which moral entities are produced can scarcely be better expressed than by the word *imposition*. For they do not arise out of the intrinsic nature of the physical properties of things, but they are superadded, at the will of intelligent entities, to things already existent and physically complete, and to their natural effects, and, indeed, come into existence only by the determination of their authors.... Also the efficacy of moral entities instituted by God flows from the fact, that, as man's creator, He has the right to set certain limits to the liberty of will which He has designed to vouchsafe man, and to turn that will when reluctant, by the threat of some evil to whatever He wishes. Nay, even men themselves have been able to give a force to their own inventions, by threatening some evil that lay within their power, on him who refused to conform to their dictates. (*LN&N* 1: 1.4)

As these moral entities have been instituted by god and humans in order to bring order in the lives of mankind, they must be standardized so that by using them as a yardstick in their relations with one another individuals can correctly determine their actions and attitudes.

Physically analogous to moral entities are moral persons. These could be a single man or a body of men as long as a moral bond unites them. A simple moral person is an individual human being and a composite moral person comes into being when several individuals join together in such manner that they are considered to possess one will. This can happen only when numerous individuals who join together agree to subordinate their will to one person or council so that whatever that person or council wills must be considered the will of all. The composite bodies that produce a moral person are not fashioned without the expectation of some moral end, that is, their end is some real benefits that accrue to all of the individual forming such a union.

Moral entities have qualities that are either formal or operative. Formal qualities are simply titles that designate some distinction or other. Operative qualities are further divided into two active and passive. The active operative qualities are power, right and obligation. Pufendorf describes power as follows:

> *Power* is that by which a man is able to do something legally and with a moral effect. This effect is that an obligation is laid upon another to perform some task, or to admit as valid some of his actions, or not to hinder them, or that he shall be able to confer upon another a power of action or possession, which the latter did not formerly possess.... On the side of its efficacy, power is divided into *perfect* and *imperfect*. The former is that which can be exercised by force against those who unlawfully endeavour to oppose it... In the case of the latter, if anyone be prohibited unlawfully from its exercise, he is being treated inhumanely, indeed, and yet he has no right to defend it either by legal action or by war, unless it so happen that necessity has supplied what it lacks in efficacy. (*LN&N* 1: 1.19)

Power can be further divided in two, personal and communicable. Personal power is that which cannot be transferred, this is the power of man over his wife, or of the sovereign so constituted by the will of the people. Other powers can be transferred.

Lastly, power over objects is divided into four categories; power over persons or things; whether they are one's own or another's. The power over one's own person and action is designated liberty. Liberty cannot be understood to be distinct from the person who possess for it is the "faculty to dispose of himself and his actions in accordance with his desires; which faculty of itself involves a negation of any hindrance arising from a superior power." The power over things is termed ownership; power over other men is command; power over other men's possessions is called "easement."[1]

Turning his attention to 'right,' Pufendorf correctly observes that it is a rather ambiguous concept. As noted earlier, Grotius uses rights as if they were faculties of the self, moral qualities that inhere in the self. Also Grotius used them interchangeably with law. Hobbes, on the other hand, considered such uses of right and law unacceptable, as in his understanding they involve a contradiction. Hobbes had classed right with liberty, that is, unimpeded motion. Pufendorf, in a manner similar to Hobbes, does not accept Grotius' definition of law as a set of rights, or as a moral quality, but, unlike Hobbes, he does not also reduce it to unimpeded motion. Given the importance of this concept I will quote the relevant passage in full:

> The word 'right' (*ius*) is highly ambiguous. For in addition to the meanings where it is used for law, and for a body of or system of homogeneous

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[1] For all the definitions in this paragraph see *LN&N* 1: 1.4.

> laws, as well as for the decision rendered by a judge, it very frequently happens that it is taken as a moral quality by which we legally either command persons, or possess things, or by virtue of which something is owed us. The difference, however, seems to exist between the words power and right, namely, that the former tends more to introduce into things or persons the actual presence of the quality mentioned, and less expressly connotes the mode by which one has secured it. Right, however, directly and clearly indicates that a thing has been lawfully acquired and is lawfully now retained. Because, however, most kinds of power have a distinguishing name, which that quality, whereby something is understood to be owed us, lacks, it is convenient to designate this quality in a special way by the word 'right,' although we have not seen fit to avoid the other meanings of this word, because of customary usage. (*LN&N* 1: 1.20)

Here, 'right' is understood to be the specifying or differentiating quality of power. Accordingly, it is the moral quality of power that gives to things and actions their particular character – moral, amoral or immoral. To put it differently, unlike Grotius who understands right as both a system of laws and the moral qualities that inhere in the self, Pufendorf considers 'right' to have a moral quality not in and of it self but as a result of its relation with the moral qualities of the faculty of power.

Moral entities, therefore, owe their origin to imposition and it is to this fact that they owe their stability as well as variations. Just as they were imposed so they can be removed. This theory of "imposition" in no way commits Pufendorf to some kind of ethical hesitancy. On the contrary, Pufendorf openly disagrees with Aristotle's view that moral science cannot have the certainty that is found in the natural sciences. He divides this question into theoretical and practical. In the latter he agrees with Aristotle that in one's actions regarding private and public affairs a great deal is prudential and susceptible to error. However, in the realm of moral knowledge it is possible to have certain knowledge:

> Now that knowledge, which considers what is upright and what base in human actions, the principle portion of which we have undertaken to present, rests entirely upon grounds so secure, that from it can be deduced genuine demonstrations which are capable of producing a solid science. (*LN&N* 1: 2.4)

Hobbes too had claimed, against the rhetoricians, that certainty in moral sciences was possible. However, Pufendorf refuses to accept Hobbes' argument for such a claim. He restates what he takes to be Hobbes' claims: certainty in moral sciences is possible (a)

because the principles of justice and injustice can be demonstrated *a priori*; and (b) because human beings make these principles themselves (i.e., prior to this time there is neither any justice or injustice).

In response to Hobbes' claims, Pufendorf states, there are some things that are upright and base without imposition (i.e., inherently) and this is the character of universal natural laws. However, morality cannot exist independent of law. To those who claim that the use of reason itself is sufficient to determine a moral quality to an act, Pufendorf replies that that is impossible. Reason, when not guided by a sense of what is lawful, is simply expedient action and cannot judge what is moral or immoral.

Pufendorf cautions that this argument about reason only applies in relation to morality. Reason can discern what is enjoined and has good and useful effect on mankind and that which is forbidden as producing the opposite effect – that is the law of nature. However, this natural sense of what is good and what is evil is not sufficient to constitute the field of morality.

A science of morality is the demonstration of those principles whereby an act is moral if it corresponds to a law. And the uncertainty that attends moral actions does not come from uncertainty in moral matters –"But that any grounds for doubt come from the uncertainty of moral matters, we emphatically deny" (*LN&N* 1: 2.9).

3. The Human Faculties and Morality

This power of the intellect whereby men can critically examine, deliberate and arrive at judgments is the faculty of understanding. This faculty has two qualities with which it brings about voluntary acts. The first, represents a thing to the will, making it possible for the will to accept or reject it. The second quality is that of deliberation: this is the ability to give reasons *via* a critical examination and then make a judgment as to what is to be done (including a determination of the necessary means). Accordingly, all voluntary action must, at least initially, spring from one's understanding. The first of these faculties is in the nature of things, man has no liberty with regard to it. It is the second faculty that is within the power of man, that is, the phenomena apprehended by the first faculty is then deliberated upon and judgment made on the desired course.

In the realm of apprehension of phenomena law does not enter, given that for a matter to be lawful or not man must be free to exercise his will. It is the second quality of the faculty of understanding that makes law possible. For here a man deliberates, makes a judgment and accordingly directs his will. It, therefore, stands to reason that all men possess adequate understanding so as to live in accordance with law:

> Hence, if we do not wish to destroy all morality in actions, we must at any hazard maintain that the understanding of man is by nature sound, and that upon sufficient inquiry it apprehends clearly, and as they actually are, the matters which present themselves to it. And further, that the practical judgment, at least as concerns the general precepts of natural law, cannot be so corrupted that it may not be held responsible for any evil actions that come from it, on the ground that they proceeded from an insuperable error or ignorance. (*LN&N* 1: 3.3)

Accordingly, as in Grotius and Hobbes, Pufendorf's premises his law of nature on the conviction that all human beings possess adequate rational abilities to comprehend at least the principles of the law of nature and to discern whether or not they accord with their own social and rational nature:

> And here we hold, that no man of mature years, and possessed of reason, is too dull to comprehend at least the general precepts of natural law, especially those which are most commonly kept by society and observe to what extent they accord with the rational and social nature of man. (*LN&N* 1: 3.3)

Even in those instances where men have been utterly corrupted by perverse customs they still possess the rational abilities to know the law of nature. For, to know the general precepts of nature, to know what accords with man's rational and social nature, one does not require great intellectual resources, just the use of that reason that is naturally granted to all.

Pufendorf writes that, in order that man be governed by laws, god planted in him an "internal director." This internal director in man is called the will. After the faculty of understanding has done its job, the will moves the body towards the end discerned by one's judgment:

> Since the most wise Creator wished to make man an animal to be governed by laws, He implanted in his soul a will, as an internal director of his actions, so that after objects were proposed and understood, he might be able to move himself to them by an intrinsic principle apart from any physical necessity, and be able to choose what seemed to him the most fitting; as well as turn from those which did not seem agreeable to him. (*LN&N* 1: 4.1)

Freedom, then, is that quality of the will that, given the necessary conditions, has the ability to choose one end over the other. This freedom or liberty has a character of indifference. The will is not compelled to act or not to act, rather it chooses to act or not

act for whatever absent end that it chooses to desires. For Pufendorf, Hobbes' view that action immediately follows upon the individual's reasoning regarding the good and evil, that is, pleasure and pain relative to the object, leaves no room for free will, and so must be rejected. Pufendorf considers free will a necessary conditions of human morality. Doing away with it would involve doing away with the entire moral basis of human actions:

> But the chief affection of the will, which seems to rise immediately from its very nature, is that it is not restrained intrinsically to a definite, fixed, and invariable mode of acting, which affection we shall denominate indifference, and that this intrinsic indifference cannot be entirely destroyed by extraneous means. And this must be maintained all the more firmly because upon its removal the morality of human actions is at once entirely destroyed. (*LN&N* 1: 4.3)

Pufendorf adds that there is a general inclination of the will to lean towards that which is good and away from evil, and to this extent the will is not completely indifferent. However, this general inclination does not limit the freedom of the will. Also, it is not just external objects that affect the will, but also qualities of the mind particular to each individual, qualities that impress the consideration of their ends upon the will.

Another feature of the will is that it is influenced greatly by repetitious acts, so much so, that often repeated actions take place without apparent effort on the part of the agent. Repetition builds certain dispositions and abilities which go by the name of habit. And habits, when directed towards good ends are virtues and towards bad acts vices:

> Another thing which also strongly inclines the will to certain acts, is the repetition of the same acts, and the consequent familiarity with them, which causes an action to be undertaken easily and gladly, and the mind to seem, as it were, drawn to the object before it. And inclinations of such sort, when joined with desires and adroitness in action, commonly go under the name of habits, which are called virtues and vices, in so far as they are concerned with good and bad moral acts. (*LN&N* 1: 4.6)

Rather than providing an exhaustive list of virtues and vices, Pufendorf says that those habits which incline individuals towards care of self and society are virtues, while those that are destructive to self and society are vices. Although "vices and evil manners, developed by long habit, seem to be so ingrained in a man's nature" that they may seem to offer an excuse for not being able to live according to the laws of sociality, Pufendorf rejects such excuse as invalid and states that a habit can always be broken, no matter how strong a hold it may have on an individual.

Lastly, Pufendorf notes that the will can be deeply affected by the passions in the mind. Here he points to Grotius, Descartes and Hobbes which he believes have presented an accurate analysis of what havoc passions can wreck when not controlled by reason.

4. Sociality and the Law of Nature

In the preceding section, I have canvassed at some length Pufendorf's account of the human faculties which moral action calls upon. Such account provides the basic conceptual framework for Pufendorf's discussion of the law of nature, to which I'll now turn.

In Chapter 3 of *ODM* Pufendorf asks three pointed questions: "What is the character of natural law? What is its necessity? And in what precepts does it consist in the actual condition of mankind?" (*ODM* 1: 3.1). In line with Grotius and Hobbes, Pufendorf contends that these questions are best answered by a "close scrutiny of the nature and character of man" (*ODM* 1: 3.1). As in Hobbes, Pufendorf starts with the premise that self-love is the most powerful of all human passions. Man is overwhelmingly motivated by considerations of preserving himself:

> In common with all living things which have a sense of themselves, man holds nothing more dear than himself, he studies in every way to preserve himself, he strives to acquire what seems good to him and to repel what seems bad to him. This passion is usually so strong that all other passions give way before it. (*ODM* 1: 3.2.)

But given man's natural physical weaknesses (*imbecillitas*), this self-love and single minded pursuit of self-preservation, has the opposite result. A single individual by her/himself would not be able to survive let alone flourish. Human beings need others to survive and flourish: "all the advantages that attend human life today derive from men's mutual assistance" (*ODM* 1 :3.3). The greatest benefits that human beings receive and which allow for civilized life come from others.

However, this mutual assistance that individuals have the capacity to give each other is balanced by their equally if not greater capacity for inflicting terrible harm on one another: "But this animal which is so mutually helpful suffers from a number of vices and is endowed with a considerable capacity for harm. His vices render dealing with him risky and make great caution necessary to avoid receiving evil from him instead of good" (*ODM* 1: 3.4). These possible dangers are occasioned by an unlimited drive for sexual gratification and material acquisitions, as well as by a multitude of other passions:

> Many other passions and desires are found in the human race unknown to the beasts, as, greed for unnecessary possessions, avarice, desire for glory,

> and of surpassing others, envy, rivalry and intellectual strife. It is indicative that many of the wars by which the human race is broken and bruised are waged for reasons unknown to the beasts. (*ODM* 1: 3.4.)

Human beings also have great abilities to inflict bodily injury on one another by virtue of their technological and strategic capacities (*ODM* 1: 3.5.).

Pufendorf emphasizes the great diversity of minds as a major cause of conflict among individuals. There is a great diversity in the things human beings desire and each assumes that her/his particular desires should have primacy over that of others. Further, human beings do not pursue just one end single-mindedly, instead, they are compelled towards a multiplicity of ends (desires) that are variously combined. To make matters more complicated, the same end at different times can either be an object of desire or repulsion to the same individual. According to Pufendorf, this multiplicity and diversity of desires, if not regulated and controlled, is bound to cause conflict among human beings.

All these aspects of human nature are summed up by Pufendorf in his conclusion on the issue of sociality:

> Man, then, is an animal with an intense concern for his own preservation, needy by himself, incapable of protection without the help of his fellows, and very well fitted for the mutual provision of benefits. Equally, however, he is at the same time malicious, aggressive, easily provoked and as willing as he is able to inflict harm on others. The conclusion is: in order to be safe, it is necessary for him to be sociable; that is to join forces with men like himself and so conduct himself towards them that they are not given even a plausible excuse for harming him, but rather become willing to preserve and promote his advantages (*commoda*). (*ODM* 1: 3.7)

Working with these negative and positive features of human nature, Pufendorf concludes that the surest means of security is to join forces with other individuals and conduct oneself in such a manner as to elicit the goodwill of others. Human beings should make certain that their actions are not perceived as threatening the security of others and that they provide no possible reason for others to feel insecure. However, according to Pufendorf, this negative stance (i.e., not doing anything to cause even a hint of suspicion or fear in others) is not sufficient for security which is assured only when one conducts oneself in such a fashion that others in response will actively promote one's "goods of life."

It is this active or positive promotion of each others goods that constitutes sociality (*socialitas*). The laws or rules that guide these acts by human beings towards each other and which make them into agreeable or suitable members of society are the

laws of nature: "The laws of this sociality (*socialitas*), laws which teach one how to conduct oneself to become a useful (*commudum*) member of human society, are called natural laws" (*ODM* 1: 3.8). Quite obviously, for Pufendorf, the "fundamental natural law" is that "every man ought to do as much as he can to cultivate and preserve sociality" (*ODM* 1: 3.9).

As we have seen, Pufendorf claims that the law of nature can most evidently be discovered by studying the nature and characteristics particular to human agents. He then divides them into four: first, the overriding instinct and passion for self-preservation and prosperity; but the first is made very difficult if not impossible by the second characteristic peculiar to humans, i.e., their natural weaknesses; third, this weakness is overcome by human beings' enormous capacity for conferring mutual benefits; fourthly, this ability to do good is qualified by man's equally enormous capacity for doing harm and inflicting injury. These four features of human nature lead Pufendorf to the conclusion that sociality is necessary to secure individual preservation and the "goods of life." Accordingly, he makes the first and most fundamental law of nature the active promotion of sociality.

