JURISPRUDENTIAL LEGACY OF THE ENLIGHTENMENT: SAVING THE IMPARTIAL SPECTATOR

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A 21st Century Liberal Enlightenment

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> It is thus that the general rules of morality are formed. They are ultimately founded upon experience of what, in particular instances, our moral faculties, our natural sense of merit and propriety, approve, or disapprove of. We do not originally approve or condemn particular actions; because, upon examination, they appear to be agreeable or inconsistent with a certain general rule. The general rule, on the contrary, is formed, by finding from experience, that all actions of a certain kind, or circumstanced in a certain manner, are approved or disapproved of.
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> Adam Smith, *Theory of Moral Sentiments,* III.4.8

INTRODUCTION

The legacy of the Age of Enlightenment spreads across the whole spectrum of human knowledge and beliefs. The scholarship of the period and the political and cultural upheaval that followed revolutionised science, commerce, politics, culture and law. The Age of Enlightenment is known as the Age of Reason. It was the age of reason because it liberated science and philosophy from the grip of superstition and censorial power of State and Church. It represented in the words of

Immanuel Kant 'man's emergence from his self-imposed immaturity ... the inability to use one's understanding without guidance from another'. (Kant, 1974) Advances in theoretical reason influenced practical reason and revolutionised politics and law.

This essay has three aims – (1) to discuss the ways in which the thinking and politics of the Enlightenment changed views about the nature and function of law and their role in the development of constitutional democracies; (2) to assess the relevance of these ideas in the 21st Century; and (3) to discuss some intellectual and political trends that challenge the jurisprudential legacy of the Enlightenment. We will see that the jurisprudential legacy of the Enlightenment comes with contradictions that continue to fuel debates in contemporary liberal legal theory. Many of these disagreements flow directly or indirectly from different understandings of reason in the Age of Reason.

Three initial clarifications of scope are necessary. First, the Age of Enlightenment, for the purpose of this discussion is understood broadly as spanning the 17th and 18th Centuries. Many scholars regard the Enlightenment as commencing in the middle of the 17th Century which is sensible in relation to the sciences and philosophy. However, the jurisprudential Enlightenment had an earlier birth as shown by the revolutionary achievements of English jurists in the early 17th Century in resisting royal absolutism. Their efforts eventually lead to the constitutional settlement that became the template for representative democracy around the world. The rise of the first truly capitalist state in the Dutch provinces and the writings of the great jurist Hugo Grotius also belong in this early period.

Second, the term jurisprudence is employed in the Anglo-American sense of the philosophy of law. It is broader than the European *jurisprudencia* which refers to the exposition

of the body of rules and doctrines that comprise the law in a given legal field. There are epochal statutes and judgments that cannot be disassociated from legal philosophy. They include those that abolished slavery in England, extended suffrage and stripped the Crown of legislative prerogatives including the power to create monopolies, to impose taxes and to make or suspend laws by proclamation. Section III of the *Act of Settlement 1701* which ended the power of government to remove judges from office without the approval of the elected legislature is seen today as an essential safeguard of judicial independence and the rule of law and is enshrined in most liberal democratic constitutions. This essay however, is focused on three schools of jurisprudence that arose from the intellectual ferment of the Enlightenment – ideas that profoundly influenced the development of the kind of political society that respects individual freedom and legal equality. Each of these schools of thought has older roots but it is in the 17th and 18th centuries that they gained their current political influence. The three schools are those focused on natural rights, legal positivism and evolutionary theory of law. Each of these traditions despite their differences has contributed greatly to the emergence of liberal democratic societies.

Third, I do not consider all the philosophical contributions on the subject of law during the Age of Enlightenment but only those that gave rise to distinctive and enduring traditions in jurisprudence. Missing, therefore, are the political theories of Kant and Rousseau, the commentaries of Sir William Blackstone and the ruminations of many other continental philosophers.

Legal positivism and natural rights are conceptually hard to reconcile. The intense and often acrimonious debates between and within these schools have dominated jurisprudence in common law countries. Some rights and freedoms considered to be natural rights have become

entitlements under positive law by their adoption in constitutions or special charters. All countries whose legal systems are regarded as reasonably liberal and democratic have rights charters in some enforceable form. (The Commonwealth of Australia does not have a dedicated rights charter but its written Constitution provides protection of many basic rights and freedoms.) Legal positivists insist that these entitlements derive their force not from a 'natural' source but from the positive law of the land. Most positivists applaud rights charters for the clarity, certainty and enforceability that they that they bring to what would otherwise be imprecise moral claims. However, there are other legal positivists who oppose the idea of rights charters in any form. These opponents are mainly scholars who favour the theory of legislative sovereignty that Hobbes and Bentham and their latter day followers espoused. Their objections are driven primarily by utilitarian considerations. The evolutionary view of law and justice has received the least attention in mainstream legal philosophy. Evolutionary jurisprudence is inseparable from Smithian and Austrian economic theory. As I argue in this essay, it offers the strongest epistemological and economic justifications of liberal constitutionalism.

THE ENLIGHTENMENT AND THE ASCENDANCY OF NATURAL RIGHTS

Pre-Enlightenment natural law and rights

Theories concerning natural law and natural rights, though related, are distinct. While the idea of natural law is ancient, the theory of natural rights in its political form is a distinctive achievement of the Enlightenment. The idea of natural right has older precedents but its empiricist foundation was laid by the thinkers of the Age of Enlightenment and it is during this period that natural rights became a powerful political program. It inspired the Declaration of American

Independence, the US Bill of Rights and the French Declaration of the Rights of Man and of the Citizen. The rules derived from natural rights theory supply the most important provisions of the Universal Declaration of Human Rights and the international treaty law on human rights. Although debate continues about the ways and means of promoting these rights domestically and internationally, there is little disagreement about the moral case for their protection.

Natural law theories of classical antiquity and medieval theology did not have as their aim or focus the protection of individual rights. In their classical and theological forms, they proclaimed the existence of a higher moral law that binds all persons and rulers. According to the teleological worldview of Plato and Aristotle, the eternal cosmic law assigns all things and persons to pre-ordained stations and ends. This cosmic law becomes the *lex aeterna* of St Augustine and St Thomas Aquinas, the eternal humanly unchangeable law of God. What is right is what is just and what is just is that which is in harmony with eternal law. There is no claim-right in the Hohfeldian sense that a person can assert against another else but only *iura* that are objectively just according to eternal law as revealed to prophets or as discovered by the reason of philosophers. The Hohfeldian claim-right equates to the continental subjective right, the *recht*. Finnis points out that the primary meaning that Aquinas attributed to the word *ius* was not 'right' in the modern sense but 'the just thing itself' including the just state of affairs. (Finnis, 2005: 206) The transformation of personal entitlement from *ius* to claim-right is one of the achievements of the Enlightenment, without which liberal society, in my opinion, was not possible.

The practical consequences of classical teleological reasoning for individual rights are too many to discuss here. One example illustrates the central problem. The first natural right is that of self-ownership. Articles 1-4 of the *Universal Declaration of Human Rights* have no other

purpose than to declare this. The status of man under classical natural law depended on one's standing in the natural order. However, reason through which the natural order is discovered leads people to different conclusions. The Stoics condemned slavery and proclaimed the equality of all human beings. Epictetus called slavery 'an abysmal crime' and Seneca said that citizens and slaves were blood relations equal under natural law. (Rommen, 1955: 24-25) Yet the two great teleological philosophers Plato and Aristotle regarded slavery as part of the natural order. Plato said of slaves 'the human animal is a difficult possession; for it is stiff-necked, and evidently not willing at all to be or become easily managed in terms of the inevitable distinction in deed between slave, free man, and master'. (Plato, 1980[360 BC]: 7) Aristotle thought that the 'complete household consists of slaves and freemen' and regarded that some persons were natural slaves (*physei doulos*) who were but animate articles of property. (Aristotle, 1946[350 BC]: 9-10)