The other laws of nature, he contends, can be obtained by simple deduction from this most evident premise. These include all actions, substantive as well as instrumental, that make possible sociality:

> On this basis it is evident that the fundamental law of nature is: every man ought to do as much as he can to cultivate and preserve sociality. Since he who wills the end wills also the means which are indispensable to achieving that end, it follows that all that necessarily and normally makes for sociality is understood to be prescribed by natural law. All that disturbs or violates sociality is understood as forbidden.
>
> The rest of the precepts may be said to be no more than subsumptions under this general law. Their self-evidence is borne in upon us by the natural light which is native to man. (*ODM* 1: 3.9)

But despite their clear usefulness for human survival and other goods of life, the laws of nature derive their force from the fact that God is the ultimate author of the law of nature. This is so because only a superior can give a law its force:

> Though these precepts have a clear utility, they get the force of law only upon the presuppositions that God exists and rules all things by His providence, and that He has enjoined the human race to observe as laws those dictates of reason which He has Himself promulgated by the force of the innate light. (*ODM* 1: 3.10)

This social life constituted by the law of nature and which is made necessary by the above mentioned features of human nature is to be understood as willed and imposed upon men by God.

The various laws of nature are 'natural' not because they are known to inhere in human agents, but because they are most evidently and easily known with the use of reason – a capacity that, according to Pufendorf, is innate to human beings:

> The common phrase that law is known by nature should not be taken, it seems, as implying that there are inherent in men's minds, from the moment of birth, actual, distinct propositions about what is to be done and what avoided. It means partly that law can be explored by the light of reason, and partly that at least the common and important precepts of natural law are so plain and clear that they meet with immediate assent, and become so ingrained in our minds that they can never thereafter be wiped from them, however the impious man may strive wholly to extinguish his sense of them, to lay to rest the stirrings of his conscience. (*ODM* 1: 3.12)

Pufendorf goes on to argue that the illusion that law of nature inheres in us results from being disciplined into civic life from early childhood:

> Since we are imbued with a sense of them from childhood on by the discipline of civil life, and since we cannot remember the time when we first took them in, we think that we had a knowledge of them already in us when we were born. It is the same thing as we all experience with regard to our native tongue. (*ODM* 1: 3.12)

In this instance, principles of ethic do not inhere in us though it is quite easy to see why some make this mistake. What is native to man is the rational faculty. It is this light of reason which allows men to know these principles of natural law so clearly and evidently that they are permanently imprinted in their minds.

5. The Duties of Sociality

Pufendorf divides the duties imposed by the law of nature into three: first are the duties toward god; second, towards oneself; and third, towards other human beings. The duties towards others are those precepts of the law of nature that derive from sociality. The duties toward god imposed by the law of nature are also derived indirectly from sociality. This is so for two reasons: first, as all duties ultimately get their force from god, a man without religion cannot possibly recognize let alone obey the laws of sociality; and second, the operation of reason in religion is limited to those aspects of religion that

"promote the tranquillity and sociality of this life" (*ODM* 1: 3.13). The duties towards oneself are sourced in religion and sociality. Accordingly, men cannot commit suicide because of their duties toward god and others to be "agreeable and useful member of human society" (*ODM* 1: 3.13).

5.1 Duties toward God

The duties towards God that are dictated by natural reason are both theoretical and practical. The first of these duties is to have a correct conception of god, while the second is to accord one's actions to god's will. In common with Grotius and Hobbes, for Pufendorf, natural reason reveals four basic principles that cannot possibly be denied: (a) god exists, (b) god is the creator of the universe, (c) god directs the universe and cares for it, and (d) no imperfect attribute can be ascribed to god.

Like the basic theoretical principles, the practical duties toward god that natural religion prescribes are not particular to any particular confessional sect. Pufendorf divides them into internal and external forms of worship. The most important external form of worship is that of living by precepts that confer the greatest benefit to other men: "to make every effort to observe the laws of nature. For slighting the authority of God is the highest of all insults" (*ODM* 1: 4.7).

Pufendorf stresses that the positive effects of natural religion are felt in this life and do not in anyway contribute towards eternal salvation. However, such effects are so great in this life that "it really is the ultimate and the strongest bond of human society." (*ODM* 1: 4.9) This is seen especially in the state of nature where belief in god is what stands in the way of men otherwise determining questions of right and wrong simply by brute force:

> For in natural liberty, if you do away with the fear of the Deity, as soon as anyone has confidence in his own strength, he will inflict whatever he wishes on those weaker than himself, and treat goodness, shame and good faith as empty words;and will have no further motive to do right than the sense of his own weakness. (*ODM* 1: 4.9)

If natural religion is absent, not only is justice compromised but also the very cohesion of the state is threatened. Removing the fear of god creates conditions whereby those not afraid to die can seek to destroy the security and stability provided by the government (*ODM* 1: 4.9).

Furthermore, as punishment meted out by the legal system relies exclusively upon proof that one's external actions are contrary to law, in the absence of the fear of god's punishment, men will simply try to outsmart the system. In other words, the emphasis

will not be on obeying the law but instead on further refining techniques of subversion. This form of strategic thinking, which seeks to obtain one's interests by outsmarting the system, will itself acquire value for men. In a situation where good faith among individuals cannot be maintained, no one can trust any anyone else's word or action. Each will hold each other in suspicion and fear. Acts of compassion and friendship in such an environment will necessarily be dictated by instrumental considerations of one's self-interest. This will in turn lead to governors distrusting their subjects and vice versa. In such conditions rulers will rule with considerations of their own interest rather than the good of society, which they will begin to see as standing in opposition to one another. Fearing their citizens they would oppress and weaken them so that they will never be strong enough to revolt against them. On the other hand, citizens fearful and suspicious of their rulers will be only too ready to revolt and overthrow their rulers at the first opportunity. According to Pufendorf, it is the fear of god's retribution that makes men (rulers and citizens) accord their actions (duties) to the precepts of the law of nature that confer mutual benefits and security to all (*ODM* 1: 4.9).

5.2 Duties toward Oneself

Despite the fact that human beings are most strongly motivated by concerns regarding themselves, the law of nature lay down certain duties in this sphere. These duties govern conduct toward oneself which cannot be reduced to narrow self-interest. According to Pufendorf, god has given human beings great natural capacities which are to be used for self-preservation and the preservation of society:

> Self-love is planted deep in man; it compels him to have a careful concern for himself and to get all the good he can in every way. In view of this it seems superfluous to invent an obligation of self-love. Yet from another point of view a man surely does have certain obligations to himself. For man is not born for himself alone; the end for which he has been endowed by his Creator with such excellent gifts is that he may celebrate His glory and be a fit member of human society. He is therefore bound so to conduct himself as not to permit the Creator's gifts to perish for lack of use, and to contribute what he can to human society. (*ODM* 1: 5.1)

For Pufendorf the individual is composed of body and soul. The soul has primacy over the body and governs it. And this governing is rightly done by the mind. Human beings must especially take care to shape the mind towards sociality:

> Furthermore, man consists of two parts, soul (*anima*) and body. The soul has function of ruler, the body of servant and instrument; consequently we

> employ the mind (*animus*) for government and the body for service. We must care for both, but particularly for the former. Above all the mind must be formed to accept social life with ease; it must be steeped in a sense and a love of duty and goodness. (*ODM* 1: 5.2)

Therefore human beings must be educated appropriately, in keeping with their status in society. Pufendorf also recommends temperance with regard to one's bodily desires. Emotions or passions must be kept under the control of reason because they can be disruptful of society. The spirit must be strengthened and "unmanliness" rejected so that men possess the courage to face adversity and difficulties in life without fear. Further, as life is given to man by god, the individual does not possess the power to extinguish or shorten his own life. Pufendorf, however, qualifies this by admitting a few exceptions. It is permissible to shorten one's life if that furthers sociality:

> Yet it may be quite correct for a man to choose what will probably shorten his life in order to make his talents more widely available to others; and a certain kind or a certain intensity of labour may so wear out his strength as to hasten the onset of old age and death earlier than if he had lived a gentler life. (*ODM* 1: 5.4)

The other exception to dictate of the law of nature against suicide is that one can put one's life in danger in order to save other people's lives. This act may either be ordered by the sovereign or simply be one's own decision. We can see, then, that while the law of nature dictates the primacy of self-preservation, it does on occasion subordinate it to the larger interest of society.

Pufendorf proceeds to discuss at some length the possible opposition between self-preservation and sociality. While self-preservation is instinctual, as well as a dictate of reason, it can come into conflict with the dictate of sociality. This conflict is evident in the act of self-defence, when the attacker is injured or killed. If the man whose life is threatened is able to defend himself without hurting the attacker, self-defence is obviously not a threat to sociality and therefore clearly permitted by the law of nature.

> But though self-preservation is commended to man by the tenderest instinct and by reason, it often seems to conflict with the precept of sociality. This happens, for example, when our safety is endangered by another man so that we cannot avoid death or serious injury without injuring him in warding him off. We must therefore discuss the use of moderation in defending ourselves against others.
>
> Self-defence, then, occurs either without injury to the party threatening us, when we make sure that an attack on us would be risky or dangerous to

> him, or with injury or death. There is no doubt that the former is legitimate and free of all wrong. (ODM I.5.5.)

However, when the attacker is hurt or killed, self-defence can seem to contradict the principles of sociality:

> But a question may be raised about the latter, because the loss to the human race is equal whether the assailant dies or I do; and because there will in any case be a loss of a fellow man with whom I am obliged to practice social life; and because violent self-defence seems to create more turmoil than if I either take flight or patiently offer my body to the attacker. (*ODM* 1: 5.6)

In spite of these arguments, Pufendorf holds that it is justified to use force and even to kill in an act of self-defence. The natural primary instinct is towards self-love, and yet the individual's natural weaknesses make self-preservation acutely risky and human flourishing impossible in isolation from other men. Self-preservation and the other goods of life are secured by conferring of mutual benefits for which men are ideally equipped. Since the minimal reason for practicing sociality is one's personal security, to remove self-defence from legitimate acts will be to remove the very premise on which sociality is based. Disallowing self-defence would create conditions of deep insecurity and threaten the survival of all members of society and therefore of society itself – i.e., the result would be a situation analogous to the state of nature.

Moreover, the duties that men have towards each other are based on reciprocity of benefits. From this it follows that, if an individual seeks to harm another, she or he forfeits at the same time all considerations of sociality. If those who live their lives according to the dictate of the law of nature are also obligated not to protect themselves when they suffer injury from another, they will always be in fear of those who do not live in accordance with the law of nature.

The third justification Pufendorf provides to legitimate self-defence, even at the cost of the assailant's life, is the functional argument that, if the law of nature prohibited men to defend themselves, the goods of life provided by nature and labour would lose their point, since it would be impossible to enjoy them. These reasons point to the conclusion that self-defence is a 'necessity' and the responsibility for the injury or death falls entirely on the assailant (see *ODM* 1: 5.6).

Nevertheless, violent self-defence that causes injury or death should be one's last recourse. Men should first try other non-violent ways of warding off threats to one's life. Also, a 'prudent' man does not react to injuries that are not significant.

Pufendorf continues his discussion of self-defence by distinguishing between the condition of natural liberty in state of nature and the condition of being subject to civil authority. Not surprisingly, in the state of nature all human beings have a right to kill in defence of life, limb and property (*ODM* 1: 5.8). However, when individuals live under civil government, violence in self-defence is permitted only if there is no recourse to civil authority. With regard to defence of property, violence is permitted only when the good that is endangered is as valuable as life itself. Moreover, vengeance and the seeking of guarantees against further attacks, which are permitted in the state of nature, are to be left to the discretion of the magistrate. (*ODM* 1: 5.9)

In situation of self-defence it is immaterial whether the attack is intentional or not. What is important is the external act that threatens a man's life and not the internal intent or the lack of it. No one has a right to kill anyone and therefore no one is obliged, for any reason whatsoever, to submit without resistance to an attack.

Further, in the state of natural liberty all human beings must assume that others will live in accordance with the law of nature. However, given that human nature is corrupted, individuals must at all times be prepared to defend their security. This they may do by erecting defences, forming armies, stockpiling arms, forming military alliances and setting up good espionage systems. However, no preemptive strikes or conquest of others is permitted under the guise of defensive action.

However, if the other party has given some sign of hostile intention, it is justified to be the first to launch an attack. In this instance, military action is justified and considered as defensive and not offensive. Moreover, if a third party is unjustly threatened by a stronger power who has shown both capability and will towards offensive action, one may be obligated by a treaty to launch the first strike against him even though not directly threatened. In this situation, it is in one's interest to launch a preemptive strike especially if the attack on the other member of the alliance is a means to increase the enemy's capability to attack you.

When subject to civil government, however, self-defence is more narrowly defined. It is only justified to kill or injure "fellow citizen" when the attack cannot be averted by any other means and especially if no juridical recourse is possible. Further, it is not permissible to make a preemptive strike on a possible assailant even if he or she gives evidence of intent and capacity to inflict injury or death. Pufendorf lays down the precise conditions that constitute justified self-defence:

> This is how one may determine the moment when one may first kill another in one's own defence with impunity: when the attacker, making obvious his intention to seek my life and equipped with strength and

> weapons to injure, is already within range to do harm and inflict actual injury, taking into account the distance I need, if I prefer to attack first rather than be attacked. (*ODM* 1: 5.12)

Pufendorf also introduces a pragmatic argument. While the dictate of the law of nature demands that injury or death should be avoided if possible and therefore other less violent strategies should be preferred, the mental turmoil caused by imminent danger often makes it impossible to be too exacting about details. Accordingly, even though other means may be available, it is justified to kill or injure the assailant for self-defence. One is also justified in killing the assailant even though the threat is only to one's limb rather than one's life. However, individuals living in states are normally not allowed to kill for defence of property, the only exception being if there is no recourse to law and therefore no possibility of the goods being returned.

In the context of all these careful qualifications, Pufendorf states that self-preservation has precedent over obligations that may be imposed by the law of the land: "'necessity', it is said, 'knows no laws.'" Still, Pufendorf adds that god and sovereign can impose such an obligation. But then hurries to further quality this by arguing that those who make laws do keep in mind this feature of human nature and accordingly do not normally make such a demand (i.e., that self-preservation be subordinated to other obligations) (see *ODM* 1: 5.18).

The enormous significance Pufendorf places on the importance and power of the drive towards self-preservation is further demonstrated by the way in which he takes up conventional discussions on the matter and concludes that even in the most extreme situations where one's self-preservation necessitates the death of another innocent man one is justified in so averting death (*ODM* 1: 5.20-22).

The last point I would like to examine in relation to the discussion of one's duty to oneself, is what in our jurisprudence is normally called the defence of 'necessity. For Pufendorf, in a situation of extreme need, individuals are justified to take by force whatever is needed in food or clothes from anybody after they have exhausted all other possibilities for obtaining these necessities:

> Anyone who through no fault of his own is in extreme want of food or clothes to protect him against the cold and has not succeeded by begging, buying or offering his services in persuading those who have wealth and abundance to let him have them of their own accord, may take them by force or stealth without committing the crime of theft or robbery, especially if he has the intention of repaying their value when he has the opportunity. For a rich man ought to help someone in that kind of

> necessity as a duty of humanity. Though what is due on the basis of humanity may absolutely not be taken by force in normal circumstances, still extreme necessity has the effect of providing a right to such things no less than to things which are due on the basis of perfect obligation. (*ODM* 1: 5.23)

In his entire discussion on self-defence Pufendorf follows Grotius and Hobbes very closely including the proviso that limits one's right to property when others are in dire need. However, while both Grotius and Hobbes situate their discussion within the juridical language of right, Pufendorf very carefully avoids the term 'right' and situates his entire justification of self-defence outside the language of right (the passage just cited being the only exception).

5.3 Duties toward Others

The duties men have towards other human beings are sourced in the law of nature and in the customs of particular societies. The one sourced in the law of nature are absolute in the sense that they involve all human beings and are absolutely necessary for human preservation.

The first and most important absolute duty is the dictate that one must not harm others (the same as in Grotius):

> First among the absolute duties is the duty not to harm others. This is at once the most far reaching of all duties, extending as it does to all men, and the easiest, since it consists of mere omission of action, except insofar as passions in conflict with reason must sometimes be restrained. It is also the most essential duty, since without it human social life would be utterly impossible. (*ODM* 1: 6.2)

This duty of abstinence from doing harm to another also involves abstaining from that which belongs to others through some human institution or convention. While this latter normally refers to property in objects, Pufendorf expressly states that it is to be taken in a " broad sense as signifying all harm, spoiling, curtailment or removal of what is ours, or usurpation of what we ought by perfect right to have had, whether it was a gift of nature or assigned to us by a supervening human act or law" (*ODM* 1: 6.5.). As we saw above in Grotius, the concept of property, in the 17th century, was far more inclusive in its meaning and uses than the narrowed down version prevailing at present.

A necessary corollary to this absolute duty is that, if harm has been inflicted, it must be made good by compensation. Without this condition, that is the necessity of restitution, the precept of abstaining from that which is another's will be without much

force. Moreover, this necessity of restitution holds even when loss has been inflicted unintentionally and through negligence (*ODM* 1: 6.9).