The Aristotelian teleology translated easily to Christian natural law of Augustine and Aquinas. Cosmic reason became Divine reason. Saint Augustine of Hippo wrote: 'eternal law is the divine reason and the will of God which commands the maintenance of the natural order of things and which forbids the disturbance of it'. (*Contra Faustum*, XXII.27; Chroust, 1944: 196) Aquinas held that all things that are subject to the *lex aeterna* and derive from it certain inclinations towards those actions and aims that are proper to them. (*Summa Theologica* I-II, Q 93, art 6; Aquinas, 1947: vol 1, 1008) The natural law theories of the early Church Fathers were equivocal on the question of natural slavery, the belief that some persons are by nature destined to be slaves. Augustine denied that slavery was a natural condition. Theological scholars have been debating endlessly on the Thomist view on natural slavery. Brett and Zagal, for example, argues that Aquinas was not considering the condition of the Greek slave (*doulos*) who was

another's property but that of a person in feudal servitude (*servus*). (Brett, 1994: 27; Zagal, 2003: 5) Zagal contends that servitude, according to Aquinas, is not natural but just in a secondary sense (*secundum quid)*. It was legitimate only to the degree that it promoted the comfort of both master and slave. (*Summa Theologica* II-II, Q 57, art 3, ad. 2) Killloran finds the Thomist view of natural slavery to be incoherent because Aquinas thinks that enslavement of people vanquished in war is not merely just according to the conventional *ius gentium* but also is also just in nature because 'victory is a sign of pre-eminence in some virtue'. (Killoran, 1987: 89) This allowed some Spanish theologians to justify the enslavement of indigenous Americans on account of the military and cultural superiority of Spain. (Ibid: 93)

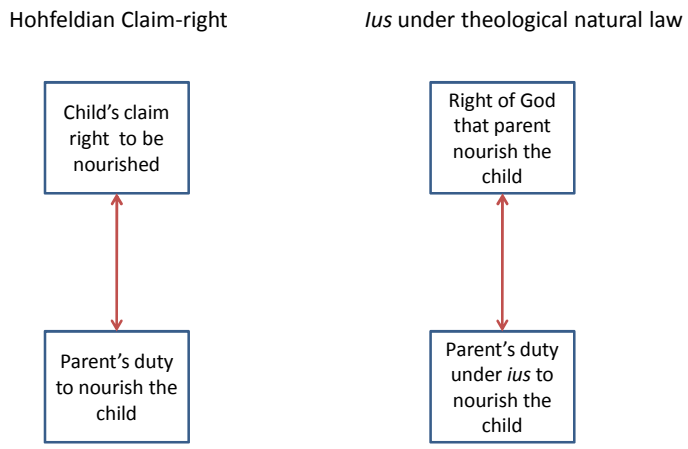
It is unnecessary for this discussion to know with certainty where medieval theologians stood in relation to various kinds of human servitude such as chattel slavery, feudal serfdom and New World slavery and the duties of owners towards slaves. What is clear is that to the extent they had any rights, slaves, like children under the dominium of the father, were protected by *ius* and not by subjective right to self-ownership and self-determination. In 1515, the Dominican theologian Silvestro Mazzolini da Prierio noted the difference between *ius* and *dominium* in this way.

> *Dominium*, according to some people, is the same thing as *ius* ... According to other people, it is not identical for an inferior does not have *dominium* over a superior, but may have a *ius* against him. Thus for example a son has a *ius* to be fed by his father, and the member of a congregation has a *ius* to receive the sacrament from a prelate, etc. So they say, to have a *dominium* implies that one has a *ius*, but not vice versa; for in addition to a ius one must have superiority. (Tuck, 1979: 5)

The difference between objective right under old natural law and subjective right of natural rights theory appears as follows.

Objective right under old natural law theory	**Subjective right under natural rights theory**
What is just according to natural law determines what is the right	What is the natural right determines what is just according to natural law

The English common law has for centuries recognised the claim-rights of children. Modern international and domestic law for the protection of children in effect enforce the natural rights of children. The fact that children have no recourse against neglectful parents *while they are children* does not mean that they have no Hohfeldian claim-rights. They can claim remedies after achieving legal capacity. Their rights may be vindicated and enforced by the state even during their childhood. A Hohfeldian claim-right moreover does not depend on the existence of an effective remedy. Remedies confer distinct entitlements that arise after a claim-right is violated. (Austin, 1869: 788; Birks, 2000:30; Ratnapala, 2009: 205-206) The concept of *ius* is not easy to explain in Hohfeldian terms. The duty of the parent to nurture the child under theological natural law is owed not to the child but to a higher moral authority. The Hohfeldian relation, if one exists at all, is between God and parent.



From objective *ius* to subjective natural right – the theological beginnings

There is a hardly an intellectual revolution to which the past has not contributed. The achievements of the Enlightenment are no exceptions. The idea that there are certain human rights that rulers must not abrogate by law did not gather political force until the Enlightenment. However, the idea of a subjective right was already well established in the Roman law although it sometimes went by the name of *ius*. Thus the landowner had *dominium* over the land. The usufructuary had *ius* to enjoy the fruits of the land. (Gaius, *Digest,* xxxix.2.19) The ancient common law of England was founded on customary rights and duties that were enforced by courts. These were rights by convention or positive law. The *Magna Carta* claimed them under the law of the land. Rights under *ius naturale* of the Romans, though influenced by Stoic philosophy, were derived from the *ius gentium.* The apparent universality of these laws lead

Rome's two greatest law codifiers Gaius and Justinian to equate the *ius gentium* with the *ius naturale*, the natural law of reason that the Stoics spoke about. (Buckland, 1963: 53)

The beginnings of this idea in theology are found in the 13th-14th Century debates surrounding the Franciscan doctrine of apostolic poverty and later the Conciliarist Movement. Among sinless people, so it was thought, there is no need for subjective property rights. Franciscans who aspired to the life of innocence insisted that they could live in poverty since they only had bare use of necessities (*simplex usus facti*) without *dominium* in its different forms. It followed by implication that in general society there is a need for private property rights. (The Papal Bull of Nicholas III had recognised five forms of interests in property: *proprietas*, *possesio*, *usufructus*, *ius utendi* and *simplex usus facti.*) John Duns Scotus (1265-1308) observed that unlike in the age of innocence where common property is natural, in sinful society persons are likely to take more than their fair shares of material goods. Therefore private ownership 'is exceedingly consonant with peaceful living' and hence it is a natural law in the broader sense. (*Ordinatio* IV, dist 17; Frank, 1997: 204, 220) Thus Duns Scotus acknowledged a concept of natural rights based on the realities of social life and human need.

William of Ockham (1288-1347), thought that there were three kinds natural law. The first kind was the law that is true for all time and all places. The second consisted of natural equity that prevailed in the age of innocence .The third kind is the contemporary moral law deduced by reason or from the law of nations or observation of human behaviour. (*Dialogus de imperio ac pontificia potestate* III, tr 2, p 3, c 6; Luscombe, 1982: 715) Private property rights are natural in the third sense although in case of extreme necessity, a person may take another's property even against the eighth commandment. (*Short Discourse*, 2, 24; Ockham, 1992[1340]: 690)

The idea of human need and social consensus as the basis of natural rights began to be heard in the late 16th Century. Richard Hooker argued that general principles of natural law are self-evidently known or gathered from the 'universal consent of men' and the fact that 'the world hath always been acquainted with them'. (Hooker, 1977: I, viii, 3, I, vii, 9) Francisco Suarez (1548 – 1617) conceded that certain acts are objectively good or wicked independently of Divine law. Human acts may in addition 'have a special good or wicked character in relation to God, in cases which furthermore involve a divine law …' (*De Legibus*, II, 6, 17; Suarez, 1944[1612]: 202) Suarez like William of Ockham believed that in times of extreme need, private property reverts to common use. Like Ockham, he maintained that when rulers become tyrants they forfeit their authority conferred by social contract and political power returns to its original natural source, the community. (Haakonssen, 1996: 18)

The work of these Church Fathers represented a move away from the older tradition of seeking to know the mind of God through reason. According to these thinkers, natural law principles, though set by God, were discernible by rational deduction from human experience. They foreshadowed the theories of natural rights and social contract that sprouted in the Age of Enlightenment.

ENLIGHTENMENT, EMPIRICISM AND NATURAL RIGHTS

The Age of Enlightenment saw rationalism displacing metaphysical thinking. The authority of church and state was under challenge and moral scepticism was on the rise in Europe. A secular *ius gentium* was an urgent need as the community of nations expanded beyond Christian Europe. For all these reasons, a natural rights theory would not have gained political force without an

empiricist foundation. The theory provided inspiration for American Independence, the US Constitution and the US Bill of Rights. The *Declaration of the Rights of Man and Citizen 1789* became the ideological platform of the French Revolution. In England, Locke supplied the elements of the political theory that lead to the Revolution of 1688 and the final internment of the legislative prerogatives of the Crown. Locke's *Two Treatises of Civil Government* was published anonymously in 1689 but was written ten years previously. (Laslett, 1988: 59-61) His views were well known as shown by his exile in 1683. Natural rights eventually became the human rights of the 20th Century. (Finnis, 1980: 198)

The Age of Reason was the Age of Natural Rights. Grotius, Hobbes, Pufendorf, Locke, Rousseau, Richard Cumberland, James Harrington, Frances Hutcheson, Algernon Sydney, and John Trenchard were all influential. Given the confines of an essay, let me consider the three most influential of these thinkers, Grotius, Hobbes and Locke.

Hugo Grotius

The first of the 17th Century natural rights theorists was Hugo Grotius who began his treatise *De Jure Belli ac Pacis* (*The Law of War and Peace*) by inquiring how rights and duties exist at all. The answer, he said lies in the nature of man as a social animal. Human beings like other animals have instincts of self preservation. They also have in addition the capacity for language, a sense what is yours and mine and the instinct of acting according to general principles of conduct. (*Prolegomena*, para 7; Grotius, 1925[1625]: 11-12) The maintenance of social order in accordance with human intelligence is the source of law properly so called. (Para 8; Id: 12) Grotius declared that these propositions 'would have a degree of validity even if we should concede that which cannot be conceded without utmost wickedness, that there is no God, or that

the affairs of men are of no concern to him'. (Para 11; Id: 13) Grotius believed that the free will of God was another source of law but his key point in the *Prolegomena* was there is a law that is natural to humankind irrespective of faith.

Thomas Hobbes

John Locke is widely regarded as the father of empiricism but we may justifiably bestow that honour on Thomas Hobbes. Hobbes was the first modern philosopher to assert the priority of 'right' over law. Law does not create right but right dictates what the law ought to be. Right confers liberty whereas *ius* or law confines it. (Hobbes, 1946[1651]: 83) Hobbes articulated the most fundamental proposition of English law that a person may do anything that the law does not forbid and refrain from any act that the law does not require.

Science was Hobbes' first preoccupation. His political theory is derived from what he considers to be incontrovertible premises founded on sensory perception. Hobbes denied the possibility of innate ideas. 'Also because, whatsoever, as I said before, we conceive, has been perceived first by sense, either all at once, or by parts; a man can have no thought, representing anything, not subject to sense'. (Id: 17) We cannot know the mind of God for God is infinite whereas our minds can only grasp the finite. (Ibid) Thus political theory cannot be derived from the unknown but must be founded on experience. The scientist in Hobbes was curious about the 'interior beginnings' of the motions of animals including the human race. In the case of animals, there are two kinds of motions. One is vital motions that begin at birth and continue till death such as breathing, pulse, nutrition and excretion. The other is voluntary motions, the visible actions caused by endeavour. Endeavour is generally in response to desire or aversion. Some

desires and aversions are inborn and others acquired by trial and error. (Id: 31) Man's power of endeavour, before the establishment of government, was retrained only by the limits of physical capacity and his own judgment.

> The right of nature, which writers commonly call *jus naturale*, is the liberty each man hath to use his own power as he will himself 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, he shall conceive to be the aptest means thereunto. (Id: 84)

This meant, according to Hobbes, that in the state of nature 'every man was at war with every other man' and so life was 'solitary, poor, nasty, brutish and short'. (Id: 82) The notions of right and wrong have no place in such conditions because where 'there is no common power, there is no law; where no law, no injustice [and] force and fraud are in war the two cardinal virtues. (Id: 83) Therefore people, by nature seek peace because of the 'fear of death; desire of such things as are necessary to commodious living; and a hope by their industry to obtain them.' (1946: 84) Reason dictates the convenient articles of peace which Hobbes called 'the laws of nature'. Hobbes thought that these were scientific laws because their absence imperils life. He identified and discussed nineteen of these laws in Chapters XIV and XV of *Leviathan*. Many of them are expressed in the form of duties of beneficence, tolerance and mutual accommodation. However, these have no other purpose than to secure the right of individuals 'to govern their own bodies; enjoy air, water, motion, ways to go from place to place; and all things else, without which a man cannot live, or not live well'. (1946: 101) It is a law of nature that any dispute concerning rights is determined by an impartial judge whose independence must be respected by all parties. Hobbes final seven rules are an elaboration of requirements of impartial adjudication.

Hobbes's scientific mind that bridged the physical, biological and cultural divides failed him when it most mattered. He fell victim to what Hayek was to term the constructivist fallacy and embraced the idea that only an absolute ruler can maintain social peace by protecting the natural rights of individuals. He theorised that people enter into a Covenant whereby they give up their autonomy to an absolute ruler capable of protecting their rights and administering justice. He went from no government to absolute government. Hobbes proposed that individuals surrender their absolute autonomy in the state of nature in exchange for the limited but workable autonomy under the rule of an absolute sovereign. Hobbes was a royalist who witnessed the death and destruction of the English Civil War and the chaotic rule of Parliament. He became convinced of the superiority of absolute rule. If Locke was the great intellectual defender of the Glorious Revolution, then Hobbes was the greatest champion of absolute rule. English history turned out to be on Locke's side.

Hobbes' covenant was not between people and the sovereign but among the people themselves to surrender natural freedom. He recognised that the sovereign may be a collection of persons rather than an individual. Yet, the kind of sovereign Parliament existing during the pleasure of the people was not what Hobbes had in mind. In *De Cive* Hobbes argued strenuously that monarchy and aristocracy are superior to democracy, which he foresaw would be riven by factions. (Hobbes, 1651[1983]: 129-40) However, we can make three points in a partial defense of Hobbes.

First, Hobbes was right in saying that civilisation is impossible in conditions of perpetual conflict. It is difficult to conceive human flourishing without security of life, liberty and property. This is commonsense that history repeatedly confirms. Second, Hobbes advocated *absolute* power but not *arbitrary* power. He considered absolute power to be the remedy for the

arbitrariness of a self-help system. According to Hobbes 'The end of obedience is protection …' and the 'obligation of subjects to the sovereign … is understood to last as long, and no longer, than the power lasteth by which he [the sovereign] is able to protect them'. (1946, 144) Hobbes maintained that the natural right of individuals to protect themselves can never be relinquished by covenant. Although sovereignty, is intended to be immortal 'yet is it in its own nature, not only subject to violent death by foreign war, but also through the ignorance and passions of men it hath in it …'. (Ibid) Hobbes here was saying that sovereignty can be destroyed not only by the subjugation of the nation by a foreign power but also by the sovereign's own corruption. A sovereign (whether of one or many) when ruled by passion or ignorance may govern in its own interests or prove too incompetent to protect the interests of its subjects. Such a sovereign loses its right to obedience. Third, Hobbes anticipated Hume, Madison and modern public choice theory in recognising the danger posed by demagogues, factions and special interests to the public interest representative democracy. (1983, 133) Aristotle had warned of these in relation to Athenian direct democracy.

Unfortunately, history shows that Hobbes' confidence that absolute power will deliver safety of life, liberty and property of the subjects was badly misplaced. So was his belief in the natural death of corrupt absolute government. It was Locke who provided the greatest inspiration for modern constitutionalism founded on the idea of individual liberty.

John Locke

John Locke, a medical man and philosopher, was also immersed in science. Locke was an early member of the Royal Society with scientists Robert Boyle, Isaac Newton, John Wilkins, Robert

Hooke and Christopher Wren. He became a close friend of Christiaan Huygens while in exile in Holland. His greatest work, *An Essay Concerning Human Understanding* examining the limits of perception and knowledge earned him the reputation of the father of empiricism.