The second absolute duty is that all men recognize and treat each other as naturally equal. According to Pufendorf, all men have a very high sense of self-worth and are acutely sensitive to any suggestions to the contrary. Their concern with regard to their sense of worth and its recognition by others is as great as their care for their life, limb, liberty, property and other goods for which restitution is necessitated as shown in the first absolute duty:

> Man is an animal which is not only intensely interested in its own preservation but also possesses a native and delicate sense of its own value. To detract from that causes no less alarm than harm to body or goods. In the very name of man a certain dignity is felt to lie, so that the ultimate and most effective rebuttal of insolence and insults from others is "Look, I am not a dog, but a man as well as yourself." Human nature therefore belongs equally to all and no one would or could gladly associate with anyone who does not value him as a man as well as himself and a partner in the same nature. Hence, the second of the duties of every man to every man is held to be: that each man value and treat the other as naturally his equal, or as equally a man. (*ODM* 1: 7.1)

As we saw earlier, Hobbes too had felt the need to recognize this trait and the necessity to consider all human beings naturally equal. For Hobbes the issue was not whether self-esteem was in accord with true worth, but rather how, given the vainglory inherent in human nature, men should conduct themselves with each other so as to minimally disturb the peace and security of the state. His answer had been that the natural equality of all human beings must be acknowledged by all (not because this is necessarily the case – though Hobbes certainly believes it to be so – but on prudential grounds). Pufendorf agrees with Hobbes' view that man's equality is demonstrated by the simple fact that any individual has the ability to kill another – their differences in bodily strength being compensated by other means at their disposal. Pufendorf also argues that the equality of all human beings should be acknowledged because they have the same duties towards each other according to the law of nature:

> This equality among men consists not only in the fact that the physical strength of adult men is nearly equal ... but also in that one must practice the precepts of natural law towards another and one expects the same in return ... [W]hat one may require or expect from others, other things being equal, they should have from him; and any law (*jus*) that a man has made

> for others, it is particularly fitting that he follow himself. For the obligation to cultivate social life with others lies on all men equally; and it is not allowed to one more than any other to violate natural laws where another person is concerned. (*ODM* 1: 7.2)

It follows from this precept of equality within the law of nature that one must be willing to do for others what one expects them to do for one self. In other words, what is in my self-interest is secured and furthered if I am willing to secure the interest of others. If benefits were to flow only in one direction, a relationship of inequality rather equality of obligations would prevail and that would be harmful to sociality. Therefore those who are willing to exchange acts of mutual benefits are ideally fitted for human society. Conversely, those who expect for themselves honour and other goods of life to the exclusion of others are unfit for human society:

> Hence those who readily allow all men what they allow themselves are the best fitted for society. By contrast, they are altogether unsocial who suppose themselves superior to others, demand total licence for themselves alone and claim honour above others and a special share of the world's goods, when they have no special right over others. Hence this too is among the common duties of natural law, that no one require for himself more than he allows others, unless he has acquired some special right to do so, but allow others to enjoy their own right equally with him. (*ODM* 1: 7.3)

This also applies to the distribution of any right among men, since otherwise the one who is denied the right rightly feels that his natural dignity has been diminished. In his discussion on the equal distribution of rights, Pufendorf places a particular emphasis on property. He stresses that property is to be distributed equally among equals. And when the object cannot be so divided, he lays down means by which this equality can be maintained; in the case of plenty the common must be shared by all, limited only by their individual wants; if the common property is limited it should be used equally in proportion to the users; and if this too is not possible they could take turns in using it. In the event that all of the above are not feasible then recourse must be had to drawing lots. This procedure gives all men an equal chance of winning or losing the contested possession and thereby retaining their dignity among fellow men (*ODM* 1: 7.4).

Another type of conduct which contravenes the principle of the equality of all human beings is pride. Accordingly the law of nature dictates that we conduct ourselves without any sense of pride. One should not consider oneself to be superior in any way, unless there are particularly good reasons for this belief. And it is only when someone

acquires through his deeds a right that puts him above others that she or he has good reasons for protecting this right of preeminence. It is a law of nature to conduct oneself with the utmost of humility and to give others due "precedence and honour" when they so deserve. Such a stance of humility is appropriate given the shortcomings of human nature:

> So, from the opposite angle, one is justified in giving another the precedence and honour which are his due. In general a certain honest humility is the constant companion of true good breeding. It consists in reflection on the weakness of our own nature, and on the mistakes we could have made or will make in future, which are no fewer or smaller than others may make. (*ODM* 1: 7.5)

Not only must men conduct themselves without pride and with due humility with others, they must especially make sure that they do not in any way express contempt for others. This is not only because contempt for fellow human beings is obviously a case of treating them unequally, but also because the law of nature forbids it insofar as such an attitude is like to cause social strife. For human beings, according to Pufendorf, any sign of contempt is at the same time a slur against their good name and this is at times even more unacceptable than a physical injury:

> In fact there are many men who would prefer to expose their lives to instant danger, to say nothing of disturbing the public peace, rather than let an insult go unavenged. The reason is that fame and reputation are sullied by insult; and to keep their reputation intact and unsullied is very dear to men's hearts. (*ODM* 1: 7.6)

The third absolute duty to others is a positive one: each and everyone must try and be useful to others, i.e., to each others. For Pufendorf the observance of the two negative duties are not enough for sociality. They must be reinforced by positive duties that promote mutual goodwill:

> The third of the duties owed by every man to every man, to be performed for the sake of common sociality: everyone should be useful to others, so far as he conveniently can. For nature has established a kind of kinship among men. It is not enough not to have harmed, or not to have slighted, others. We must also give, or at least share, such things as will encourage mutual goodwill. (*ODM* 1: 8.1)

These duties which involve conferring mutual benefits are either indirect or direct (Pufendorf calls them indefinite and definite). Indirectly one confers benefits on fellow human beings by developing one's intellectual and physical abilities. Also, by making

discoveries in knowledge that contribute towards improving people's lives: "Someone is being useful to others in an indefinite way when he develops his mind and body to be a source of actions useful to others, or if he makes discoveries by the acuteness of his intellect for the betterment of human life" (*ODM* 1: 8.2).

Accordingly, those who do not acquire any abilities are unfit for human society; just as those who live exclusively from wealth they have inherited, living in idleness through the labour of others; and also men who are wealthy but do not have the magnanimity to share it with others; and finally such people who take from society without giving anything in return (here Pufendorf is referring to monastical orders).

Even if one does not do good deeds oneself, it is one's duty not to hinder efforts by others that are for the good of society. And one must duly praise these efforts. One of the worst acts against sociality is the denial of various goods of life to others which do not in any way involve a loss to oneself:

> It is thought to be a particularly odious act of ill will and inhumanity not to make freely available to others those goods things which we can offer them without loss, labour or trouble to ourselves. Such things are normally recognized as beneficial and harmless; that is, things that help the recipient without burdening the giver. (*ODM* 1: 8.4)

However, the truly exemplary forms of benevolence, through which individuals acquire a good name, occur when benefits are bestowed on others when this does constitute a loss to the donor and does take time and effort. Such acts of benevolence must be made to those who truly are in need of such benefits. In bestowing them, one must be guided by "magnanimity and good sense":

> It is a higher degree of humanity to give something to another freely from extraordinary benevolence, if it involves expense or labour to give it and if it relieves his needs or is exceptionally useful to him. Such services are called benefits in a paradigmatic sense and are the fittest material for winning a reputation if duly governed by magnanimity and good sense. (*ODM* 1: 8.5)

Pufendorf displays a keen sense for the particular circumstances which give the benefits their value. In particular, he focuses on the circumstances surrounding the benefactor and the beneficiary, as well as on the capacity to give and the needfulness of those receiving the benefits. He also places few constraints on the act of conferring benefits. The generous act must not in the end harm the recipient in any way, nor must it be harmful to the benefactor whose capabilities it should not exceed. When giving out benefits, it is important to be sensitive to the dignity of the recipient; his need should be

kept in mind as well as other possible means of assisting him that may be available with or without these benefits. Finally, the manner of giving these benefits is as important as the benefits themselves. They should be given gracefully, at the appropriate time and with a display of goodwill.

On the other hand, the recipient of these generous acts must be grateful. This is the virtue that best expresses appreciation for the gift received and respect for the benefactor. Moreover, the recipient of the gift must be willing to repay in equal measure or more this act of generosity, as and when the opportunity presents itself (*ODM* 1: 8.6).

Pufendorf, like Hobbes sets up a strategic actor rationale for the conferring of mutual benefits. Benefits are mutually exchanged with the expectation that they create for each other mutually beneficial obligations. Otherwise such acts would simply be irrational as they serve no conceivable purpose for the benefactor (ODM 1: 8.7).

Ingratitude is, for Pufendorf, the basest act of all for it removes the basic condition for conferring benefits on others, and with it one of the key elements components that render human society secure:

> Although an ungrateful heart is not an offence in itself, still a name for ingratitude is regarded as baser, more odious and more detestable than a name for injustice. For it is felt to show a thoroughly low and mean spirit to reveal oneself as unworthy of the judgment which another man had made of one's sense of honour; and to let it be seen that one cannot be moved to conceive a sense of humanity by benefits which soften even the beasts. (*ODM* 1: 8.8)

In spite of the importance of this virtue, Pufendorf maintains, as did Grotius, that gratitude cannot be enforced in a court of law. This is so because if it could be so enforced it would no longer count as a virtue – an act of virtue being by definition one that is not enforceable at law. There is no honour in an act when we are compelled to do it through the threat of legal sanctions. This is the great distinction between contractual obligations and those which obtain through acts of benevolence. However, when an act of benevolence is reciprocated by injurious or harmful acts from the recipient of benefits, then the law is appropriately harsher since illegality is conjoined with ingratitude (*ODM* 1: 8.8).

However, living as he was in a century that had experienced a devastation of life and property of great magnitude, Pufendorf was only too aware that everyone will not live in accordance with the duties prescribed by the law of nature and so necessary for human society. While emphasizing that human beings for the most part do perform their natural duties, he goes on to caution that the performance of these duties cannot be

expected to sufficient for the smooth functioning of society. Pufendorf gives some reasons for this: first, all human beings are not so keen on conferring benefits without expecting anything in return; second, individuals may need things which they cannot ask for without feeling a loss of dignity; third, some individuals who due to their high standing is society may not be willing to accept gifts from others; last, individuals may simply not know what is needed and by whom. Accordingly, following Grotius, Pufendorf reinforces voluntary acts of mutual benevolence with binding obligations by mutual agreements. Consequently, all of the duties that the individual must fulfill in society, other than those discussed above, presuppose tacit or explicit agreement:

> It is quite clear that men had to enter into agreements with each other. For although duties of humanity pervade our lives, there is no way that one could derive from that source alone every benefit that men might legitimately expect to receive from each other to their mutual advantage. In the first place, not everyone has such goodness of heart that from sheer humanity he would be willing to give others whatever would do them good without looking for an equal return. Again, benefits we might derive from others are often such that we cannot without a feeling of shame require them to be simply given to us. Often too it is not appropriate to our person or position to be beholden to another for such a kindness, so that just as the other is unable to give, so we are unwilling to accept, unless he takes something equal from us in return. Finally, it happens from time to time that others are simply not aware how they may serve our ends. (*ODM* 1: 9.2)

Agreements put in place a set of rules that make clear and regularize the duties that individuals must perform towards each other in society. This amounts to reinforcing sociality through binding agreement:

> It was therefore necessary for men to make agreements with each other so that the duties which they perform for each other (and this is the advantage of sociality) might be performed more frequently and in accordance with what one might call fixed rules. This is particularly true of the mutual provision of the sort of things which a man could not surely count on getting from others on the basis of the law of humanity alone. Hence a prior determination had to be made as to what one man should do for another and what he should expect in return and might claim in his own right. This is done by means of promises and agreements. (*ODM* 1: 9.2)

The duty or the dictate of law of nature in this sphere is that individuals must keep their promises and abide by the agreements they have entered into. In the absence of this duty human beings will not be able to plan their lives confident in the support from others. The absence of such this confidence in others' commitment to perform their duties leads to conflicts and war, i.e., to the demise of society.

The most important difference between the duties of sociality and the duties imposed by agreements is that the former cannot be enforced in a court of law, while for the latter legal recourse is available. If a benefit is not returned or appropriate gratitude shown, the aggrieved individual cannot force the other to reciprocate through the threat of legal sanctions. However, in the event that someone reneges on an agreement he or she can be forced by the courts to abide by the terms of the agreement. It follows that the right arising from the duties of sociality is an imperfect right inasmuch as it cannot be enforced in court, while the right arising from the duties originating in an agreement is a perfect right inasmuch as it is legally enforceable. The obligations that arise from these duties are correspondingly imperfect or perfect (*ODM* 1: 9.4).

Most importantly, as an agreements place demands on the individual, they have to be mutually and freely consented to (*ODM* 1: 9.8). Consent does not need to be expressed by some sign and can be tacit when the circumstances surrounding the agreement make it obvious. Indeed, even when consent is expressed through a written agreement, there are a number of tacitly accepted conditions which are not explicitly stated (*ODM* 1: 9.9). Pufendorf continues the law of nature tradition of the seventeenth century by maintaining that consent implies the possession of rational faculties. The use of reason is the necessary condition that makes freely given consent binding. However, there are some conditions that can cancel an agreement even though it was freely consented to. For example, an agreement will be void if it is premised upon a mistaken assumption, or if it has been made through deception and fraud; or again when fear has been used by one party to obtain the other's consent to the agreement.

However, as in Grotius and Hobbes, agreements that have been consented to because of fear are valid as long as that fear not has been created by either party and is rather the result of some external cause (*ODM* 1: 9.15.). Also, agreements that are made with those that possess sovereign authority or power, whether through respect or fear, are certainly valid.

6. Human Institutions and Duties

All duties, other than absolute duties and duties related to agreements and promises (which reinforce absolute duties and connect absolute duties to civil duties),

"presuppose either the introduction among men of some human institution which rests upon a general agreement, or some particular human state (*status*)"; and there are primarily three such human institutions: "language-use, ownership of things and their value, and human government" (*ODM* 1: 9.22) The remaining part of this chapter is devoted to an analysis of the first two of these institutions while the third, given its scope and importance, will be discussed in the next and concluding chapter of this study.

6.1 Duties in the Use of Language

For Pufendorf language is a human artifact and, in keeping with Aristotelian thinking, which Grotius and Hobbes adopted in this respect, Pufendorf maintains that the communication made possible by language is constitutive of human society. It is in the context of this contribution to sociality that the duties related to the use of language have to be understood.

The law of nature dictates the duty that there should be no deception in the use of language:

> Everyone knows how useful, how simply necessary, an instrument of human society language (*sermo*) is. Indeed, it has often been argued, on the basis of this faculty alone, that man is intended by nature to live a social life. The legitimate and profitable use of language for human society is based upon this duty prescribed by natural law: no man should deceive another by language or by other signs which have been established to express the sense of his mind (*sensa animi*). (*ODM* 1: 10.1)

Pufendorf also knows that the nature of language is such that confusion can be caused in society through its use even when there is no intent to deceive on anyone's part. The reason for this is simply that words in and of themselves have no natural meaning. Rather the meaning that words have arises from the uses human beings make of them in their diverse and varied social practices. It is only through the use of words that human beings can convey what is in their mind and such meaning is based on conventional and customary usages that obtain in society. This is the reason why human beings understand each other's uses of terms, that is, what such words mean, when they speak or write to one another. In the absence of a shared and customary settled usage of words, all understanding among individuals is at risk. Thus problems arise in society when individuals misuse a term, that is, when they deviate from the customary and conventional usage of the term. When used outside of custom and convention, words lead to unintelligibility, breakdown in communication and misunderstandings among the members of society. As such, according to Pufendorf, tacit agreement obtains among all

language users to use words in accordance with customary and conventional meanings. Further, this tacit agreement binds individual not to impose any private meaning on words. Accordingly, there are two further duties: first, all men must use words in their settled customary and conventional senses. This is to insure that they all share in common the meanings of terms they employ in expressing their thoughts (*ODM* 1: 10.2).

Not only do men have a duty to employ the same word for the same object following settled usage, they also have a duty to express themselves in such a manner that the other person is left in no doubt as to what the speaker wants to say. This duty commanding everyone to make every effort toward undistorted communication arises either by agreement or through some precept of the law of nature. And it is necessary for sociality.

However, human beings do not always have a duty to disclose their minds to others and such a duty only arises if others have obtained a right to know one's thoughts. This right can be both perfect or imperfect – by agreements or through the duties of sociality. It is also permissible, in cases where the truth may hurt or be too painful, to use veiled language, when seeking some good or conferring benefits. In this instance, Pufendorf comes close to saying that it is one's duty to dissemble if it is of service to society.

It is in this context that Pufendorf introduces his understanding of truth in matters of morality. Moral truth is the correct correspondence of words with our thoughts when communicating with others in society. Truthfulness resides in the correct expression of what we are thinking in situations of perfect and imperfect obligation. This ensures that individuals may benefit or prevent possible losses by knowing the intentions of other individuals.

As we can see, Pufendorf's concept of a moral truth is intrinsically situated within his understanding of sociality. Falsehoods or lies are not necessarily the lack of correspondence between thought and words but rather have meaning only in conditions where this lack of correspondence causes the denial of benefits or incurs possible losses to fellow men. That is, the lack of correspondence between thought and words leads to falsehood only in conditions where others have an imperfect or perfect right to expect a correct correspondence between the two (*ODM* 1: 10.8). This is contrasted to logical truth which is understood by Pufendorf to mean the correct correspondence between a word and the object that it stands for:

> From this we may see what truth is, which good men are so strongly approved for loving: it is that our words should fairly represent the sense of our mind to a person who has the right to know it when we have a

> perfect or imperfect obligation to reveal it. And the purpose is that he may derive some benefit due to him from knowing the sense of our mind or that he may not suffer undue loss by being given to understand otherwise. It is also clear from this that we are not always telling a lie when we say, and say deliberately, what does not exactly correspond either with the facts or with our thoughts. Hence what we may call "logical truth", which consists in the congruence of words with things, does not altogether coincide with "moral truth". (*ODM* 1: 10.7)

6.2 Duties Arising from Ownership

The second important human institution is that of property in things. Human beings need various material goods in order preserve themselves and therefore natural that individuals will seek to secure access to those goods. However, the process of acquiring property in things did not emerge at once, but gradually and as a consequence of the various needs human beings develop (*ODM* 1: 12.4). At first all things belonged to all in common, and any distribution of things would be governed by concern for social peace. This arrangement involved not the distribution of land but only of those things that were produced by it. It was assumed that when anything was with an individual, in order to be used or consumed by her or him, it belonged to her or him and nobody else. In due course this arrangement was no longer viable given the increase in population, cultivation and primitive manufacturing (e.g., the making of clothes). In order to reduce the possible occasions of conflict and ensure the orderly social interaction new arrangements emerged. Land was divided among men and a convention was established that all land that had not been so divided would belong to the first occupant. According to Pufendorf, therefore, property or ownership in things was instituted through a form of tacit agreement:

> To avoid conflicts and to institute good order at this stage, they took the step of dividing the actual bodies of things amongst themselves, and each was assigned his proper portion; a convention (*conventio*) was also made that what had been left available to all by this first division of things should henceforth be his who first claimed it for himself. In this way, property in things (*proprietas rerum*) or ownership (*dominium*) was introduced by the will of God, with consent (*consensus*) among men right from the beginning and with at least a tacit agreement (*pactum*). (*ODM* 1: 12.2)

Ownership or property in a thing is to acquire a right in that thing. A right in this case means that a thing belongs to a person to use and dispose as he wills. This right is an

exclusive right in that it excludes the claims of others from the exercise of this power over that object. However, with the institution of civil government, this right is not unlimited; rather it is limited by civil authorities, as well as by agreements between individuals in society:

> Ownership is a right, by which what one may call the substance of a thing belongs to someone in such a way that it does not belong in its entirety to anyone else in the same manner. It follows that we may dispose as we will of things which belong to us as property and bar all others from using them, except in so far as they may acquire a particular right from us by agreement. In states, however, it is normally the case that ownership is not unrestricted in perpetuity for anyone, but is confined within fixed limits by the civil power or by arrangements and agreements of individuals with each other. (*ODM* 1: 12.3)

However, some things were not divided for the reason that they could not be physically partitioned such as air and water. In the event that all men use a thing in the same way, all are supposed to have a common right in the thing.

There are two ways of acquiring property in a thing. One is original and the other derivative. By original is meant that the first person who possesses a thing acquires a right in it. The derivative mode of acquisition occurs when property is obtained through an agreement, i.e., when a person who has a right in it and transfers it to another (*ODM* 1: 12.5).

Once the first division by men had taken place the only way of acquiring a right in land originally was by first occupation of the uninhabited regions of the world. This original mode of acquiring a right was established through a convention. Pufendorf's use of the term convention (*conventio*) consistently means a tacit agreement among men. Though Pufendorf does not make cultivation a criterion for acquiring a right in land, he does conjoin cultivation to convention by means of the concept of occupation (*occupatio*) which involves bringing free land under cultivation and fixing its boundaries with the intent of acquiring a right in it. After human beings had accepted the division of things by ownership, they made a convention that whatever had not entered into the earliest division should go to the occupier, that is to the man who first physically laid hold of it with the intention of holding it for himself. Consequently the only original mode of acquiring ownership today is occupation:

> This is the mode by which unoccupied regions which no one has ever claimed are acquired. They become his who first enters them with the intention of holding them so as to introduce cultivation and establish fixed

> limits for the extent of the territories which he wishes to be his. Where a company of many men jointly occupy some part of the earth, the most usual thing is that some portion is assigned to individual members of the company, and the rest is taken to belong to the whole company. (*ODM* 1: 12.6)

The initial distribution of the products of the land, the subsequent acquisition of property in land itself, and all other relations of property that Pufendorf discusses, are grounded in the overriding need to preserve the social order. In other words, the concern for sociality is essential to Pufendorf's understanding of property. Accordingly, he lays down two primary duties that come along with the right of property in things. The first duty is that of abstinence, that is, the duty each man has to let other men enjoy the fruits of their property without any hindrance of any kind. The second duty is that of restitution. If any goods fall into the hands of another they must be restored to their rightful owner (ODM 1: 13.4-11).

Conclusion

In a manner similar to Grotius and Hobbes, Pufendorf begins his account of the law of nature by analysing human nature. In their natural condition, human beings are powerfully driven by consideration of self-love. However, their natural weaknesses make it impossible to survive without the assistance of other individuals. Also, human beings are exceptionally well equipped and inclined to confer benefits on each other, though, on the other hand, they are equally disposed and capable of harming one another. By means of these observations, Pufendorf arrives at what he calls "the character of natural law" and is able to argue that this law is necessary. He also maintains that simple abstinence from harming others, while necessary, is not sufficient for individual security. Rather it is the active promotion of each other's goods that constitutes *socialitas*. Thus Pufendorf makes the active promotion of sociality the first and most fundamental law of nature. As we saw above, Pufendorf divides the duties that men in all 'states' must perform into three: towards god, oneself, and others. In a manner similar to Grotius and Hobbes, the law of nature also attend to human institutions such as speech, property and the institution of the state. All laws of nature, both absolute and those which are from human institutions, have the force of necessity.

On this account of basic human natures Pufendorf builds his analysis of the laws of nature and of the duties and obligations of human beings both prior and subsequent to the establishment of the sovereign. So far, however, I have focused on those duties that are either inherently natural or related to the interaction of human beings which gradually

evolves toward greater and greater complexity, thus ultimately requiring the establishment of the state. It is to the latter and to the duties that are intrinsically related to the institution of government that this study will now turn. Then the complete trajectory of Pufendorf's language of the law of nature will become clear and with it the crucial differences and similarities between Pufendorf and his two great masters: Grotius and Hobbes. Because of his constant concern for sociality, Pufendorf was perceived to be Grotius' most eminent disciple, the one who integrated Hobbes' insights in the Grotian system. To what extent is this view of Pufendorf correct? That is one of the key questions that will be addressed in the next and final chapter.

Chapter 6

Samuel Pufendorf, Part II

Introduction

The previous chapter laid out Pufendorf's understanding of human nature which provides the basis form which the laws of nature are deduced. I analysed the three absolute duties that must obtain in all states, as well as those attendant to the human institutions of language and property. In this chapter I will concentrate on the necessary duties that arise from the institution of human government, in other words, civil society. However, in order to understand the nature of civil society it will be necessary to understand in precise detail Pufendorf's account of the 'state of nature' and the reason and procedures through which civil society is instituted. I will then go on to lay out some of Pufendorf's arguments for the character possessed by such a civil society.

1. The Natural State of Humanity

The duties of sociality that human beings perform accord with various 'states' that they find themselves in. A 'state' is a condition or circumstance that calls for the performance of particular actions. The point is that the various actions we perform can only be said to be appropriate insofar as they accord with particular states. These states also have their own individual set of laws. Pufendorf divides the states into two: natural and adventitious. The duties particular in the natural state, considered with the help of reason alone, can be had from three perspectives; the duties we have towards God, toward ourselves, and toward others.

> We must next inquire into the duties which fall to man to perform as a result of the different states in which we find him existing in social life. By 'state' (*status*) in general, we mean a condition in which men are understood to be set for the purpose of performing a certain class of actions. Each state also has its own distinctive laws (*jura*). (*ODM* 2: 1.1)
>
> Men's state is either natural or adventitious. Natural state may be considered, in the light of reason alone, in three ways: in relation to God the Creator; or in relation of each individual man to himself; or in relation to other men. (*ODM* 2: 1.2)

Pufendorf provides three perspectives on the natural state. The first is based on a consideration of our duties to god as our creator. This is what we could call an Adamitic state in which the duty of human beings is to acknowledge the creator, worship and stand in awe of him and his creation. Pufendorf, however, immediately distances himself from Hobbes by stating that God intended man to be greatly superior to animals and so live in a fashion utterly different from theirs.

The second perspective on the natural state can be had via the somewhat Hobbesian consideration that, as a result of human vulnerability, the natural state would have been one of utter misery where survival itself would look hardly possible. As all the improvements in mind, body and goods that human beings have attained come from mutual benefits that they confer on each other. The natural state where individuals simply had duties toward themselves alone would be one that stood in opposition to human flourishing:

> the fact that we have been able to grow out of such weakness, the fact that we now enjoy innumerable good things, the fact that we have cultivated our minds and bodies for our own and others' benefit – all this is the result of help from others. In this sense the natural state is opposed to life improved by human industry. (*ODM* 2: 1.4)

The third perspective on the natural state is the one where human beings have the simplest of social relations, i.e., that of kinship. This state is prior to one in which actions or agreements give rise to perfect obligations and individuals are subject to a common superior, i.e., this is still a state is prior to the institution of civil government. From this point of view, we consider the natural state of human kind in terms of the relationship which individuals are understood to have with each other on the basis of the simple common kinship which results from similarity of nature. In this sense human beings can be said to live in a natural state with each other when they have no common master, when no one is subject to another, and when they have no experience either of benefit or of injury from each other (*ODM* 2: 1.5).

Having set out these three different pictures, Pufendorf divides natural state into its fictional and real depictions. As fiction would have it, human beings in the state of nature were solitary creatures scattered all over the earth who governed themselves and in no way depended on each other. However, according to Pufendorf, in reality the natural state was different. Families, in the natural state joined together to form distinct groups. What held these groups together was the fact that they were formed by beings whose nature was human. Accordingly, other than the duties owed to fellow men there were no

duties that gave rise to mutual and perfect obligations. It was a condition, Pufendorf argues, very similar to that existing at present between the nation-states of Europe:

> But the natural state which actually exists shows each man joined with a number of other men in a particular association, though having nothing in common with all the rest except the quality of being human and having no duty to them on any other ground. This is the condition (*status*) that now exists between different states (*civitas*) and between citizens of different countries (*res publica*), and which formerly obtained between heads of separate families. (*ODM* 2: 1.6)

In his own account of the state of nature, Pufendorf weaves elements taken from the three perspectives already mentioned. He begins his narrative from the biblical account but quickly moves away from it. As human beings grew in number they dispersed to various parts of the world in order to secure themselves and their families. Members of these families further dispersed to the point where the only thing common to them were not affections of kinship but indeed simply the nature possessed by all humans. Once human beings recognised the advantages of forming associations with others, their numbers multiplied rapidly. Small associations gave way to the formation of city states and from there they simply progressed to the large states familiar to Europeans. However, between these large states, relations were still conducted in a manner appropriate to the state of affair obtaining when human nature is the only common bond: "Among these states the natural state still certainly exists; their only bond is their common humanity" (*ODM* 2: 1.7).

The laws that are applicable in the state of nature are simply the laws of nature. There is no common superior to whom individuals are subjected. It is in this sense that all human beings in the state of nature are said to be equal. The state of nature is a condition of natural liberty, within which each individual is sovereign and subject to none.

As all human beings are possessed of the rational faculty, they govern their actions with the help of reason. This means that they conduct themselves in natural liberty in accordance with their own reasoning and judgment. All humans have self-preservation as their first care, and accordingly it is rational for them to do everything they can to ensure their own survival. Also, at this stage, they are the final authority on what counts as self-preservation. Most importantly, Pufendorf adds that "it is essential that he conduct his government of himself, if it is to go well, by the dictates of right reason and natural law"(*ODM* 2: 1.8). The three absolute laws of sociality must guide the individual's conduct if one is to secure one's self-preservation. What 'reason' dictates can only be fully secured by conduct guided by 'right reason.'

On the face of it, the condition or state of natural liberty seems an ideal one: there is no subjection to anyone and each individual is alone the master of her or his will and judgment. One is alone responsible for one's actions and answerable to no one. However, this state of natural liberty is not as attractive as it looks at first sight. Without the security provided by the state, life has all the frightening possibilities evoked in Hobbes' scenario. It is only within the context of the state that security is finally achieved and human flourishing made possible.

It is quite surprising to see Pufendorf minimizing the governing force of the law of nature and reducing the conditions of human beings in the state of nature to that depicted by Hobbes. What Pufendorf means here, I believe, is that the Hobbesian state of nature is a definite possibility without civil government, even though sociality governs the conduct of men in their individual governing of themselves:

> For if you picture to yourself a person (even an adult) left alone in this world without any of the aids and conveniences by which human ingenuity has relieved and enriched our lives, you will see a naked dumb animal, without resources, seeking to satisfy his hunger with roots and grasses and his thirst with whatever water he can find, to shelter himself from the inclemencies of the weather in caves, at the mercy of the wild beasts, fearful of every chance encounter.... To put the matter in a few words, in the state of nature each is protected only by his strength; in the state by the strength of all. There no one may be sure of the fruits of his industry; here all may be. There is the reign of the passions, there is war, fear, poverty, nastiness, solitude, barbarity, ignorance, savagery; here is the reign of reason, here there is peace, security, wealth, splendour, society, taste, knowledge, benevolence. (*ODM* 2: 1.9)

In the state of nature, though the laws of nature guide to a degree the actions of human beings, these laws cannot be fully relied upon for one's security. While others should never be treated as though they were one's enemies, in the state of nature they should be treated cautiously as one treats unreliable friends. The reason for this is that some individuals do not follow the laws of nature through corrupt character, others because of their passion for power and wealth; and even those who do not possess these flaws may use arms to preempt others who threaten them. Sometimes security is also endangered by conflicts over a particular good or virtue that all desire. It is for all these reasons that while law of nature does infuse human beings in the state of nature, its precepts cannot provide complete security. Accordingly, all human beings must take whatever defensive measures are necessary to protect themselves. The old maxim, when

at peace prepare for war and when at war prepare for peace is for Pufendorf the most reasonable stance:

> Therefore as a good man should be content with his own and not trouble others or covet their goods, so a cautious man who loves his own security will believe all men his friends but liable at any time to become his enemies; he will keep peace with all, knowing that it may soon be exchanged for war. This is the reason why that country is considered happy which even in peace contemplates war. (*ODM* 2: 1.11)

2. The Formation of the State

As discussed above, life in the state of nature , though governed by the laws of nature, was at all times vulnerable to all kinds of dangers. Ultimately, therefore, Pufendorf's position about the state of nature comes very close to that of Hobbes whose graphic and disturbing picture of life before the commonwealth Pufendorf largely endorses. Once again, therefore, the primary reason for the formation of states is held to be the to maximize the individual's security. This end, that is security, could best be obtained through the establishment of the state: "which is considered the most perfect society, and is that wherein is contained the greatest safety for mankind, now that it has grown so considerable." (*The Law of Nature and of Nations* [hereafter *LN&N*] 7: 1.3) Let us look more closely at his argument.

In *LN&N* Pufendorf asserts that human beings are surely social animals, that is, by nature fitted to live in society. However, from this it does not follow that human beings will naturally prefer civil society. After all, the individual can succeed in meeting most of his basic needs in social arrangements that preexist full blown civil society. Indeed, civil society can easily be seen to be contrary to the natural inclinations of human beings insofar as it is contrary to their natural liberty. And in spite of some statement that may indicate the contrary, Pufendorf ultimately holds that it is "discipline not nature, that fits a man for such a society" (*LN&N* 7: 1.3).

This becomes clearer when we consider that human beings in natural liberty are subject to no one. As we have seen, one's will and judgment are the sole determinants of one's actions. One is the final authority on what is and is not in one's self-interest. In the event that one's interest clashes with that of the common good, one is free to pursue that which is to one's advantage. It is quite evident that in order to give up this right to govern one's own action some great necessity must intervene. That is, it is only for some very significant reason that human beings would give up their natural liberty.

On the other hand, it is also easy to see why some think that a civil society grew naturally from state of nature. For it is equally clear that human beings tend to be good citizens and willing to subsume their individual interest to the public good (*LN&N* 7: 1.4). How does Pufendorf resolve this seeming contradiction? While it is true that human beings are naturally disinclined to give up their natural liberty and often obey the law only from fear of punishment, they also do make good citizens and subordinate their interest to the public good whenever necessary. But the latter is not the result of the fact that human beings have natural aptitudes or inclinations that make them good citizens. Rather it is discipline, education and the cultivation of good habits that makes human beings fit for civil society through (*LN&N* 7: 1.4).