Locke, like Hobbes, rejected the notion of innate ideas and treated mind as a blank slate on which experience does the writing. 'The senses at first let in particular ideas, and furnish the yet empty cabinet … afterwards the mind, proceeding farther, abstracts them, and by degrees learns the use of general names'. (Locke, 1836: 13) Experience leads to the formation of political authority. Locke's theory also begins with man in the state of nature. However, unlike in the Hobbesian world, Locke's state of nature was not a state of war. The state of nature was ruled by the law of nature. Human beings are God's creatures and hence are his property. No person may therefore harm himself or any other person. (Locke 1960[1690]: 289) Every person has the right to life, liberty and property. A person owned his own body and mind and any property converted to use through his labour. This was the fundamental natural law. There was one serious problem with the state of nature. There was no civil government hence every person was his or her own law interpreter, judge and enforcer. In the state of nature I determine what my right is, pronounce judgment in case of a dispute and enforce it to the best of my ability. So long as resources are plentiful in the state of nature conflicts are few and manageable. However, as life becomes more complex and commerce develops, the need for civil government arises.

Hobbes argued that only a sovereign with unlimited power was capable of establishing order and protecting the people. He saw no need for any precautionary limits on power. Locke, on the contrary believed the opposite – that it was the absence of limits on power, particularly those set by the separation of powers that caused the inconvenience in the state of nature. Locke's people, like those of Hobbes enter a covenant by which they concede to a supreme

authority the power to protect life, liberty and estate. However, unlike Hobbes' covenant which is a contract among individuals themselves, Locke's contract is between members of society as a group and the sovereign. Also unlike the Hobbesian folk, the Lockean people give the sovereign only a limited mandate. Power is given to the sovereign on a trust in return for the undertaking that it will govern in a manner that avoids the principle causes of misery in the state of nature. Locke wrote:

> … the power of the Society or Legislative [the supreme authority] constituted by them, [the people] can never be suppos'd to extend further than the common good; but is obliged to secure every ones Property by providing against those three defects above-mentioned that made the State of nature so unsafe and uneasie. And so whoever has the Legislative or Supreme Power of any Common-wealth is bound to govern by establish'd standing Laws, promulgated and known to the People, and not by Extemporary Decrees; by indifferent and upright Judges, who are to decide Controversies by these Laws; And to employ the force of the Community at home only in the execution of such Laws, or abroad to prevent or redress Foreign Injuries, and secure the Community from Inroads and Invasion, And all this to be directed to no other end, but the Peace, Safety, and publick good of the People. (Id: 371)

Locke was more explicit than Hobbes about what would happen if the sovereign violates the natural rights of the people. The people retain the right of resistance to the sovereign. 'The Legislative being only a Fiduciary Power to act for certain ends, there remains still in the People a supream Power to remove or alter the legislative, when they find the Legislative act contrary to the trust reposed in them'. (Id: 385) When the legislature violates the trust, 'the trust must necessarily be forfeited, and the Power devolves into the hands of those that gave it,

who may place it anew where they shall think best for their safety and security'. (Ibid)

Persistence of natural rights thinking in the modern age

Legal positivism became the dominant theory of the post Enlightenment Age. The idea of natural rights though remained one of the most powerful ingredients of liberal constitutionalism. The idea of the social contract and the Lockean right of resistance became guiding principles of the US Constitution and the adoption of the Bill of Rights in 1791 entrenched a number of rights that Hobbes and Locke considered to be 'natural'. Natural rights in their modern form 'human rights' gathered strength in post WW II era pushed along by the United Nations *Universal Declaration* and the *Convention on Civil and Political Rights* and more effectively by the regional Conventions like the *European Convention on Human Rights*. There are entrenched or unentrenched 'bills of rights' in 130 countries. Not all these are effective but those in the industrialised democracies are considered a valued feature of their constitutional systems. Natural rights became positive human rights under constitutional and legislative protection. The idea of natural rights gained in influence even as their original justification weakened under the assault of legal positivists.

EMPIRICISM TO LEGAL POSITIVISM

Legal positivism is a direct offshoot of Enlightenment empiricism. Legal positivism in the form presented by Hobbes and Bentham predates philosophical positivism of Auguste Comte and, by a long stretch, the logical positivism of the Vienna Circle. Since the publication of the first authoritative version of Bentham's *Of Laws in General* in 1970 (it was discovered posthumously

in 1939 among his papers at University College) Bentham has been regarded as the founder of the British School of legal positivism. Yet, that distinction may belong to Hobbes. Hobbes and Bentham were not against the legal recognition of basic rights. In fact they were fierce defenders of basic rights and liberties. What they denied was that *in a political society* these rights had any force unless enacted by a political superior.

The core of the positivist doctrine is the message that we must separate the law as it is from all other kinds of rules and norms and our notions of what the law ought to be. A bad, immoral or unjust law is nonetheless law if it satisfies the formal criteria of validity such as enactment by authorities designated under a constitution. The other related theme of British legal positivism is that law exists as social fact. The law may give effect to moral precepts and religious beliefs but its existence as law depends entirely on social reality. Thus the law against theft is law not because of the Eighth Commandment but because of its human enactment. The free speech guarantee in the United States is law not because it is morally compelling but because it is enacted by the First Amendment.

State law of course is not the only kind of law that exists as social fact. Persons are guided in their behaviour by custom, commercial usage, moral codes and so on. In fact contrary to social contract theory, society existed before a state capable of producing law emerged. Why should norms that are not directly or indirectly enforced by the state not count as law? A stipulative definition of law that excludes such norms will simply be a *petitio principii* unless some further justification is found. Hobbes and Bentham justified absolute sovereignty on the principle of utility.

Absolute monarchs from time memorial have claimed God given exclusive power to make law. (*Quod placuit principi legis habuit vigorem.*) The modern idea of legally absolute sovereign was first proposed by Jean Bodin (1530-1596). Bodin's sovereign derived its authority from God and was subject to the divine law. Hobbes was the first thinker to advance a purely utilitarian argument for an absolute sovereign. He argued (wrongly in my view) that social peace can be achieved only under an absolute sovereign who has a monopoly of law making power. The rights of persons in the state of nature had no legal limits. Hobbes understood that in human society there can be no absolute rights and freedoms. Rights can be enjoyed only in conditions of peace and peaceful coexistence required the curtailment of rights. Thus the sovereign must have the power to determine both what is necessary for peace and the means of achieving it. (Hobbes, 1651(1946): 116) The sovereign, to this end, has 'the whole power of prescribing the rules' that announce what to every man their entitlements and obligations. (Id: 117) Sovereign's law served the public interest at two levels. First, Hobbes made the dubious assumption that an absolute sovereign will be above factions and so be better able to protect the rights of all citizens. Hobbes' sovereign is the benevolent dictator or dictatorial assembly whose governance is unmoved by self-interest, a rare phenomenon of history. The sovereign was the uncommanded commander. The sovereign is not subject to popular democracy. Hobbes was on surer ground at the second level. The sovereign's exclusive authorship of law increased the clarity, certainty and predictability of the law. The law was made by the sovereign's command or by those authorised to command on his behalf judges and authorised officials was more certain than law that depended on diffused opinion, unwritten custom or religious beliefs.

We know that the history of humankind was not remotely like the story told by Hobbes. As other Enlightenment thinkers like Hume, Smith and Bentham realised man human beings evolved in society which by definition is a form of coexistence. Many past and present societies have prospered without the protection of absolute rulers and many societies have been impoverished and destroyed by absolute rule. However, we should mention in Hobbes' defence the following points.

First, Hobbes was right in saying that civilisation is impossible in conditions of perpetual conflict. It is difficult to conceive human flourishing without security of life, liberty and property. This is commonsense that history repeatedly confirms. Second, Hobbes advocated *absolute* power but not *arbitrary* power. He considered absolute power to be the remedy for the arbitrariness of a self-help system. According to Hobbes 'The end of obedience is protection …' and the 'obligation of subjects to the sovereign … is understood to last as long, and no longer, than the power lasteth by which he [the sovereign] is able to protect them'. (Hobbes, 1997[1651]: 121) Hobbes maintained that the natural right of individuals to protect themselves can never be relinquished by covenant. Although sovereignty, is intended to be immortal 'yet is it in its own nature, not only subject to violent death by foreign war, but also through the ignorance and passions of men it hath in it …'. (Ibid) Hobbes here was saying that sovereignty can be destroyed not only by the subjugation of the nation by a foreign power but also by the sovereign's own corruption. Unfortunately, history shows that Hobbes' confidence that absolute power will deliver safety of life, liberty and property of the individual subjects was seriously misplaced.

The principle of utility became a fully fledged theory in Bentham's jurisprudence. Bentham was aware that in his time the English law existed mainly in the form of the common

law. Yet in he argued that only the expressed will of the political sovereign ought to be considered as law. Bentham regarded the authorless, unpromulgated and uncodified body of rules that made up English law to be unworthy of the name law. (Bentham, 1988 [1789]: xiv-xv) He dismissed similarly the idea of a higher natural law. He called such law 'an obscure phantom, which, in the imaginations of those who go in chase of it, points sometimes to *manners*, sometimes to *laws*; sometime to what the law *is*, sometimes to what the law *ought* to be'. (Bentham, 1970[1789]: 298) Bentham reasoned that a system of law that derives its rules exclusively from the clearly expressed legislative will of a sovereign will produce clearer and more certain laws than the rules generated by the common law system.

Bentham argued that customary law and the common law lacked the 'signs of law'. A law in Bentham's view is known beforehand. It must set a standard by which conduct of people can be judged by courts to be legal or illegal. Adjudication was primarily a process of deduction from established law and found facts. Bentham saw in customary and common law the opposite process. The court determines whether an act is legal or illegal and people infer a rule of conduct from the court's decision. The rule is drawn inductively from the observation of what courts actually do. The law in its legislative form applied generally whereas a judicial order bound only the parties. Bentham concluded that customary laws 'are nothing but so many autocratic acts or orders, which in virtue of the more extensive interpretation which the people are disposed to put upon them, have somewhat of the effect of general laws.' (Bentham, 1970[1782]: 158) He likened the common law process to the old Turkish practice hanging a baker who is caught selling under-weight bread. The silent act of hanging had the desired effect on cheats. Bentham wrote: 'Written law is the law for civilized nations; traditionary law, for barbarians; customary law, for brutes'. (Bentham, 1970[1782]: 159)

Bentham was conscious that customary law and common law cannot be eliminated from a legal system without the comprehensive codification of all branches of the law. He pursued the cause of codification with passion and industry, producing three major works on the subject: *Papers relative to codification and public instruction* (1817), *Codification proposal, addressed to all nations professing liberal opinions* (1822-1830) and *First lines of a proposed code of law for any nation compleat and rationalized* (1820-1822) These have been recently consolidated in one volume. (Bentham, 1998)

History shows that Bentham failed in his mission within his own country and in other parts of the English speaking world. Bentham did not inspire the codes of civil law countries. The civil law codes have their origins in the *Code civil des Français* enacted by Napoleon I in 1804. The failure of the codification movement in England is not surprising. Bentham misconceived the nature of English common law. Common law, contrary to Bentham's hyperbole provided guidance for conduct both for the people and the courts. The common law courts did not create the common law willy-nilly. In the large majority of cases, the courts enforced a known rule articulated in precedents and followed in practice by most people. The common law possessed a virtue that Bentham simply failed to notice. It was the capacity for incremental legal change to reflect social evolution – something that a legislative process riddled with factional conflict lacks. In England, the common law was regarded not just as law but as a system of law that was the product of English genius. On Bentham's own greatest happiness principle, the English common law has done rather well in upholding the legitimate expectations of the people.

The proposition that law is exclusively the product of sovereign will has been abandoned by modern legal positivists. Instead law's validity is traced to some kind of socially established

ultimate validating rule such as Hart's 'rule of recognition'. (Kelsen's *Gründnorm* is similar though his system is founded not on empiricism but on a form of transcendental idealism.) The rule of recognition is not easy to find in a political system of divided powers as in the Roman Republic or the United States. At the zenith of the Roman Republic, the *Comitia Curiata*, the *Comitia Cencuriata*, the *Senate* and even the *praetors* all made laws with no authority holding supreme power. Even in England both Parliament and the superior courts make law. Some British judges regard the rule of parliamentary sovereignty as a judicial creation amenable to judicial modification. (See for example, *Jackson v HM Attorney General* [2006] 1 AC 262 at 302, 304, 318, 320 and 326.) Fuller disputes that 'the rule of recognition that ascribes legal sovereignty to the Queen in Parliament can in some way summarise and absorb all the little rules that enable lawyers to recognise law in a hundred different special contexts'. (Fuller 1964: 140) Despite these difficulties, British legal positivism as refined by Hart *et al*, remains the dominant jurisprudential theory within the common law world with the exception of the United States. In Europe, Hans Kelsen's transcendental 'pure theory of law' that separates law from both morality and social fact has been influential.

The attraction of legal positivism owes much to its closeness to the intuitive understanding of state law by lawyers and citizens in parliamentary systems. It explains the 'lawyer's law' rather well but not so well the law in the broader sense of the rules of justice upon which a liberal social order rests. Legal positivism has a narrow compass and leaves to other disciplines the study of law in its social and economic dimensions.

LAW OF THE THIRD KIND – THE NEGLECTED JURISPRUDENCE OF THE SCOTTISH ENLIGHTENMENT

Legal positivism promotes the idea that there is only one concept of law in a mature legal system. This is the law that is identified by reference to some formal criterion of validity. It assembles within the concept of law many of types of rules and commands such as Acts of Parliament (or Congress), rules and regulations made under the authority of Acts, directives and orders and judicial precedents. In short, any instrument that is formally authorised is valid law. This is a reasonable way to understand how a mature legal system in fact operates today provided we keep in mind that actual legal practice does not always accord with the law in the books and that social order depends also on many less formal rules. What legal positivism does not examine are the questions: what kinds of law are appropriate to a liberal social order and what are the consequences of the lack of constitutional limits of legislative power.

At the heart of this problem is the neglect of a crucial distinction between law in the older sense and law in the modern sense which includes all legislation. Law in the older sense were the rules that guided the behaviour of individuals in society towards others. These are the 'rules of justice' that Hume and Adam Smith discussed and Hayek later termed *nomoi* or rules of just conduct. Law in the modern sense includes these as well as all other state enforced directives and decrees including those that have nothing to do with general norms of conduct and all to do with the achievement of specific outcomes. Thus the prohibitions of the criminal law against harm to person and property and the rules of contract law that demand performance according to agreed terms are rules of justice and therefore law in the classic sense. Legislation that sets aside or allows officials to set aside contracts, fix wages and prices, censor speech, confer benefits or impose deprivations on persons or classes and in innumerable ways intervene in economic relations fall outside the class of the rules of just conduct. Their purpose is to secure specific

ends whereas law in the older sense is general, abstract and impersonal. The rule of law suffers to the extent that legislation of the latter kind displaces law in the classic sense.

The most profound modern exposition of the neglected distinction and the epistemological argument for re-instating the supremacy of the law of the first kind is found in the magisterial work of the founder of this Society, Friedrich Hayek – *Law Legislation and Liberty.* (Hayek 1982) However these ideas were first worked out by the Scottish empiricists, most notably by David Hume and Adam Smith – thinkers to whom, Hayek acknowledges, he owes his greatest debts. The jurisprudence of these Scottish moral philosophers, who Sir Fredrick Pollock called the 'Darwinians before Darwin', was drawn from a theory of social evolution based on uncompromising empiricism. (. (Pollock, [1890]1972: 41-42) Unlike Hobbes and Locke, the Scots did not subscribe to the idea of a social contract as the foundation of society. (Neither did Bentham who believed that man always lived in society.) Unlike Bentham, the Scots valued custom and common law, recognised the limits of human knowledge and were sceptical of the capacities of a central authority to design society according to some utilitarian calculus. They argued that by understanding our limitations we can actually extend our capabilities.