But then this analysis of human nature of human begs the question of what made human beings give up natural liberty. In developing his answer, Pufendorf accepts in part the Grotian answer, namely: human beings were impelled by the desire to form states that would make a more humanly rich and rewarding life possible. Pufendorf does not find it difficult to accept that the refinements and elegance of "contemporary" life became possible after the state was formed. What he does not accept, however, is that these enhanced living conditions provided by themselves alone the necessary impetus to leave the state of natural liberty. This could not have been the reason since the pre-state man could not have any idea of the refinements to come once the state were formed – and here once again we see Pufendorf qualifying Grotius through a Hobbesian perspective. Moreover, wants do not lead to states as is evident in the actions of contemporary states who do not form larger states due to want and instead depend on commerce with other states. And lastly, the refinements that emerged are an indirect rather than a direct result of the existence of the state, the immediate cause being the impossibilities of finding conventional means of earning a living in large cities. This is what led to the development of various arts and luxuries.

The 'real and principal' reason for the establishment of the state was the need of human beings to protect themselves from the possible dangers to every day lives from those who did not follow the laws of sociality (*LN&N* 7: 1.7). In the final analysis, then, the formation of the state is seen in Pufendorf's account as the only possible means of securing oneself from injury and death. This move from natural liberty to the state, while not being natural, is understood by Pufendorf to possess a kind of necessity. Against those who argue that fear naturally leads to the legitimacy of preemptive strike and not the formation of the state, Pufendorf argues that the means necessary for security must encompass and not be in contradiction with "sane reason." And sane reason is that which does not offend the laws of nature. A preemptive strike, while legitimate within the

Hobbesian argument that in the state of nature human beings have a right to all things and to the means to secure self-preservation, cannot be accepted as a solution to the uncertainties of the state of nature, for the right to all things is qualified by that which is permitted by "right reason." The insecurity human beings face in natural liberty cannot be overcome through means that destroy sociality among fellow men.

Furthermore, mere respect of the dictates of the law of nature cannot safeguard one's preservation because of the flaws in human nature, i.e., because the law of nature will not be observed by all at all times. However, Pufendorf is at pains to distance himself from Hobbes in this instance. He claims that Hobbes is entirely wrong in arguing that in the state of nature all are each other's enemies due to inevitable insecurity (*LN&N* 7: 1.8).

Having determined that the greatest possible security is obtained by forming states, the next question is how did human beings go about securing this end and actually instituted a state? Of all the various reasons that lead human beings to act in ways contrary to the dictates of the law of nature, thus creating the misery and insecurity, Pufendorf gives special attention to the diversity of opinions and the intractability of individuals in natural liberty. Since all human beings in the end are responsible for their own security, their actions are quite rightly determined by their individual considerations of what is and is not to their advantage. The sovereignty of their will and judgment in governing their conduct is supreme. Pufendorf makes this his starting point in the formation of the state.

In order to form a state, human beings have to take into account the diverse views they inevitably hold regarding the good of human kind and society. Even if they agree to institute a state directed towards the common good, they will most surely disagree on what constitutes this common good. Also, they have to take into account the limitations of the intellect which prevents some from grasping what is to their advantage, which make some others obstinately unwilling to abandon some notion of the good that has catches their fancy without due deliberation. So as to overcome this inherent multiplicity and plurality of conceptions of the common good, human beings must first agree on uniting their individual wills into a single will which will determine what the common good of all is and have the power to act upon it. The second step is to establish a power capable of inflicting punishment on those who do not accord themselves willingly to the common good.

The only way in which all wills can be united into one is if they all agree to subordinate themselves to one individual or council, whereby the will of that individual or assembly on matters of security and the common good will be the will of all (*LN&N* 7:

2.5). In this way not just the will but also the power of all is united in a single body (*LN&N* 7: 2.5).

Pufendorf then proceeds to describe how this process could reasonably have come about – the uniting several physical persons (a multitude) into a single moral person. A multitude is not a single collective body of but rather numerous individuals subject to no one, possessing their own will and judgment on all matters. Since they are not as yet a body where the majority principle can operate, they individually have to enter into agreements with each other (*LN&N* 7: 2.6) if they are all to be bound. Those who refuse to enter into the agreement simply remain outside of the state (*LN&N* 7: 2.7).

However, once individuals have made these agreements with each other and taken on, as it were, an embryonic form of a state, they could be said to now constitute a body, and the majority principle begins to be a legitimate form of reaching a decision. Then they take the second step, which is to decide on the particular political arrangement which is to characterize their state, i.e., a monarchical, aristocratic or democratic form of government. The difference between these arrangements lies in the number of those who are to rule the citizens.

The third and final step in forming the state is an agreement between the individual or council instituted to form the government and the people itself. The essence of this agreement is that the rulers obligate and bind themselves to the people to provide them with security, and the people obligate itself to give obedience to the rulers. With this pact the state is instituted in its final form.

Pufendorf contends that while there are no written records by which we can learn how exactly the state first appeared, it stands to reason that it could not have been instituted otherwise than by virtue of the three steps laid out above. In order to buttress his argument, Pufendorf proceeds to scrutinize and refute Hobbes' account of the establishment of the state.

Prior to Pufendorf, the only other major attempt to rationally reconstruct the institution of the state was that of Hobbes. It is therefore understandable that Pufendorf would spend so much space to refute him.

Pufendorf primary goal in his confrontation with Hobbes is to demonstrate the impossibility of setting up the state through a single agreement. Hobbes had argued that there had been just one agreement between individuals among themselves to institute the sovereign, and that there was no agreement between the people and the sovereign so instituted. According to Pufendorf, Hobbes' rejection of the notion that the sovereign is bound by an agreement with the people is rooted in his desire to disarm those "seditious" individuals who had tried to limit or eliminate royal power. By not making the obligation

between the sovereign and the people reciprocal, Hobbes sought to take away from the subjects any excuse/justification for rebellion, a justification which could easily be grounded in the mutually binding nature of agreements. In other words, if there was a contract between the rulers and the ruled, the subjects are under an obligation to obey the sovereign only insofar as long as the latter keep its promises. According to Pufendorf, in order to give the sovereign a power that was absolute and therefore secure from seditious individuals, Hobbes did away with what he reckoned to be the principal instrument for curtailing royal power and the principal excuse for rebellion.

While accepting that human beings with seditious intent must be checked, Pufendorf does not accept that this can be done at the cost of denying the most obvious. Just as the citizens are obligated to obey their ruler so also is the ruler reciprocally obligated to protect the people. The state could not have been instituted without such an agreement (*LN&N* 7: 2.9).

Pufendorf goes on to note that a pact and the reciprocal obligations entailed by it do not in themselves occasion rebellious behaviour on the part of the subjects. A ruler does not break a pact whenever she or he makes a slip. Rather, it is only when the ruler renounces the "care of the state," or acts as though he were an enemy of the citizens, or does not observe any of the laws of government, i.e., when the ruler departs from the very conditions on the basis of which citizens promised obedience, that the agreement can be understood to have been broken. Rather than blaming the reciprocal agreement for the seditious nature of the citizens, it is better to point the finger at the shortcomings of the ruler who does not have the ability to convince the subjects that it is in their best interest to make the ruler's position secure (*LN&N* 7: 2.10).

Moreover, Pufendorf warns that a system that seeks to secure rulers by arguing that the founding pact obtains only among the individuals subjects, is in fact conceptually unstable and liable to cause a great deal of insecurity. If the agreement is only between the subjects, the obedience of one citizen is tied to the obedience of another, and therefore if one individual does not render obedience all the subjects are legitimately free to disobey their sovereign. It is for this reason that it is necessary that all individuals obligate themselves to the sovereign through an agreement. In this way, the obedience of one citizen is not tied to the obedience of another and in the instance of a citizen not obeying the force of the other citizens could be brought to bear on the disobedient subject.

Moreover, in order to derive obedience from sources other than agreements, Hobbes puts himself in a situation whereby the sovereign can rightfully ask for the subjects' life while, on the other hand, the subject can rightfully resist the sovereign. According to Pufendorf this contradiction cannot arise if an agreement is made between

the ruler and citizen. By such an agreement, the power of the sovereign corresponds exactly to the duties of the citizens. A sovereign cannot lawfully demand that which a citizen can lawfully refuse. The reason for this is that the sovereign cannot command of the citizen anything that does not accord with the "end of instituted civil society" (*LN&N* 7: 2.11). And the end of civil society is security and the common good – which includes the care of the state and its citizens.

Pufendorf brushes aside another argument made by Hobbes, namely, that there cannot be a pact between a people and the sovereign for the people comes into existence only after the state is formed and prior to that there is merely a multitude. Before the state there is no people and therefore at that stage no pact can be made with a yet non-existent people. To counter this argument Pufendorf points to the fact that his account contemplates a first agreement of all the individuals with each other: this is the agreement that forms them into a people, i.e., a single body that can vote by majority to institute its own form of state. This leads Pufendorf into another criticism of Hobbes who claimed that individuals decide by majority whether to institute a commonwealth and then minority has to comply with the wish of the majority. Pufendorf objects that the majority principle cannot come into play before the multitude had constituted themselves into a single body, i.e., a people. Before this is done, individuals yet have complete control over their will and judgment that determines their actions and therefore the majority cannot dictate to the minority.

Hobbes' next argument was that, even if there were a pact between the king and the people, such agreement would become superfluous because it necessarily ceases upon the institution of the sovereign. When they constitute the sovereign, individuals are utterly changed and dissolve in the body of the leviathan. Pufendorf rejects this argument. By making an agreement and instituting a sovereign a people expresses its nature as a people and the obligations that flow from this acts are embedded all the more strongly in the very foundations of the state:

> By these two agreements and a decree a multitude of men unites to form a state, which is conceived as a single person with intelligence and will, performing other actions peculiar to itself and separate from those of individuals. As it is distinguished and marked off from all individual men by one name..., so it has its own laws and property, which neither individual men, nor groups, nor all together can lay claim to, save him who holds supreme sovereignty, while from it, in the same way, there proceed actions peculiar to it which individuals can neither hold for their own use, nor claim as their own. (*LN&N* 7: 2.13)

3. The Supreme Sovereign

The multitude coming together in a state form a unit that has its independent will and intelligence and is clearly distinct from the individual and groups in it, as well as from all the individuals taken together. This new entity possesses its own laws, property, and distinctive actions. The will of the state acts through the monarch, a council composed of a few persons, or all the citizens. The creation of supreme sovereignty entails that the sovereign possesses the requisite power to provide security and take care of the state. The pact that subjects the will of all to the sovereign includes the transfer of the individuals' strength to the sovereign so that it may fulfill its ends by commanding the obedience of its subjects. This transfer of strength:

> flow[s] directly from the pact by which a state is formed. For although no man can transfer his strength in any physical way to another, yet the sovereign is understood to possess the strength of others, since they are so obligated to exert it at his direction, that there resides in them no power to resist or refuse his command. (*LN&N* 7: 3.1)

From this it also follows that those who submit their wills to form a state do not simply accept the command of the sovereign, but also accept the legitimacy of the force that the sovereign could use in order to force them to obey if they resisted:

> Now since all the members of the state, by the act of submitting their will to the will of another, have bound themselves not to attempt resistance, that is, to obey him who would direct their strength and resources to the public good, it appears that he in whom resides the supreme sovereignty has such strength that he is able to force whom it pleases to his orders. (*LN&N* 7: 3.1)

Moreover, the pact also establishes that the supreme sovereignty is lawful, just and based on the consent of those who are the subjects. It is this founding pact that most immediately establishes the "moral quantity" of the supreme sovereign. When one willingly subjects oneself to another there arises a right in the latter to command the former. This is the case in relation to the supreme sovereign:

> So also the pact in question supplies a clear title, whereby that sovereignty is understood to be lawfully established, not upon violence but upon the free subjection and consent of the citizens. This, therefore, is the most immediate cause from which supreme sovereignty comes about as a moral quantity, for upon the offer of submission by one person and its acceptance by another, there at once arises for the latter the right to command the former, that is, sovereignty. (*LN&N* 7: 3.1)

While the pact that finally establishes the state does constitute a supreme sovereign as a moral person in whom inheres a perfect moral quantity, this is still not enough to secure to the sovereign "a special efficacy and sanctity." It is therefore necessary to regard the state as instituted by god as well. This must not be taken to mean that the state is instituted pursuant to a divine command, but rather that the institution of the state is the logical step that human beings must take in order to live by the laws of nature and of sociality. Once human beings grew so numerous that it became impossible to maintain peace and well-being outside of the state, reason dictated that the only way to lead a life in keeping with the natural laws was to form states. And since, with the growth of population, the law of nature cannot be conveniently observed without civil sovereignty, it is clear that god, who embedded the former in human beings, also sanctions the establishment of civil societies, precisely insofar as they serve as the means to the observance of the law of nature:

> the command of God to establish states manifested itself through the dictate of reason, by which men recognized that the order and peace which natural law considers as its end, cannot exist without civil society, and especially after mankind has so increased in numbers. And in this respect the state differs from other human institutions, the introduction of which is likewise urged by sane reason, yet not in such a way as that, without them, the order, safety, and welfare of mankind could not be preserved. (*LN&N* 7: 3.2)

The supreme sovereign is a unity and undivided. Its a moral body with one will and intelligence, however, it performs its functions through various parts. This one will, as mentioned above, was made possible by the subjection of the wills of all persons to that of one individual or council. However, because of the inevitable diversity and multiplicity of views that are held by individuals it is imperative that the supreme sovereign make clear what is to be done and what is to be avoided. Moreover because of the great differences in people's judgment the supreme sovereign must make clear what is lawful and honourable and that which is not. The peacefulness of civil society also rests upon how the sovereign shapes the rights individuals still retain in relation to other individuals from their natural liberty (*LN&N* 7: 4.2).

The most important task of the supreme sovereign is to secure its citizens from violence, so that they can live in security and have no cause of fear from other men. To ensure that the subjects are able to observe the laws of sociality, as well as the civil laws, for the common good, the fear of punishment must be present in the minds of each subject while the supreme sovereign must have the power to inflict such punishment.

This power to inflict punishments on those who disturb the peace of society is given by the people to the sovereign at the time of making the final pact instituting the state. By and large, Pufendorf accepts Hobbes' views on the power of the supreme sovereign, with the proviso that the sovereign cannot ask just about anything from his citizens. The laws of the sovereign have to be limited by the appropriate end of the state, to make it possible for human beings to live in accordance with the laws of nature and sociality.

Also, due to the inherent possibilities of legal disputes arising from the application of laws, the sovereign must have the power to adjudicate between them.

Thirdly, it is not enough to protect individuals from their fellow citizens. It is imperative to protect them also from external enemies. Therefore the sovereign must have the power to build strong armies, make alliances and enter into leagues in the interest of the citizens. Moreover, both in times of peace and in times of war, the state must build intelligence networks, train soldiers as well as allocate necessary resources to build its strength against external enemies.

Fourth, both in times of peace and in times of war, the state must have the financial resources to fulfill its tasks. And so in the state exists the power to claim as much of the wealth of the citizens as it seems necessary to carry on the state's work. Furthermore, there must exist in the state the power to appropriate any service from citizens that may seem necessary.