Empiricism and spontaneous order

The key to the jurisprudence of the Scottish Enlightenment is the rediscovery of the spontaneous order of society and the evolutionary nature of the rules of justice. Empiricism lead Hobbes and Locke to believe that the only source of human law was the sovereign person or assembly. Locke denied that evolved custom had any legal force and treated the legislature as antecedent to all positive law. (1960:373-74) Hobbes claimed that customs were 'antiently Lawes written' that

were ‘now Lawes, not by vertue of the Praescription of time, but by the Constitutions of their present Soveraigns’ (1946:175). The empiricism of Hume and Smith, on the contrary, lead to the opposite conclusion – that there was law before government and indeed that a primary cause of the emergence of government was the need to maintain the law of the land.

The eighteenth century evolutionist thinkers were not the first to notice spontaneous order. Hayek notes that the idea was current among the Spanish schoolmen and even in Greek classical thought. (Hayek, 1982: vol 1, 20-21) The great English jurist and Chief Justice Sir Matthew Hale regarded the common law as part of the spontaneous order of society. Hale observed that law is ‘accommodate to the Conditions, Exigencies and Conveniences of the People’ and ‘as those Exigencies and Conveniences do insensibly grow upon the People, so many Times there grows insensibly a Variation of Laws, especially in a long Tract of Time’. (Hale 1971:39)

It was the Enlightenment empiricism that established spontaneous order theory on a firm epistemological foundation. The first of them was in fact a Dutchman, Bernard Mandeville to whom Hayek pays the extraordinary tribute that he made Hume possible (Hayek 1978:264). Mandeville detected that society is neither supernaturally installed nor humanly created but is the result of the accumulation of design through intergenerational experience. He set out his thesis in the celebrated parody, *The Grumbling Hive; or Knaves turn’d Honest.* In the third dialogue, Mandeville’s Cleomenes says, ‘that we often ascribe to the Excellency of Man’s Genious, and the Depth of his Penetration, what is in reality owing to length of Time, and the Experience of many Generations, all of them very little differing from one another in natural Parts and Sagacity’. (1924: vol. 2, 142). In the sixth dialogue, Cleomenes compares the process by which the law attains its sophistication to the mechanical process of weaving stockings. (Id: 32)

However, it was Hume who provided the first scientific explanation of spontaneous order. Hume took Mandeville's playful satire a bit too seriously and condemned him for suggesting that the public good always resulted from the contrivances of crooks. Nevertheless he found Mandeville's theory of the accumulation of design compelling.

Hume

There are two major limitations of human intelligence – one internal and the other external. Internally the human mind is limited by the limits of perception and experience which Locke exposed in his *Essay*. We cannot know the infinite but only what we can gather and extrapolate from experience. Externally, it is not possible even with our physical capabilities to command the kind of knowledge necessary to understand, let alone regulate, a system of emergent complexity or spontaneous order such as society.

Hume was much more precise than Hobbes and Locke in advancing what he called the 'speculative science of human nature'. (Hume, 1748[1975]: 297) He agreed with Hobbes and Locke that our knowledge of the world is based exclusively on experience but found their denial of innate knowledge to be problematic. Knowledge is not innate in the sense of being miraculous but like Smith Hume argued that human beings have original passions. He also pointed out that whereas our ideas are in no sense innate, our impressions may well be considered innate if that term is understood to mean 'original or copied from no precedent perception'. (Id: 22) Hume's major breakthrough was in noticing that the human mind has no prescience and in deriving the practical consequences of that limitation. He observed that there are only perceptions present to the mind. The objects that cause our perceptions are not knowable directly. What we do not

perceive directly, we infer on the principle of cause and effect. Causation is a relation and not a thing. Wherever there is fire, we feel heat and therefore we infer that fire causes heat. In *A Treatise of Human Nature* Hume argued that reason alone can never give rise to any original idea and that the basis of our knowledge is nothing more than custom or accumulated experience. (Hume, 1978[1739]:157) We can construct theories and test them by laboratory experiments, but this process too is based on the 'general habit, by which we transfer the known to the unknown, and conceive the latter to resemble the former'. (Hume, 1975[1748]: 107) Scientific theorizing depends in part on experience and in part on blind speculation. Hume declared that 'experimental reasoning itself, which we possess in common with beasts, and on which the whole conduct of life depends, is nothing but a species of instinct or mechanical power, that acts in us unknown to ourselves' (Id:108)

This theory of knowledge led Hume to his view that the rules of justice on which social order rests grew out of convention or custom and are not the result of design or agreement. Conventions are formed not by reason but by the accumulation of experience. He rejected the social contract theory arguing that law and society could not have been established by a promise as the institution of the promise was itself based on convention. The rules of justice arise not result from verbal exchanges but through the coincidence of behaviour as when 'two men, who pull the oars of a boat, do it by an agreement or convention, tho' they have never given promises to each other'. Thus, rules of justice, like other conventional things such as language and currency, 'arise gradually, and acquire force by a slow progression, and by our repeated experience of the inconvenience of transgressing it'. (Hume, 1978[1739]: 490) Hume struck upon the evolutionary idea that rule formation is a process of habit meshing that occurs through

the tendency of punishing encounters to extinguish and rewarding encounters to re-enforce behavioural patterns. (cf. Campbell, 1965: 32-33)

Hume was a utilitarian before Bentham. (Id: 212) However, he argued against the attempts of contemporary thinkers to reduce all good intentions to self-interest and devoted Appendix II of the *Enquiry* to this subject. Hume argued that there are countless instances of 'general benevolence in human nature where no real interest binds us to the object'. (Id: 300) They reflect original passions that are irreducible to private pleasure. Hume recognised the importance of 'social virtues' – sympathy and beneficence in their various forms. However what secures the general peace and order of society is the virtue of justice. Beneficence is directed at particular persons whereas justice is general and impersonal, being owed to all persons. 'Among all civilised nations', he wrote, 'it has been the constant endeavour to remove everything arbitrary and partial from the decision of property, and to fix the sentence of judges by such general views and considerations as may be equal to every member of the society'. (1975[1748]: 308) In the *Treatise* Hume argued that justice is anterior to government which arises out of the need to enforce justice. Though men can maintain 'a small uncultivated society without government, 'tis impossible they shou'd maintain a society of any kind without justice and the observance of the three fundamental laws concerning the stability of possession, its translation by consent and the performance of promises'. (Hume, 1978[1739]: 541) Government was needed not to make law but to administer the law impartially. (Id: 537)

Hume understood the interdependence of the rules of justice. Happiness of society arising from beneficence is like a wall built by many hands that rises with each stone. Happiness of society arising from justice is like a 'vault, where each individual stone would, of itself, fall to the ground; nor is the whole fabric supported but by the mutual assistance and combination of its

corresponding parts'. (1975[1748]: 304) This is a profound insight. At one level, justice, unlike beneficence cannot be selective without undermining the whole structure. At another level the different rules of justice function as a system. Property is not secure without personal security and certainty of contract. Contractual certainty is impossible without security of property and person. Personal freedom is unachievable without private property. Justice is blind and may reward the unworthy as when a bad man inherits riches according the law of succession. Justice may hurt a good man by depriving him of property acquired by mistake. It is impossible for the rules of justice to prevent all particular hardship without bringing down the edifice. 'It is sufficient', Hume wrote, 'if the whole plan or scheme be necessary to the support of civil society and if the balance of good, in the main, do thereby preponderate much above that of evil'. (Id: 305)

Smith

The starting point of Adam Smith's theory of justice, developed in *The Theory of Moral Sentiments* (TMS), like that of Hume, is the original passions of man, of which sympathy or fellow feeling is the most important for the generation of rules of justice. How does sympathy coagulate into rules of justice?