Last, and most importantly, given the essential liberty of human will even when bound by a pact and checked by fear of punishment, it is necessary to educate, train, and discipline the citizens from childhood onwards so that their acts accord with the laws of nature and the promotion of sociality. This power to mould the citizens for peace and tranquillity inheres in the state:

> Finally, although it be beyond the power of man to take away the intrinsic liberty of the will, and at the same time by some intrinsic means to compose men's judgments about things into a lasting harmony, every precaution should be taken that such judgments, however much they vary, should not disturb the tranquillity of the state. For since all voluntary actions take their beginning from and depend upon the will, while the will for action, whether positive or negative, depends upon the opinion of that good or evil, of that reward or punishment, which every man thinks will be his lot because of something he does or avoids, and so the actions of all men depend upon their own individual opinions, there will surely be need of external means to make those opinions and judgments, so far as

> possible, agree, or to prevent at least their differences from disturbing the state. Therefore it is desirable that a state openly profess, as it were, such beliefs as agree with the end and use of states, and the minds of citizens be filled with them from childhood on, inasmuch as most mortals are accustomed to think about matters as they have been trained and as they see the men about them are persuaded. (*LN&N* 7: 4.8)

There are two reasons for disciplining the minds of the citizens. First, according to Pufendorf, only a few individuals are capable of discerning for themselves the complexities of human affairs and arrive at a correct judgment. Secondly, there is virtually no theory in the sciences or religion that is not the occasion disputes and even wars. This difficulty in arriving at an agreement is not due to the subject matter but rather to the intellectual vanity of human beings. Apart from habituating the citizens to observe the right doctrine, the sovereign must have the power to inflict punishment on those whose doctrine lead to the disturbance of peace. Here Pufendorf adds a rationalization to soften this draconian power. Obviously, as in all state action, the ends of the state guide the official view point. And the end of the state is to make it possible for citizens to live by the laws of sociality. The doctrines that are censured are, therefore, only those that disturb this end. It follows that the criterion of a true doctrine is that which is conducive to peace and those who profess doctrines other than these are to be censure and penalized:

> However, our concern is not properly about these dogmas, but rather about those which, thrusting themselves forward under the guise of religion, or in some other way, overturn the law of nature, and the principles of sound politics, and so are of a nature to infect the state with mortal diseases. Nor is there any danger for any true doctrine from the enactment of such penalties, for no true doctrine disturbs the peace, and whatever does disturb the peace is not true, unless it be that even peace and concord are opposed to natural law. Therefore, surely the examination of such beliefs, and the power to drive them out of the state, can rightfully be assigned to the supreme civil sovereignty. (*LN&N* 7: 4.8)

The powers of the supreme sovereign can be and normally are exercised by different people, but this does not imply that sovereignty is divided. Rather, the difference between a regular state and one that is irregular is that in the former sovereignty is undivided while in the latter case sovereignty is indeed divided, much to the detriment of the state:

> With this much settled, it will easily appear, so close is the union between the parts of supreme sovereignty, that one cannot be torn from another without destroying the regular form of a state, and creating an irregular body which will be held together by nothing but an insecure pact. (*LN&N* 7: 4.11)

Pufendorf's argument is that if one person has the legislative power and another the power to punish, the former power independent of the latter becomes useless for it would not be able to enforce what it legislates. Similarly, if those who possess punitive power can only use it to enforce laws that they do not themselves make and only on the decision of the legislator, then quite obviously they are not exercising of sovereign power but are simply public officials. On the other hand, if the person who possesses punitive power is allowed to make the decisions with regard to its applicability, then the legislative power becomes superfluous. Accordingly, both these powers must reside in one will. Pufendorf also argued that the right of war and peace, as well as the power to raise the necessary money to wage war, must inhere in the same unified will of the supreme sovereign. And finally, the regulation of beliefs, especially those that concern the end of the state, that is, their notions of the common good, must reside in the same power.

Pufendorf provides several forceful illustration of how difficult it would be for a state to do what was necessary in conditions of divided sovereignty which, therefore, is portrayed as putting into jeopardy the very purpose for which the state was instituted in the first place:

> Therefore, if any man should want entirely to separate the parts of sovereignty, he will under no circumstances establish a regular state, but an irregular body, the members of which, in possessing separate parts of the sovereignty, are held together not by a common sovereignty, but only by an agreement. It will be possible, after a fashion, to preserve concord in such a group, so long as the opinions of the members of the state agree after a friendly manner on the public good, and every citizen is ready of his own accord to do his part towards meeting this end. But when dissension has arisen, nothing is left but to turn to arbitrators, or to decide the issue by war. (*LN&N* 7: 4.12)

But what exactly is then the "regular" state? Pufendorf defines it as a state where sovereignty is embodied in a single will:

> We hold that the regularity of states lies in this: that each and every one of them appears to be directed by a single soul, as it were, or, in other words, that the supreme sovereignty, without division and opposition, is

> exercised by one will in all the parts of a state, and in all its undertakings. (*LN&N* 7: 5.2)

Pufendorf is quite aware of the fact that the issue of divided vs. undivided sovereignty was one of the key bones of contention between his two masters: Grotius and Hobbes. He then confronts Grotius' contribution on this issue and agrees with Grotius' contention that sovereignty cannot be divided between a people and the monarch and that obedience is due whether or not the monarch governs well. The essence of Grotius' position, however, is that the limits to sovereign power and the conditions for obedience should be clearly laid down, i.e., sovereignty can be divided as long as there is a clear agreement to this effect. This Pufendorf rejects out of hand.

Grotius' second form of divided sovereignty is also jettisoned. Grotius had argued that sovereignty can be divided if the people, before forming the state, put a limit, a sort of "permanent command" on the ruler. Pufendorf maintains that this is not possible, as you cannot put a permanent command on someone when you do not have the power to enforce such command. A command presumes a power that can be used to inflict punishment when it is disobeyed. If the people do possess this power, then the ruler is a ruler only in name, possessing no sovereignty which is rather with the people. On the other hand, if they do not have the power to correct the a violation of the command, then the command is hollow and sovereignty resides only in the ruler.

Grotius' final argument for divided sovereignty is also refuted by Pufendorf. Grotius had argued that sovereignty can be divided if, at the time of its transfer to the ruler, a stipulation had been made that the people retained the right to punish and constrain the ruler. Pufendorf claims that if the people retained the right to punish or constrain the monarch, sovereignty is clearly not divided for it resides entirely in the people.

Pufendorf accepts the realistic Grotian view that all human institutions possess disadvantages, including those that constitute a regular state. While a divided sovereignty is particularly problematic, Pufendorf concedes that it is not for experts to lay down what kind of sovereignty is best for a particular people. Ultimately, it is for the people who is the original possessor of sovereign power to rightly decide what kind of supreme sovereignty is to be instituted. However, Pufendorf emphasizes that the conditions in a divided sovereignty, that is, in an irregular state, are particularly "sickly":

> In conclusion, we agree with Grotius, that there is nothing in civil institutions which is entirely free from disadvantage, and therefore one should not infer at once that, because of the inconveniences certain to arise from divided sovereignty, the question is to be decided not by what

> appears best to one man or another, but by the will of him from whom the right arises. But it will have to be granted us in our turn that, if such a division may strike the fancy of a people, it is not establishing a regular state, but an ill-adjusted and sickly body. (*LN&N* 7: 4.14)

The next issue Pufendorf addresses is what are the forms possible for a regular state. He isolates three forms: these are monarchical, aristocratic and democratic. Interestingly then, Pufendorf asks the question: what form did the first state take? He attempts to deduce the answer by reflecting on what would have seemed the most reasonable course of action in the conditions prior to the institution of the state and given human nature. He concludes that the first state could only not have been democratic in form. His reasons are that in the state of nature human beings lived in natural liberty and equality, governing their conducts via their own will and judgment. When they first formed states it stood to reason that they would adopt a system that deviated as little as possible from what was familiar to them. Accordingly, democracy was:

> the oldest form among most nations, and reason likewise shows it to be more likely that when a number of men, endowed with natural liberty and equality, decided to unite into one body, they first wished to administer their common affairs by a common council, and so to establish a democracy. (*LN&N* 7: 5.4)

This must have seemed to be the most reasonable arrangement: what affects everyone should be everyone's business. Pufendorf claims that it is only later that new forms were devised. And he notes that most of the petty states which initially formed democracies were joined together into large states largely through warfare.

Once formed, the primary characteristic of the state is that it possesses supreme sovereignty. No individual or group in the state has greater power in relation to other individuals or groups. The duty of all is to apply themselves toward the public good as determined by the sovereign:

> First among the characteristics of sovereignty is that it is *supreme* and is so styled. The chief reason appears to be the fact that no greater power than the following belongs to one man over another: That the latter is obligated to apply his strength and resources to the public good at the pleasure of the former, and is liable to the right of life and death. (*LN&N* 7: 6.1)

That the state possesses supreme power is also made evident by the fact that it exercises the natural liberty human beings have in nature. There is no greater power or liberty than what human beings possess in their natural state. To decide upon what is and

is not conducive to one's advantage and to act on such deliberation without any external constraint, that is the fullest possible liberty one can have, and that is the liberty exercised by the supreme sovereign.

The person or council that holds sovereign power is not accountable to anyone. Therefore those who hold sovereign power do not have to justify their conduct to anybody nor can anybody inflict punishment upon them. For both of these presuppose a superior power which is a logical impossibility since the sovereign power is by definition supreme. However, a prudent rulers will make public the reasons for their conduct in order to protect their reputation and prestige.

Further, sovereignty is supreme because it stands above civil laws (though not above the law of nature and divine law). Pufendorf's argument is straightforward: (a) a law to have force must come from a superior; (b) civil laws are made by the sovereign for the state; (c) there is no one superior to sovereign in the state; and therefore (d) the supreme sovereign cannot be subject to the laws it has itself made for the state. This notwithstanding, the possessor of supreme sovereignty should do what accords with the laws in the interest of the state and to safeguard his reputation.

Against, writers who assert that the sovereignty of the monarch is not superior nor should it be to that of the people, Pufendorf retrieves Grotius' argument that nothing prevents a people in certain circumstances to hand over all its rights to the sovereign. The circumstances evoked by Grotius are when a people is threatened with destruction which can only be avoided by unconditionally transferring all rights to the sovereign, and when they are stricken by great poverty which threatens their survival.

In some states sovereignty is limited procedurally and in other it is absolute. Those states where sovereignty is procedurally limited, as we saw above, are in a condition of divided sovereignty constituting irregular states which Pufendorf considers to be badly diseased.

Pufendorf maintains that regular states possess absolute sovereignty but is careful to define the word absolute. Specifically, he tries to remove from the adjective the negative connotations that it carried for the people of Europe. With a brilliant rhetorical move, Pufendorf suggests that absolute sovereignty is simply a name for the natural liberty earlier enjoyed by human beings in the natural state and now reposed in the supreme sovereign. This natural liberty or absolute sovereignty entails that one is the ultimate governor of one's actions, but this does not mean that everything is allowed, because, on the contrary, this liberty is limited by, and must accord with, the laws of nature that is sociality. When human beings come together and constitute a regular state, they transfer this absolute liberty, limited by the law of nature, to the supreme sovereign.

This in turn entails that within the limits of law of nature the supreme sovereign can ask for and get obedience from the citizens in all the endeavours it thinks fit for the common good:

> Therefore, to make our meaning clear, we will say at once: Just as it is understood to be the highest and absolute liberty of individual men, when they can decide upon their own affairs and acts in accordance with their own wish and judgment and not of those of another, while always observing natural law, and that liberty belongs by nature to all men who are not subject to the sovereignty of another man, so when several men have come together into a perfect state, in it, as in a common subject, there must likewise be found the same liberty, or faculty to decide by their own judgment about the means that look to the welfare of the state. And this liberty is attended with absolute sovereignty, or the right to prescribe such means for citizens, and to force them to obedience. Therefore, there exists in every state in the strict sense of the word, an absolute sovereignty, at least in habit and theory, if not always in practice. (*LN&N* 7: 6.7)

However, Pufendorf recognizes that human beings are likely to make errors in judgment with regard to what constitutes the public good, errors of judgment may also come about through the inability of men to control their passions and bring them under the control of reason. Some people are not prepared to accept a form of absolutism by which they are subjected to the judgment of one person whose will may err and be under the sway of passions. In order to safeguard themselves, these individuals will put certain conditions on their transfer of natural sovereignty and will seek to define how sovereign power is to be exercised in the state. Paradoxically, Pufendorf seems to recommend this limitation on sovereignty as it may be suited to the aptitudes of some people (*LN&N* 7: 6.9).

In the end, then, it is entirely within the will of free peoples, when they grant a monarch sovereignty, whether they wish it to be absolute or restricted by certain laws, provided, of course, such laws have in them nothing impious, and do not obstruct the end of sovereignty itself. Although at the first men enjoyed entire liberty to come together into a civil society, yet we must not forget that they were still subject to the law of nature, and so were obligated to draw up only such rules of sovereignty and civil obedience as were agreeable to that law and the end of the state as dictated by right reason.

It should be clear by now that Pufendorf's description of the powers of the absolute sovereign shares a great deal with Hobbes' view on the same matter. Still, the

German thinker gives a more detailed and explicit account of the limitations on the sovereign. The supreme power can surely force citizens to do those things whose end is the public good, but cannot force them to do "things as are repugnant to the safety of the state, or opposed to natural laws, should be a thing never even contemplated, and if he has undertaken any such enormity, he oversteps without a doubt the limits of his power" (*LN&N* 7: 6.13).

Still, the last characteristic of supreme sovereignty listed in *LN&N* reminds us of Grotius' influence rather than Hobbes. Pufendorf maintains that ultimately the character of the state is determined not so much by the sovereign but by the people who in constituting the state retained for themselves those rights that accorded best with the nature of the state they desired (*LN&N* 7: 6.17).

4. The Justification of Resistance

Pufendorf has so far established that supreme civil sovereignty – constituted in order to create the conditions whereby men live in accordance with the law of nature – is to be held "sacrosanct and inviolable" by the citizens as long as the rulers remain within the just limits of their power. What is not so clear is whether the citizen, when commanded unlawfully or when suffering an injury, can legitimately retaliate with force against the sovereign.

Pufendorf begins by opposing what he takes to be Hobbes' position in *OC*, namely, that a sovereign can do no injury to a subject since (a) there is no pact between the sovereign and the subjects the contravention of which could constitute an injury; and (b) whatever the sovereign does is *ipso facto* the will of the subject and therefore no willingly received harm can be counted as an injury. Pufendorf rejects these arguments. He is careful to deny that an act just because it does not agree with a citizen's judgment of what is good for the public is a legitimate injury. However, it is indeed possible for the one holding sovereign power to inflict injuries on the citizens, especially when the sovereign acts contrary to the very conditions that obligate the citizens to obey him in the first place. The sovereign can inflict injuries by violating the pact made between them and also the laws of humanity (the law of nature).

However, Pufendorf is only too aware of the dangers that attend admitting this right of resistance and rebellion. Consequently, his entire discussion is very guarded and strewn with qualifications. Nevertheless he does assert that while this is the excuse most often employed by ambitious and rebellious elements:

> there is no question but that an injury can be done a citizen by a state and its head, since there exists between them a community of natural law, at

> least, which is sufficient to make one of them capable of being injured by the other. Now it appears that a prince may do an injury to his subjects in two ways: If in his relations with them he violates the duty either of a prince or of a man, or, in other words, if he treats them either not as citizens or not as men. (*LN&N* 7: 8.4)

Rulers are regarded as having violated their duties toward the citizens when they no longer take care of the state (again Grotius is in the background) and neglect all their duties concerning its affairs – that is, when the rulers do not protect the citizens from external enemies nor keep the internal peace by enforcing the laws. Rulers violate their duties even more grievously if they attack their own citizens, just as though they were their enemies. A ruler who tries to undermine the basic laws or change the conditions of his possession of sovereignty in opposition to the citizens also violates his duties; and so is a ruler who imposes taxes far in excess of what the security of the state necessitates:

> The prince owes his citizens as individuals to allow them the enjoyment of the right each holds in common with the rest, to defend them, and to administer justice, in so far as he can do all this without prejudice to the state. If the prince does not do this for each of his citizens, when the condition of the commonwealth permits him, he is guilty of an injury. (*LN&N* 7: 8.4)

Rulers do not do their human duty toward their subjects when they dishonour an honourable man; when they do not keep their promises; when they commit acts of passion and do not make amends; when they rape virgins, commit adultery and inflict physical injury on subjects; when they unlawfully appropriate their subjects' property; and, worst of all, when they kill innocent people. In all these ways rulers commit an injury against his subjects.

If a ruler can do so many injuries to his subjects, what are the latter to do? Does this give the subjects the right to revolt against their ruler? Pufendorf responds that no state, regular, irregular or natural can be without inconveniences. Therefore, it behooves the citizen not to take offence and not to respond with violent acts to every misdemeanour committed by the ruler. More importantly, because a violent revolution causes great human slaughter and tears a society asunder, individuals should overlook minor injuries in the interest of fellow citizens and in order to preserve the benefits that derive from living in the state.

In the event that the prince seeks to physically attack a citizen, the citizen should try to avoid death by fleeing and seeking refuge in another country, rather than retaliating with force. However, if the prince threatens the life of a citizen and the citizen does not

have any place to flee to what is the latter supposed to do? Pufendorf does not provide an answer himself and rather suggests in the third person that, "as some men would claim," if the ruler does attack in this manner an innocent subject then the subject is released from her or his obligation to the ruler and may use whatever means are necessary to protect her or his life, including force.

Pufendorf considers such a scenario rather implausible and very rare. He goes on to say that the more interesting and frequent occurrence is when a ruler seeks to attack a subject on the excuse that they have failed to obey some unjust directive. This excuse equips the ruler with a right to take punitive measures against the subject. According to Pufendorf, if the subject is innocent, then the prince has turned himself into his enemy by attacking the subject, thus releasing the latter of all duties of obedience. However, even here Pufendorf considers it preferable for the subject to accept personal sacrifice rather than risk plunging the commonwealth into a state of civil war, knowing the drastic consequences this would have on fellow citizens (*LN&N* 7: 8.5).

However, even if it is acknowledged that a citizen who is being attacked can defend herself or himself with force, it does not follow that others not so immediately threatened can rally behind the one who is unjustly attacked. The reason is simple: people do not have a right to judge the actions of their sovereign. If this right were permitted, it would provide justification to all sorts of seditious elements in the state. Moreover, each citizen has individually made a pact with the sovereign to obey as long as the sovereign can guarantee the citizen's security. An injury to another does not in any way affect the binding nature of this agreement. We should note, however, that in this instance Pufendorf is not quite consistent. According to his rational reconstruction of the formation of the state individuals do indeed get into individual agreements with each other, but when they make the final agreement obligating both the ruler and the ruled they do not do so as individuals but rather as a body, as one person. The duty to obey arises from this second agreement which is a collective and not a personal one. The question that Pufendorf does not answer directly is whether an injury to one can be taken to constitute a breach of this collective agreement which would free all citizens from their obligations. Pufendorf's reply to this line of argument is not difficult to anticipate.

Pufendorf rejects absolutely all the general theories that argue that citizens can legitimately revolt against a ruler who has turned into a tyrant. His first argument here is that the "common sort" cannot understand the "equity or necessity" of a particular course of action undertaken by the ruler either because of their intellectual limitations or because of they cannot hold their passions in check. Further, issues of state are sometimes

obscured because the reasons for certain actions have to be kept secret in the interest of the state (here the target seems to be Grotius as he refers to Boecler on Grotius).

And yet Pufendorf claims that his position on revolution is very similar to that expressed by Grotius. And indeed he comes out in support of the right to resist unlawful exercise of sovereign power:

> He [Grotius] is right in suggesting, among other things, that it can be decided, first, from the nature of supreme sovereignty, and then, from the presumed will of those who were the first to unite to form a state, whether an extreme injury by a supreme sovereign can be repelled with violence. For surely it is by no means repugnant to the nature of sovereign authority that it should direct the acts of all citizens to the public safety, and that it should hold the severest punishments before him who flaunts its decrees, without also having the power to slay any one at its pleasure, and allow him no degree of resistance. Nor is there any natural connexion between the absolute power to secure a man's safety, and the absolute power to slay him at pleasure. And it cannot be shown that such a power in a sovereign, or such an obligation in the citizens, can contribute to the peace and security of the state. (*LN&N* 7: 8.7)

Pufendorf disagrees with those who claim that the supreme sovereign is ultimately only answerable to God and the people retain no right when the state is constituted, and maintains that the right of self-defence has a wider scope. In the end, one is forced to conclude that whatever fears Pufendorf may have had of building into his political philosophy the right of just resistance, he eventually came round to it and when he did confront the issue did so in a manner consistent with his over all argument. The end result is a forceful reaffirmation of the people's right to resist the rule of those who break all the laws of nature and sociality.

Pufendorf accepts Grotius' argument that, had the people been asked at the time of instituting a supreme civil sovereign whether they would give up this right of resistance, they would never have responded in the affirmative. The reason for this is simple: they were leaving a condition of natural liberty – where their lives were insecure (but where at least they possessed the power to defend themselves by force) – in the hope of achieving a conditions of greater security, namely, the state. It then borders on the absurd to suggest that they would give up this power of defending themselves; that is, they would leave an uncertain predicament only to replace it by the possibility of death without resistance!

5. The 'Care' of the State

The duties of the sovereign can be determined by the purpose and character of the state. Pufendorf's list of these duties is so inclusive that very little is left outside the concerns of the sovereign. Governing the conduct of citizens was totalizing!

The most important duty of the sovereign is to become knowledgeable about the duties entailed by sovereignty. The sovereign must eschew trivial activities and acquaint itself with those who are wise in the art of governing. In order to do his job well a king must study the laws of the country and the character of his subjects. Accordingly, he must study those virtues necessary for his government and so "order his conduct" that it possesses the requisite dignity. And the sovereign must subsume all interest to that of the end of the state.

The first governing principle of the supreme sovereign must be the security of the subjects. For the sake of security inside the state the sovereign must mould the wills of the subjects in such a manner that they will contribute to public safety. In order to do this the sovereign must lay down appropriate laws and also insure their observance, not so much by threatening punitive measures but by developing habits of obedience. Pufendorf shows his astuteness in recognizing that there is a limit to the effectiveness of direct orders as a means of controlling the subjects' conduct. It is discipline and habit that, according to Pufendorf, secure obedience and the security of the state:

> It is necessary for the internal peace of the states that the wills of the citizens be restrained and guided in such a way as will minister to the safety of the state. Therefore, it is incumbent upon supreme sovereigns not only to prescribe laws suited to that end, but also so to buttress up public discipline that citizens will live in accordance with the commands of the laws, not so much out of fear of punishment, as through a natural habit; for mere penalties engender not so much what is the real purpose of reason and discipline, that is, an interest in the right conduct, as a precaution that one be not apprehended in some misconduct. (*LN&N* 7: 9.4)

Human beings in their day to day activities are mostly unaware of the laws and guided only by the use of their natural reason. Therefore, the laws must be few and simple, in accordance with the good of the citizens as well as of the state. The sovereign has the duty to enforce the laws with the threat punishments. However, it is also his duty to ensure that the punishments are to the benefit of the common good. This overriding goal should temper the severity of the sovereign, but also dictates that the severest

punishments are to be given to those who inflict injuries on others, since it was precisely to avoid this the state was established.

The sovereign has the power to appoints ministers to conduct the affairs of the state. These individuals are the sovereign's agents and their actions are ultimately the sovereign's responsibility. Accordingly, it is the sovereign's duty to regulate their conduct through the principle of pleasure and pain. It is also the sovereign's duty to determine how much the citizens are to be taxed and to ensure that they are not taxed beyond the legitimate needs of the state. In order to be fair, taxes must be proportionately related to material conditions of each individual citizen. The sovereign must also take care of the subjects in time of catastrophe, as, for example, during a famine. Promoting commerce and the exchange of goods is also part of the sovereign's duties. To safeguard against factions so as to minimize the possibility of civil war is a key responsibility of the sovereign who,. And lastly, even in times of peace, must always secure his frontiers and maintained a well-trained and equipped army. In the full performance of all these duties lies the security and well-being of the state.

6. On the Law of War

Before commenting on the laws of war, Pufendorf compares nation-states have to human beings in natural liberty, and investigates what is particular to them due to the particular set of laws applicable to the interaction between states (i.e., the *jus gentium*).

What has to be recognized is that men should not take to arms for minor injury and even in the case of major injuries inflicted on a person he should take into consideration "the greater disadvantage than advantage to me or mine, or if others with whom I am still at peace will by reason of my war suffer great losses, which I should, by the law of humanity, have warded off from them by allowing such an injury as was done to me to go unpunished." Accordingly, if a man reckons that war would do more harm to fellow-men than good he should, in accordance with the laws of sociality, refrain from such a retaliation.

As we have seen repeated over and over again, for Pufendorf, human beings live in nature according to the law of nature, that is, the duties of the law of humanity or sociality. This means refraining from harming fellow human beings and conferring on them acts of mutual benefit. This mutual exchange of duties is what constitutes peace, i.e., the state which is most suitable to human kind. Still, war is a lawful activity insofar as it allows individuals to protect themselves and their property. As such, war is legitimate only insofar as its ultimate goal is the (re)establishment of peace.

Pufendorf lists three cause for just wars: first, to defend life and property; second, to obtain that which is owed to one through a perfect right; and third, to obtain reparations as compensation for injuries and losses. Also reparation may be exacted as a punitive measure, so as to deter future hostile actions. A defensive war is just when human beings defend their lives and possessions, while an offensive war is just when waged to obtain what belongs through a perfect right. In these circumstances war is just inasmuch as, by the performance of an hostile act, the other has freed me from my obligations to maintain peace and promote fellowship in accordance with the law of nature. However, "as the mercifulness of natural law orders control and temperance in its indulgence," men must not go beyond certain limits and must avoid extremities (*LN&N* 8: 6.7).

For an account of the unjust causes of war Pufendorf points to Grotius' discussion of the same topic. He is particularly keen to agrees with Grotius on the point that fear of another state's strength is not a just cause of war. Fear only allows one to make defensive arrangements. Along with Grotius, and in opposition to Bacon, Pufendorf condemns the wars waged on the native people of America because acts not in accordance with what can be deduced from the law of nature are not a justification for war.

Pufendorf diligently follows Grotius' account and reasoning on the subject of the laws of war and peace. And it is probably for this reason that scholars of international law in the twentieth century see Grotius as the more original thinker of the two. However, as my discussion demonstrates, international law issues occupy only a small section in the last book of Pufendorf's *The Laws of Nature and Nations*. By far more original and interesting is, as I hope to have shown, the sophisticated and richly detailed discussion of some of the most important questions about human agency in society. These discussions represent the real legacy of Pufendorf to the "modern" world view, a legacy which is as forgotten today as it was considered fundamental by Pufendorf's most immediate heirs, the European thinkers of the seventeenth and eighteenth century.

Conclusion

1. Grotius: The Founder of the Modern Language of the Law of Nature

The most illuminating and formative context in which to situate Hugo Grotius' text *The Law of War and Peace* published in 1625 are the religious civil wars of sixteenth and seventeenth–centuries. The people in Europe had lost the art of interacting among themselves with mutual respect and, the various countries in Europe had lost the art of conducting relations among themselves diplomatically without resorting to open warfare. In other words, sociality among people and nations in Europe had significantly broken down with critical and varied implications for individuals, society, and nations. If Grotius is read as addressing the breakdown of sociality among the people and nations of Europe it makes quite perspicuous what he was doing and the practices in which he was intervening by writing *LWP*.

Hugo Grotius constructed the modern language of the law of nature as a complex of rights and duties of sociality informed by his theory of society. The law of nature, the dictate of right reason are the rights and duties of sociality that are the necessary conditions for the individual and society's preservation and well–being.

Grotius' effort to construct the new language of the law of nature involved five steps. First, he constructed the essentially social and rational nature of man in which the law of nature was grounded and by which it could be apprehended and lived.

Second, (a) the new language of the law of nature was constructed by demarcating the law of nature from volitional law – civil, divine and the law of nations; (b) the criterion for this demarcation was not different subject–matter but point of origin, that is, civil law, divine law and the law of nations originated in the free–will of man and god while the origin of the law of nature was the social nature of man ('right reason' accessible to all men with rational faculties); (c) the scope of law of nature was necessarily universal as it was grounded in the essentially social nature of man; (d) the law of nature applied exclusively to external actions, internal considerations of actions were left to Aristotelian distributive justice and the law of love (divine law); and lastly (e) the law of nature was made independent of god's will.

The third step was to build a framework of justice that accorded with the social and rational nature of man. He did this by giving law a three part definition: (a) all actions that conflicted with the larger good of society constituted acts of injustice; (b) a body of rights that were the moral qualities of the self. These rights that were the property of the self were instrumental to the higher rights of society, that is, the public good; and (c)

volitional law and the law of nature. The law of nature which is a dictate of right reason grounded in the social nature of man makes perspicuous man's rights and duties of sociality. These rights and duties governed by 'right reason' as in the above two instances subordinated individual rights to those of the common good the higher rights of society.

The fourth step was to reinforce this framework of justice grounded in the social nature of man consistent with the common good of society by expediency. The public good was not simply an end in itself standing in opposition to individual self–interest, rather, it is demonstrated to be in accord with one's self–interest. This is the domain of 'law properly so called' or civil law enforced by the sovereign/citizens.

The above four steps inform Grotius' treatment of the varied array of rights and duties of sociality that men possess and must perform toward themselves, other men as men, and citizens as citizen. Further, it is a thoroughgoing treatment of the diverse and varied juridical arrangements and institutions Europeans established in the process of living socially.

This comprehensive articulation of the new language of the law of nature on a vast range of substantive matters is Grotius' fifth step.

In the process of setting up his 'modern' language of the law of nature, Grotius makes a decisive break with his pre-modern predecessors in the law of nature tradition. This break creates, in part, the conditions for modern juridical thought and practice set in place by Thomas Hobbes and Samuel Pufendorf.

The final step of the Grotian agenda intended to clarify and lay down rights and necessary duties of sociality, to mitigate against dissolution of society covers an enormous range of topics, not all of which are discussed in this thesis. Accordingly, the selection of those treated is based on: Grotius' own emphasis upon the topics; the importance they were to have in the political theories of Thomas Hobbes and Samuel Pufendorf; the past 400 years of living in this juridical house, first by Europeans and later, as a result of imperialism, by non–European peoples all over the world.

When Grotius wrote his *Commentary On the Law of Prize and Booty* in 1604-05, he was not writing in response to the sceptical crisis, but as a justification for Dutch commercial ambitions. Grotius categorically stated that the entire wealth of the Dutch people depended upon the successful outcome of the Prize Court case for which he prepared arguments that he prepared as counsel to the Dutch East India Company, defending the booty looted from the *Carack Catherina* during hostilities between the Netherlands and Portugal.

The first principles of the law of nature are not constructed by Grotius as an intellectual response to the arguments of the Sceptics but functioned as elements in the

theoretical framework Grotius used in the concrete practice of representing the interests of East India Company in its imperial commercial ambitions and that of the Dutch republic in general. In this earlier work, Grotius lays out thirteen laws of nature which are entangled with nine rules and together provide the normative grounds for his arguments. It is quite clear that in the construction of these norms/rules/laws Grotius does not deviate in any significant manner from his predecessors.

The new language of the law of nature was not constructed until 1623–25 when he worked on *LWP* in Paris. In this critical work the previous framework of nine rules and thirteen laws of nature is entirely done away with and a new framework is constructed. It is this new framework and the impact it was to have on European political thought and practice that makes Hugo Grotius the first significant political theorist of modernity. These new foundations of the law of nature as we saw above are the social and rational nature of man which accord the dictate of right reason with man's rights and duties of sociability. Significantly, the 'social' as the objective domain of political and legal thought and action had not been constructed in the earlier text and explains Grotius' move from theological voluntarism to non–voluntarism.

The framework for Grotius' natural jurisprudence in the Prolegomena and Chapter 1 of the *LWP* is his construction of the social nature of man, the first step in his response to those who claimed that the law of nations was simply a matter of expediency. He provides a triadic definition of law: first, injustice as that which is injurious to society; grounded in the first, a body of rights as moral qualities, in which rights of society have precedence over individual rights; and third volitional law and the law of nature. The law of nature which is the dictate of right reason subordinates individual rights to the common good on grounds of strategic rationality and more importantly, as it is a superior end. The various demarcations among the various law forms and their objective domains that Grotius effects are made possible by his new construction between the law of nature and other forms of law.

The complex new language of the modern law of nature with which Grotius worked and upon which others critically built answered some of the important question thrown up by the horrors of ensuing religious civil wars. The law of nature was a dictate of right reason, that is, rights of individual/society and duties of sociality. What these rights of individual/society and duties of sociality dictate for the complex, multiple, varied practices and institutions in which men–in–society find themselves, is the subject–matter of the two books of *LWP*. As such, it is impossible to treat all the rights and duties of sociality that Grotius lays down for Europeans.

This thesis follows Grotius in retrieving and critically analyzing the two main contexts of legal claims – for acts not yet committed and for acts that are committed. The first involves discussion on the right of self–defence the second takes us into the origin, limits and defence of private property and punishment. It is in these two contexts of legal claims which is also the context of the justifiable use of force for the enforcement of rights and duties that Grotius spells out his political theory. This political theory makes Grotius extremely important for Hobbes and Pufendorf who were build upon his work.

Grotius first addresses the question whether use of force is ever justified in order to defend one's life. It is within this context that he treats the question of sovereign power, its varied character, original locations, possible transfers, its transgressions by governors, the law of non–resistance, the rights of resistance and the limitation to alienation of sovereignty.

Second, Grotius makes claims with regard to the justified use of force for the defence of property. Within this discussion he treats the origin of private property and limits to individual ownership.

Lastly, he addresses the right to use force for punishment. This allows him to lay down the original location of the right of punishment, the purposes of punishment and punishment for crimes against god within the context of religious civil wars

Grotius' discussion of the right of self–defence as one of the sources of our legal claims addresses: first, whether violent action is ever justified in self-defence and the defence of society; second, the character of civil power, the definition of sovereign power, its varied locations and multiple ways it can be possessed and exercised; third, the law of non–resistance and the right of resistance; limitations on the alienation of sovereignty; and last, the definition of a state and the conditions under which it either ceases to exist or multiplies into several states.

This is a comprehensive treatment by Grotius of what is understood today as the subject–matter of political theory. Later Hobbes and Pufendorf were to build on some of this, condemn some of it as utterly misguided and in the end construct theories that denied validity to the rich set of political and institutions and practices which existed in Europe and were so well endorsed by Grotius.

The arguments treated by Grotius are: (1) defence of property which involves a discussion of its origin, transfer and just limitations; and (2) punishment, its origin and limits which are connected to the role it performs in reinforcements of the dictate of right reason, that is, sociality. To repeat, Grotius sets rules in these areas so that men–in–society may so conduct their (external) actions in their complex and varied interactions with each other so as to secure society and the goods (primarily moral and material) it

makes possible. These rules of sociality are natural because they accord with human nature, right, reason, right, habit, and custom.

Grotius' treatment of property was guided by two fundamental questions: (1) the origin of the right in ownership; (2) limits to individual ownership. This is also true with regard to punishment. Grotius' treatment is based on three questions: (1) the original location of the right of punishment; (2) the purposes of punishment; and (3) and the justifiability of punishment for religious crimes. These were the central concerns of all philosophers because they were the main cause of wars – civil/internal and external – the greatest curse of human society.