Smith argued that moral judgment is that made from the point of view of the impartial spectator. Why the impartial spectator? Smith's argument proceeds as follows. Sympathy or fellow feeling is a universal instinct. A person can have sympathy for another only if the person can imagine the feelings of the other. (Griswold, 1999: 339-41) We cannot get into the mind of another. So we imagine his feelings by the way we ourselves would feel in his situation. 'To

approve or disapprove, therefore, of the opinions of others is acknowledged, by every body, to mean no more than to observe the agreement or disagreement with our own'. (*TMS* I.i.3.2) Assume that W sees A stealing B's wallet. W has sympathy for B because W knows that he will feel the same way if he was the victim. Likewise W can sympathise with B's anger. However, a person can never fully associate with the feelings of another. W's resentment of A's act is likely to be somewhat weaker than B's own resentment of it. Hence overreaction will not meet with W's approval. The aggrieved person therefore is advised to attune his passion to the level of an impartial spectator if he is to gain his sympathy. 'He can only hope to obtain this [sympathy] by lowering his passion to that pitch, in which the spectators are capable of going along with him'. (*TMS* I.i.4.7) Thus moral judgment about propriety and impropriety of an action is that of the impartial spectator who has no particular positive or negative relation to the parties directly involved. Likewise proper judgment about reward or punishment for the act of theft is that of the impartial spectator. B may feel that A deserves life imprisonment but he will not find much sympathy for this from the impartial spectator.

There are of course instances when the judgment of the impartial spectator within us is overruled by the real spectators without. We may think in good conscience that we have done the right thing only to be shocked by the disapproval of our peers.

> In such cases, this demigod within the breast appears, like the demigods of the poets, though partly of immortal, yet partly too of mortal extraction. When his judgments are steadily and firmly directed by the sense of praise–worthiness and blame–worthiness, he seems to act suitably to his divine extraction: But when he suffers himself to be astonished and confounded by the judgments of ignorant and weak man, he discovers his

> connexion with mortality, and appears to act suitably, rather to the human, than to the divine, part of his origin. (*TMS* III.2.32)

Our judgments about right and wrong are thus edited by public opinion. Where public opinion fails to overrule our conscience, 'the only effectual consolation of humbled and afflicted man lies in an appeal to a still higher tribunal, to that of the all–seeing Judge of the world, whose eye can never be deceived, and whose judgments can never be perverted'. (*TMS* III.2.33) These passages again demonstrate Smith's empiricist and evolutionary method. Moral sentiments are drawn not from mystical sources but from attitudes of interacting self-interested persons. We may in good conscience defy the judgments of fellow men and women but it is they and not the all-seeing Judge that determine morals on earth and hence the rules of justice.

Parts II and III of TMS contain Smith's most important contribution to moral philosophy from the classical liberal standpoint. They deal with the two main 'outward' moralities: justice and beneficence. Sympathy is the origin of the ideas of beneficence and of justice. The absence of beneficence or of the sense of justice in a person evokes disapprobation. However it is only unjust conduct that inspires the stronger feeling of resentment and leads to the demand for retribution. This is a critical distinction. Beneficence involves positive action whereas justice is concerned with the breach of negatively expressed prohibitions. That one should show charity to a victim of misfortune is a principle of beneficence. That one should not steal another's property is a rule of justice. Smith rejected the notion of social justice. He wrote: 'Beneficence is always free, it cannot be extorted by force, the mere want of it exposes to no punishment; because the mere want of beneficence tends to do no real positive evil'. (*TMS* II.ii.1.3) A person could be just without being beneficent. 'We may often fulfil all the rules of justice by sitting still and doing nothing'. (*TMS* II.ii.1.9)

Smith considered that of the two outward moralities of justice and beneficence, justice was the more fundamental to society. The state, he believed has a clear role in the administration of justice. The moral rules of justice are for the most part recognised as legal obligations that in the last resort, the state has a responsibility to enforce. However, Smith did not see a major role for the state in the determination of the rules of justice because they are formed spontaneously through the conversation of mankind. Part VI of the book reveals Smith's thoughts on government. As a Whig, he believed in limited government. He condemned the notion that a ruler knows best what is good for people and that a central plan of government can take care of all aspects of social life. The man of system 'is apt to be very wise in his own conceit' and fails to realise that 'in the great chess-board of human society, every single piece has a principle of motion of its own, altogether different from that which the legislature might choose to impose upon it'. (*TMS* VI 2.17) Society will be harmonious and successful when the legislature's laws coincide with the expectations of the community and when they do not they lead to misery and disorder. Smith regarded society as a spontaneous order that cannot be micro-managed by a central government. He thought that established powers and privileges and the great orders of society should be tolerated even if they are abusive in some measure. We should try to moderate things that we cannot annihilate without great violence. Likewise we must not try to establish the best system of laws but only the best that people can bear. (*TMS* VI.2.16)

Smith also cautioned against state attempts to promote beneficence. He argued that although the absence of beneficence excites disapprobation, attempts to extort it would be even more improper. He wrote: 'To neglect it altogether exposes the commonwealth to many gross disorders and shocking enormities, and to push it too far is destructive of all liberty, security, and justice'. (*TMS* II.ii.1.8) Smith realised that while beneficence is highly desirable, it couldn't be

exacted without jeopardising the more fundamental morality that is justice. Smith's warning is current as shown by modern research on institutional decay caused by the perverse incentives and moral hazards of the modern state welfare systems. (Becker 1981; Murray 1984; Yankelovich 1994) While both justice and beneficence form the moral capital of society, the state is effective only in the promotion of justice. Beneficence can only be promoted by 'advice and persuasion'. (*TMS* II.ii.1.7) The subordination of beneficence to justice is a key to understanding the harmony of the *Theory of Moral Sentiments* and *The Wealth of Nations*. Smith was clearly and rightly concerned about intemperance and indifference towards poverty in his time. Yet, he saw that the progress of nations is served not by coerced beneficence but by the steady observance of the rules of justice that secure the conditions for trade and industry, the means to the wealth of the nations.

STATE OF THE LEGACY – THE DEMISE OF THE IMPARTIAL SPECTATOR

The jurisprudence of the Scottish Enlightenment provided the most powerful epistemological argument for the rule of law in the sense of the supremacy of rules of justice. These are the general and impersonal rules that arise from the moral sentiments winnowed by intergenerational experience. The basic rules of property, wrongs and contract have no author as they grew not out of man's foresight but out of the evolutionary process of selection as persons went about adapting to the ever changing world they found themselves in. As the Scots realised, the origins of some of the most fundamental social norms are lost in the mists of time and some norms predate the emergence of human capacity to express them in words. They arose not from rational calculations but from regularities of action and the advantages they conferred on groups

who happened to observe the regularities without any foresight of those advantages. (Hayek 1982: I, 19)

Modern democracy typified by the OECD countries is a welfare state that has assumed a wide range of social security functions. It is also characterised by direct and indirect wealth transfers through taxation, subsidies and regulation of economic activity. Coercive wealth transfers do not constitute acts of beneficence on the part of the state or the persons from whom the wealth is transferred. It can hardly be said that I engage in a beneficent act when I give what I am forced to give. If I choose to distribute my wealth I will be beneficent but only because the rules of justice do not require me to do so. A private citizen who coerces me to give away my wealth commits a serious crime. When the state compels me to part with my wealth, it may be acting lawfully in the modern indiscriminate sense but contrary to the rules of justice in the classic sense.

Most members of a society are likely to agree that every member should have an economic safety net for coping with misfortune. There is an element of beneficence in such an arrangement though it is also in everyone's self interest as a form of universal insurance against catastrophe. However, in the age of democracy, the welfare state has extended itself far beyond this objective. Elected governments, particularly those whose powers are not carefully circumscribed by constitutional rules, cannot ignore the distributional claims of critical sections of the voting public on whom its fate depends. As Hayek wrote, 'an omnipotent democratic government simply cannot confine itself to servicing the agreed views of the majority of the electorate' but will be forced 'to bring together and keep together a majority by satisfying the demands of a multitude of special interests, each of which will consent to the special benefits granted to other groups only at the price of their own special interests being equally considered'.