Grotius' discussion on property provided Europeans with the first fully formulated arguments on the topic and were to become important for Samuel Pufendorf and John Locke in their philosophical and political enterprises. The discussion on punishment as a reinforcement of the law of nature was seen by Grotius as a necessary support for the natural inclination towards society dictated by right reason and customary practices. These transgressions against the law of nature could and did happen due to corruption of habits and customs. And it is for this reason that it forms such an important section in *LWP*.

Hugo Grotius' political theory was not premised on and built upon minimal rights as Richard Tuck has argued but instead three irreducible principles: (1) preservation of society; (2) self-preservation; and (3) consent. These three principles inform, among others, his account of just and unjust political and legal arrangements; his account of revolution; and his theory of property in land.

As these three principles can and do come into conflict Grotius attempted to resolve some of them, however, as others could not be so resolved (given their irreducible and conflicting character) he left it to the practical judgment of individual, a people or society. The important role played by practical wisdom in Grotian political theory is further reinforced by Grotius' emphasis on the third principle that of consent. The importance of leaving deeply problematic political decisions on the practical wisdom of an individual, a people or society concomitantly further acknowledged the limits of deductive theorizing in political theory. This is why it is incorrect to read Hugo Grotius as constructing a deductive political theory or, as Richard Tuck calls it, the modern language of the law of nature that flows from accepting the two minimal rights and one duty.

2. Hobbes and the Language of Expediency

Thomas Hobbes begins his political theory in *Of the Citizen* within these Grotian parameters. Central to his agenda is sociality and the possibility of peaceful relations between people and nations of Europe. Again like Grotius he starts his project by investigating the nature of man in order to derive his laws of nature, in other words, his laws of sociality. The answers he gives to the same problem a drastically different and set the agenda for a particular kind of modernity.

Hobbes' moral and political theory is premised on his understanding of human nature. For Hobbes man does not have any innate drive towards a social life as in Grotius' understanding of human nature. Naturally, men have minimal functional abilities. All developments, intellectual and otherwise, are possible only in society.

Human beings are most powerfully driven by self-love. However, in conditions of natural liberty with all having a right to all things the situation soon degenerates to a war of all against all. Accordingly, natural reason informs men in the state nature that they must institute a sovereign to whom they transfer all their powers. Sovereignty so instituted is indivisible and absolute. A just and peaceful polity is one where the sovereign enforces the law of nature, which is for Hobbes the true moral science.

However, as we saw, Hobbes' theory falls into incoherence. If all human attributes only develop in society and as there is no society in the natural state, it is unclear how men acquire the rational and linguistic abilities to institute a sovereign in the first place.

It is now possible to note the differences and commonalities with the Grotian concept of justice. For Hobbes, in the final analysis, justice is that which makes self-preservation possible. It makes self-preservation possible by dictating that covenants once made are not broken. As such, sets in place necessary (though not sufficient) conditions for mutual trust. These conditions are fully operationalized (and made sufficient), only when the sovereign is instituted. The Sceptic is held in check only to the extent that his instrumentalist account of justice is countered by a strategic (advantage of the individual in the long run) account. While Aristotelian division and Stoic language of justice is taken into consideration, terms are redescribed to fit his account.

On the other hand, Grotius operates with a complex understanding of justice grounded in the social nature of human agency and his three definitions of law. Justice exists before the institution of the state; rather, it is the legitimate grounds of the state. Further, while strategic and functionalist accounts of justice are given a place in his system, his concept of justice is not exhausted by it. These are the higher goods that are made possible by instrumentalist considerations and which stand over and above self-interest.

3. Pufendorf: The Difficult Synthesis

The last of the thinkers discussed in this thesis is the German philosopher, jurist, historian and statesman Samuel Pufendorf. In a manner similar to Grotius and Hobbes, Pufendorf begins his account on The law of nature by analysing human nature. In natural condition men are powerfully driven by consideration of self-love. However, their natural weaknesses makes it impossible to survive without the assistance of other men. Second, men are exceptionally well equipped and inclined to confer benefits on each other. But, on the other hand, men are equally disposed and capable of harming one another. With these steps, Pufendorf arrives at the "character of the law of nature" and its necessity. He argues that simple abstinence from harming others while being necessary is not sufficient for individual security. Rather it is the active promotion of each other's goods that constitutes *socialitas* and thus makes it the first and most fundamental law of nature - the active promotion of sociality. As we saw above, Pufendorf divides up absolute duties that men in all 'states' must perform into three: towards god, oneself, and other men. In a manner similar to Grotius and Hobbes, the law of natures also attend to human institutions such as speech, property and the institution of the state. All laws of nature, both absolute and those which are from human institutions have the force of necessity.

Men leave the state of nature for two reasons: Hobbes' reason (security) and Grotius' reason (desire for refinement). Pufendorf hypothetically reconstructs the three steps that are needed to institute the sovereign power. These three steps - two agreements and a decree - are seen as overcoming the non-viability of Hobbes' argument explaining the steps necessary to institute a sovereign. However, Pufendorf along with Hobbes, argues that a sovereign power of a 'regular' state must be undivided and absolute at the same time he distances himself from Grotius' justification of divided sovereignty as characteristic of a 'sickly' or 'irregular' state.

3. The Importance of the Law of Nature Tradition for Future Studies

In the end, I would like to claim that if the law of nature tradition is understood in part as I have tried to reconstruct it, then our understanding of those who came after must be quite different. At the least, it would clearly have many implications for how we understand the Scottish Enlightenment, for they worked and furthered this language of modern natural jurisprudence. It would also affect our understanding of the law of nature in Germany, as it was developed by Leibniz and Kant. And it would certainly affect the reading of English philosophers, such as Locke and Blackstone. Further, it is no little matter that even nineteenth century variants of socialism work within the framework constructed first by Grotius - by which I mean the 'social' as the objective domain of

analysis. As well, it will make us clearer on the common grounds shared by allegedly opposing contemporary camps in moral and political theory - the liberals and communitarians. But this is work that will involve many a scholar and a long time to complete.

However, let me just gesture at what could possible be reworked in contemporary political theory if there is even some partial truth to this interpretation.

(a) If juridical thought is not right-based but based in duties of sociality in which rights and discipline have their place it dislocates contemporary rights theorists from their alleged juridical foundations. I have claimed and demonstrated that the subjectivized language of right was introduced into 17th century juridical thought and practice to justify punishment by the Sovereign when subjects deviated from their duties of sociality that were necessary for the existence of societies and not in order to give individuals primacy over society. Quite the contrary, the very construction of the rights-bearing individual in these the law of nature theories was in order to punish the subjects or citizen for transgressions in the performance of their duties of sociality which were seen as necessary for the preservation of society. Individual rights were clearly subordinated by all the three thinkers being treated (as well as by John Locke) to the primacy of the public good, that is, the good of society. It now seems that it is not Rawls or Dworkin who possess greater family resemblance to their seventeenth-century ancestors, rather, philosophers such as Charles Taylor and Michael Sandel resemble more closely this juridical family. Both, Taylor and Sandel see rights as major gains of modernity, but just as their 17th century ancestors situate them within and not outside of the public good. Moreover, ontologically along with Grotius, Hobbes and Pufendorf they see rights as qualities possessed by human-agency-in-society. The disengaged, rights-bearing individual who is morally and intellectually complete, standing over and above society, maintaining with it only instrumental relations (protected by rights), is a 20th century caricature of liberalism from the 17th century to the present.

(b) Michel Foucault has rightly censured political theorists of the last 100 years for concentrating exclusively on juridical practices (legal and political) grounded in right instead of also looking at the complex motley of social practices where power circulates differently to manufacture the modern subject. My complaint against Foucault is that he uncritically accepts the notion that 17th century is best understood at least in part within the language of right which is precisely what I have tried to call into question. I suggest that to his extremely important works and insights should be added the duties of sociality. After all, instead of being foundational, right and discipline were the scaffolding that held *socialitas* in place.

Second, while Foucault is quite right to place the beginnings of the utilization of this disciplinary power in the 17th and 18th centuries to produce and govern the conduct of individuals he seems to have drawn too great a distance between juridical power and disciplinary power. While seeing them both as responses in part to Machiavelli's republicanism he has always stressed and maintained their different origins and trajectories in the formation and the governing of modern societies. Disciplinary power, he argues, grows out of the concern for policing 'populations' and sees the various strategies of governing mentalities within this complex of consideration, on the other hand, juridical power has a more ancient lineage drawing extensively from *Roman Jurisprudence.* I agree with a great deal that Foucault has to say, however, I would like to murky the waters a bit here. So let me point out at the outset that these are not two simple narratives standing along side each other but come intertwined in complex and intricate ways. The Dutch juridical philosopher Justus Lipsius is the key figure here. In his *Constantia* and *Politicus*, both published towards the end of the 16th century he argued that juridical structures had to be reinforced by discipline. For Lipsius, discipline meant infusing the citizens with Neo-Stoic moral values and this be done through techniques of drill, repetition and surveillance employed previously by the Roman military academies. He then went on to lay out these rediscovered techniques of manufacturing the ideal citizen-soldier in order to build a well ordered and moral state. His nephew Prince Maurice of Nassau went on to build the first modern army by implementing his uncle's recommendation by building just such an academy. All countries in Europe followed suite and set up these model military academies for building professional armies. This Lipsian model was then systematically used to build schools, factories, hospitals, mental asylums, cities etc. The fact that we have forgotten Lipsius' role is unfortunate as his recommendations, of course in an adapted form, circulate in most of our own disciplinary institution today. To come back to our concerns it is important to remind ourselves that Grotius' father had been a student of Justus Lipsius and the young Hugo himself knew him well. He spent many a pleasant evening in the company of his intellectual mentor the elderly Lipsius. To further draw your attention to these connections lets remember that Pufendorf was very good friends with Grotius' son Peter de Groot who did much to further his intellectual career. Further, Pufendorf now Secretary of State to Fredrich of Prussia aided in the struggle between Catholic bloc led by Louis XIV and the Protestant bloc led by Fredrich of Prussia. And it is not surprising that it is Prince William of Orange, the grandson of Prince Maurice of Nassau (Orange) that invaded England in 1688 to secure the balance between the two blocs (the British euphemistically call it the Glorious Revolution). With the exception of Grotius all

thinkers of the 17th century argued against Aristotle that man is not naturally a political animal but rather made into one through discipline and they went on to make it the most critical duties to be performed by the sovereign. Both Locke and Pufendorf were also in a position not only to write philosophical treatises about discipline but implement these policies through the various administrations where they occupied key positions - Pufendorf in Sweden and Prussia, Locke in England. I would like to suggest that this complex interweaving of juridical power and disciplinary power is critical to the understanding of modernity from 17th century to the present.

(c) Now to Habermas. His triadic conception of reason grounded in our structures of linguistic competence privileges only one moral language that of right over all others. I have several problems with his programmatic construction. I have with good reasons grave misgiving with regard to Habermas' entire project: his epistemology grounded in the 'force of good reason' cannot be accepted, his historiography is deeply flawed thus rendering his understanding of the present very problematic, and his captivity to the quasi-Hegelian progress view of history that informs his entire agenda is equally indefensible. However, these are flaws that don't directly bear on this thesis so we need not address them here - I just had to mention the full extent of my differences with Jurgen Habermas. Below, let me just gesture towards some problems I have with his moral philosophy.

First, Habermas sees the pervasiveness of rights in late 20th century as pointing towards some essential feature of language itself and by implication, human agency and the human condition. I think it is important to shed this illusion. Instead of being essential to our linguistic competence the language of subjectivized rights was introduced into European juridical thought and practice by Hugo Grotius in 1625. Rights have acquired a seemingly 'natural' 'universal' and 'objectivist' character only because over the last 400 years they have been interwoven into the varied legal and political practices of Europeans and subsequently spread to non-European people through imperialism (economic, intellectual, religious and cultural). In other words, it is the deeply customary and conventional character of these right based practices that gives them the illusion of being somehow essential to human agency.

Second, Habermas seems to assume that along with their essentialism the meaning of 'right' has remained constant. Once again this is an illusion that one falls under when one of its (rights) uses is universalised - when one gazes too long at one fibre that makes the rope. The meaning of any concept is determined by the uses and functions it performs in the various language-games in which it is employed. Rights have performed not one but many functions through history depending upon the uses to which they have been put.

To draw upon one of Wittgenstein's greatest insights: the meaning of words is not determined by grasping its essential nature rather it is seeing the customary uses of the word, that is, the function it performs in the varied practices that permit us to know how to go on, or go against, in this particular game. I will just survey a few of its meanings to make this point clearer. The term Right (*ius*) in Roman Jurisprudence points to an act or state of affairs that accords with law; in Grotius we find rights as subjectivized properties of the self and function as foundational to law; for Hobbes rights were simply those acts made possible by human faculties limited by and not foundational to law. Right is simply human motion and law stops it; for Pufendorf a right is the name (a differentiating signifier) given to the undifferentiated moral power of the subject. If we observe the uses of the language of right in history we find that from the 17th century onwards they have performed diverse functions: they have been used to justify the Sovereign's punishment in the event of the non-performance of one's duties of sociality; right has been used by the Sovereign to destroy the power of other corporate bodies such as the Church, feudal and guild power in order to locate it all in the Sovereign - in other words to clear the age of rank and privilege and leave the undifferentiated individual completely vulnerable to the majesty of power now concentrated in the Sovereign; in turn rights were used against the Sovereign by the people in Europe so as to limit the power of the Sovereign; the language of right has further been used in the great anti-colonial struggles by non-European people to repossess the oldest political good that of self-rule; workers all over the world have waged some of their most successful struggles in the language of right; today rights are more or less effective tools in varied struggles - Women's rights, rights of Aboriginal people, Gay and Lesbian rights, rights against power that circulates through various disciplinary institutions, animal rights, the right to live in a non-nuclear world, etc. I find that Habermas is not very sensitive to the richness of the meaning of the word right and the uses (meaning) to which it has and is being put.

Last, the allegedly quasi- transcendental moral framework that Habermas has put together has no place for sociality. More importantly, his rationalist agenda as it is grounded in the speakers very act of speaking cannot by definition have a place for the language of sociality. Further, given the fact that Habermas does not give the language of virtue which has been the moral frame of reference of Europeans for the last 2500 years (or for that matter the ethics of care) a place in his rational reconstruction it would seem rather surprising if he were to acknowledge the need to build into his system the duties of sociality. Therefore, the only reason I am pointing this out is to further highlight the limitedness of Habermas' inclusive claims. I won't even raise the possibility of how a citizen of India or China - or anywhere else in the non-western world for that matter -

would react to this attempt at universalising this one type of moral language with particularly Europeans roots by supposedly grounding it in the linguistic competence of all human-beings as such.

(d) Canadian philosopher Charles Taylor has over the years spun a fine tapestry with great finesse. Among the many contributions made by him he has meticulously traced the intricate and tangled motley of practices that have constituted the modern 'Self' in the West. His work has shed more light on the multiple paths moderns have taken to reach the present than any other single 20th century philosophical contribution. An integral part of the story he tells, or rather, has been hammering home, for the last 30 years is the limitations of 17th century construals of moral and political philosophy. To this he contrasts the richness of the works of late 18th and early 19th century Romantic scholars. Taylor's canvass is far too broad and intricate for my meagre abilities to address, however, what I do want to call into question in this instance is his understanding of 17th century moral and political philosophy which he sees with great sadness as having become foundational to present conversation on the subject. My difficulty here is that Taylor in the first instance reduces 17th and large parts of 18th century into John Locke. He further reduces this to a particular interpretation of Locke to that of Robert Nozik. I find this rather surprising as this reading of Locke has been quite thoroughly rejected and replaced by some of the finest scholarship emerging from the 'Cambridge School' - I say this with some amusement as the scholar to correct this Nozikian misunderstanding is Charles Taylors' highly esteemed colleague. This in itself is enough to repudiate this part of Taylors' construal but the question I am interested in at the moment is how would the Taylorian world-picture be affected if instead of right it is the duties of sociality that lie at the foundations of modernity. The law of nature did make right to self-preservation and its means, the first principles but instantly situated them within what they all considered the higher principles those that involved the common good. I cannot see how Taylor can find fault with this situated understanding of right as it is a critical part of his own self-understanding where the socially constituted self is not some thing that may be prescribed or simply be done away with, but rather, is the very ontological condition of being human, to think otherwise is to simply dive out of the human condition.

Of course the 'Self' that has 'depth' which has to be given articulation for it is in the articulation, that is, in the investigation of this depth that it partly constitutes itself, the expressivist-constitutive feature of the Taylorian agenda, was not a feature of 17th century theorizing about the Self. The 'thick' or 'rich' Self is certainly an insight of late 18th and early 19th century philosophers who both partly discovered and partly constituted this new self-understanding. Yet if sociality and not right is seen as lying at

the their foundation I would like to claim that (1) the distance between the two is not as wide as the claims of the Taylorian polemic; and (2) the connections between the two are rather different and present not a contrast but a complex and tangled relationship.

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