(Hayek 1982: 3, 99) The argument that wealth transfers resulting from the electoral process and the discretionary powers of government have little to do with genuine collective choice is well supported by public choice studies. (Buchanan 1962, 1975, 1986; Tullock 1962, 1976; Olsen 1965, 1982) Even if it is conceded that such transfers deserve the name beneficence on the occasions that they benefit the genuinely destitute, there is no way of determining accurately, the winners and losers in the overall political scramble. It is hard to disagree with Ropke's comment that the welfare state has degenerated 'into an absurd two-way pumping of money when the state robs nearly everybody and pays nearly everybody, so that no one knows in the end whether he has gained or lost in the game'. (Ropke 1971: 164-5) Indeed as Brennan and Buchanan remind, 'the implementation of political transfers will always be such that the direction of transfer is away from the minority and toward the decisive majority, and the poorest cannot be expected to be in the decisive majority any more often than anyone else.' (Brennan and Buchanan 1985: 128) In the absence of genuine community consensus, the coercive redistributions effected in the name of social welfare transgress the rules of justice.

These observations are not meant to understate the value of beneficence as a moral good or as moral capital. Acts of beneficence benefit both giver and recipient. They rarely have externalities if performed in accordance with rules of justice. Beneficence increases trust and lowers transaction costs. A democratic state without beneficence will be one where all those in need are dependent on the state. In such a state, justice will be in jeopardy from the continual government interventions. A society rich in beneficence will be more than likely be a society rich in justice because true beneficence requires stability of possessions that is only secured by the rules of justice.

The impartial spectator of Adam Smith no longer reigns, being displaced by interested faction in legislative calculations of majoritarian democracies. I will conclude my thoughts by leaving you with just one case that graphically illustrates the endemic arbitrariness of the law that Hume and Smith warned of, and in our age, Hayek exposed as the road to serfdom. The case is that of Mr Bone a Queensland farmer against whom the local council issued a vegetation protection order that prohibited him from clearing his farm of invading vegetation. The Australian Constitution does not require compensation to be paid for takings by State or local governments. The Queensland Court of Appeal found no way of granting Mr Bone any relief against the brute force of the law. The presiding judge, Hon Bruce McPherson JA, one of the State's finest, made this sad observation.

> This brings me to what is really Mr Bone's fundamental complaint about the whole process of vegetation protection that has been imposed on his land under chapter 22 is that, by the Council's action in making the order, his land has been struck with sterility in relation to the uses he can now lawfully make of it. Except with Council approval, there is practically nothing he can do with it except continue to grow vegetation and perhaps walk on it…For this severe limitation on his rights as owner, he has received and will receive no compensation, although he continues to enjoy the privilege of paying the rates that the Council levies on his land. *Bone v Mothershaw* [2003] 2 Qd R 600, 611

This is not an isolated case but an instance of the wider legislative and administrative phenomenon that our crude majoritarian democracy seems powerless to arrest. The natural rights to life, liberty and property that Hobbes and Locke proclaimed and for which millions laid down their lives from the time of the Enlightenment to our day remain under threat. His Honour's words are a chilling warning about the imminent demise of the Impartial Spectator.

REFERENCES

Aquinas, T St, (1947) *Summa Theologica literally translated by Fathers of the English Dominican Province; with Synoptical Charts*, Volumes 1-3, London, Burns and Oates.

Aristotle (1946[350 BC]) *The Politics*, E Baker tr, Oxford, Clarendon Press.

Austin, John (1869) *Lectures on Jurisprudence*, 3rd ed, London: J Murray

Becker, Gary (1981) *A Treatise on the Family*, Cambridge, Mass: Harvard University Press

Bentham, J (1970[1782]) *Of Laws in General,* London, University of London, The Athlone Press

Birks, Peter (2000) 'Rights, wrongs and remedies', 21 *Oxford Journal of Legal Studies*, 115-58

Bodin, Jean (1992) *On Sovereignty: Four Chapters From Six Books of the Commonwealth*, Cambridge: Cambridge University Press.

Brennan, Geoffrey and Buchanan James M, (1985) *Reason of Rules*, Cambridge: Cambridge University Press

Brett, Stephen F (1994) *Slavery and the Catholic Tradition: Rights in the Balance*, New York, Peter Lang.

Buchanan, James M, (1975) *The Limits of Liberty*, Chicago: Chicago University Press.

Buchanan, James M and Tullock, G, *The Calculus of Consent*, Ann Arbor: University of Michigan Press.

Buchanan, James M, (1986), *Liberty Market and State*, Brighton: Wheatsheaf Books.

Buckland, W W (1963) *A Text Book of Roman Law from Augustus to Justinian*, Cambridge, Cambridge University Press.

Chroust, A-H (1944) 'The Philosophy of Law of St Augustine, 53:2 *The Philosophical Review*, 195-202.

Finnis, John (1980) *Natural Law and Natural Rights*, 2005 Reprint, Oxford, Clarendon Press.

Frank, W A (1997) *Duns Scotus on the Will and Morality*, Washington DC, The Catholic University of America Press.

Fuller, Lon (1964) *The Morality of Law*, New Haven and London, Yale University Press

Griswold, Charles L (1999) *Adam Smith and the Virtues of Enlightenment*, Cambridge: Cambridge University Press

Hale, Sir Matthew (1971) *The History of the Common Law*, Chicago, University of Chicago Press

Hayek, F A (1982) *Law, Legislation and Liberty*, London, Routledge & Kegan Paul

Hayek F A, (1978), *New Studies in Philosophy, Politics, Economics and the History of Ideas*, Chicago: University of Chicago Press

Hobbes, Thomas (1983[1651]) *De Cive*, Oxford, Clarendon Press

Hobbes, Thomas (1946[1651]) *Leviathan*, Oxford, Basil Blackwell

Hohfeld W N (1913[2001]) *Fundamental Legal Conceptions as applied in Judicial Reasoning*, ed D Campbell and P Thomas, Aldershot, Ashgate Dartmouth.

Hume, D (1978[1739]) *A Treatise of Human Nature*, 2nd ed, Oxford, Clarendon Press

Hume, David (1748[1975]) *Enquiries Concerning Human Understanding and Concerning the Principles of Morals*, Oxford, Clarendon Press

Immanuel Kant (1784) 'Beantwortung der Frage: Was ist Aufklärung?'*, Berlinische Monatsschrift*.

Killoran, J B (1987) 'Aquinas and Vitoria: Two perspectives on natural slavery', *The Medieval Tradition of Natural Law*, ed H J Johnson, Kalamazoo, Michigan: West Michigan University.

Laslett, Peter (1988) Laslett, 'Introduction', *Two Treatises of Government*, Cambridge, Cambridge University Press, 1988

Locke, John (1836) *An Essay Concerning Human Understanding*, London, T Tegg & Son

Locke, John (1960[1690]) *Two Treatises of Government*, P Laslett, ed, Cambridge, Cambridge University Press.

Murray, Charles (1984) *Losing Ground*, New York: Basic Books

Olson, Mancur (1982), *The Rise and Decline of Nations*, New Haven: Yale University Press.

Olson, Mancur (1965), *The Logic of Collective Action*, Cambridge, Mass: Harvard University Press

Plato (1980[360 BC]) *The Laws*, T L Pringle tr, Chicago and London: The Chicago University Press.

Pollock, Sir Fredrick (1890/1972) *Oxford Lectures and Other Discourses*, Cornell: Cornell University Library, 41-42

Ratnapala, Suri (2009) *Jurisprudence*, Cambridge: Cambridge University Press

Rommen, H A (1955) *The Natural Law*, St Louis and London: B Herder Book Co.

Smith, Adam (1751/1976) *The Theory of Moral Sentiments*, Oxford: Clarendon Press

Tuck, Richard (1979) *Natural Rights Theories: Their Origin and Development*, Cambridge: Cambridge University Press.

Tullock, Gordon (1976) *The Vote Metric: A Essay in the Economics of Politics, with Applications to the British Economy*, London, Institute of Economic Affairs

Yankelovich, D (1994), 'How changes in the economy are reshaping American values', in Aaron H J and T Mann eds, *Values and Public Policy*, Washington D C: Brookings Institution.

Zagal, H (2003) 'Aquinas on Slavery: An Aristotelian Puzzle', paper presented at *Congresso Tomista Internationale,* 21-25 September, 2003 in Rome.