The Relationship of Natural Law and Natural Rights: Organic, Contingent, or Logically Contradictory?

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Introduction: two fundamental questions

Few would doubt the widespread commonplace in the history of ideas that natural rights were conceived from natural law. Nevertheless, the nature of the relationship between natural law and natural rights is far from being unambiguous. Although several competitive theories arose to explain this relationship, the debate around it has not come to an end.

It seems that the two most fundamental and most difficult questions in this regard are

(1) whether the 'encounter' between the concepts of natural law and natural rights in a certain period of the history of Western political and legal thought was necessary or merely accidental, and

(2) whether there is an organic, contingent, or logically contradictory relationship between these two concepts.

The relation between natural law and natural rights raises further issues as well. Is natural law or are natural rights entitled to logical primacy and is it possible to derive natural rights from natural law or vice versa? If above all obligations originate from natural law, what and how could establish a relationship between the norms of natural law and natural rights? Do natural rights only serve to fulfil obligations arising from natural law, or is their scope wider than this, and so and so forth?

In this paper I will try to answer only the two 'fundamental questions'. As it seems to me, these two questions are interrelated, and the answer to the first one is ultimately dependent upon the consideration of the second. The starting point of my argumentation is the statement that the 'intermediate period' between the thirteenth century, commonly regarded as the golden age of scholasticism, and the seventeenth century marking the beginning of modern natural law theory is essen-

tial concerning the evolution of the idea of natural rights. Thus the main reason why the problem of the relationship between natural law and natural rights is dividing historians of ideas and provides them with false ambiguities is that up to recent times they have neglected the thorough examination of these three and a half centuries between Saint Thomas Aquinas and Hugo Grotius.

Two diametrically opposed answers

There are two easily tangible, crystallised and characteristic opinions considering the historical relationship between natural law and natural rights. According to the first view, initiated by Leo Strauss and Michel Villey, there is a mutually exclusive relationship, or at least a fundamental tension and historical discontinuity between the ideas of natural law and natural rights. Strauss maintains that the authentic, classical tradition of natural law declined when (and not to a negligible extent because) natural rights arose. Modernity took over temporarily the concept of natural law inherited from Antiquity and the Middle Ages, but transformed it according to the axioms of modern philosophy, made it secondary and derivative compared to the concept of rights and finally abandoned it (see esp. Strauss 1953). Michel Villey is even more categorical. The French legal philosopher sees an absolute logical incompatibility between the ideas of natural law and natural rights, and claims that while the classical concept of '*ius*' meant the constraint of all power, the modern notion of '*iura*' means the theoretically unrestricted power of the individual (Villey 1975, 227–230).

The other general opinion is diametrically opposed to the previous one, as it regards the seventeenth-eighteenth-century modern variant of natural law rather than its classical version as a point of departure and ideal-typical (see e.g. Haakonssen 1996, Hochstrasser 2000). According to this approach, there is a close relationship and codependency between the ideas of natural law and natural rights. In this view, the most remarkable and imperishable merit of natural law theories is the elaboration of the idea of natural rights (see e.g. Péteri 1988, Gérard 2007). If we pursue this reasoning further, we may even arrive at the conclusion that nowadays, when jusnaturalism is considered to be a minority view in jurisprudence, besides its official advocates this approach endures latently – as a subterranean river – in the works of such human rights theoreticians as Ronald Dworkin, who cannot or are not willing to come to common grounds with natural law due to their dedication to analytical philosophy.[1]

[1] Dworkin was even labelled as a natural lawyer; he wrote as a response Dworkin (1982).

The conventional story

In order to do justice between these opposite views, we have to examine at least the major stages in the history of the idea of natural law from the perspective of natural rights. Ancient theories of natural law are not taken into account, since neither Greek philosophers nor Roman lawyers knew the concept of natural rights; at least we do not have indisputable evidence that they did.[2] The concept of subjective rights founded on the immanent value of the individual could have been made compatible with Aristotle's metaphysical realism only with great difficulty, mainly because of his holistic approach subordinating parts to the whole.[3]

Aquinas who offered a paradigmatic formulation of medieval natural law theories only occasionally used the word '*ius*' in a subjective meaning. For him, *ius* is above all an objective concept, a synonym for '*iustum*', i.e. the object of justice, the primary meaning of which is the just thing or action.[4]

After discussing Aquinas's doctrine, the works that deal with natural law theories or the history of legal philosophy in general usually skip over or only briefly outline the legal thought of late medieval and Renaissance scholasticism and pick up the threads of the theories of natural law in the seventeenth century, with Thomas Hobbes (or maybe Hugo Grotius). It is exactly here that the books on the history of natural rights usually start (see e.g. Macpherson 1962).

Thus I continue my brief historical sketch with the author of the *Leviathan*. According to Strauss's influential thesis, Hobbes deduces the laws of nature from natural rights (Strauss 1952, 157). This thesis is widely accepted but questionable. While it seems incontestable that in Hobbes's political philosophy natural rights have priority over natural laws, it does not necessarily follow that laws of nature are derivative of natural rights. On the contrary, it seems that Hobbes himself excludes this possibility when he draws an impenetrable demarcation line between the concepts of 'right' and 'law':

> 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

[2] According to Richard Tuck (1979, 10–13), in late Roman Empire the words '*ius*' and '*dominium*' were often used in a meaning that in many ways resembles the modern concept of 'right'. Even if we were to accept this claim, it would not change the basic fact that Roman jurisprudence had no conception of universal natural rights inhering in all persons by virtue of their humanity (Tierney 2002, 392).

[3] Fred D. Miller has argued in his monograph on Aristotle's *Politics* (1995, ch. 4) that the Greek philosopher had already used the language of subjective natural rights. His arguments, however, do not seem to be convincing.

[4] I have discussed Aquinas's different usages of *ius* in detail in Tattay (2012).

> them: so that Law, and Right, differ as much, as Obligation, and Liberty; which in one and the same matter are inconsistent. (*Leviathan* ch. 14, 189)[5]

Hobbes consistently maintains this strict differentiation between law and right when he defines the concepts of 'right of nature' and 'law of nature'. According to his definitions, while the right of nature means the *freedom* to protect our own life, the law of nature *forbids* us to end our life, and also *commands* us to do everything possible to protect it.[6] If right and law are such incompatible concepts, then the laws of nature cannot be derived from the fundamental right of self-preservation. Although either the natural rights or the laws of nature can be deduced from our innate instinct to preserve our life, it would be rather difficult to posit an organic, if any connection between them.

On the other hand, since Hobbes does not require moral rightness as a conceptual element of natural rights, he excludes the possibility that they could be regulated or measured by the laws of nature. Thus natural laws cannot frame and restrict rights, the result of which is that in the state of nature 'every man has a Right to every thing; even to one anothers body' (ibid. 190). Moreover, it is doubtful whether the laws of nature are able to fit into this role at all, inasmuch as their normative status is questionable. Hobbes's point of view is rather ambiguous as to whether the laws of nature are commands expressing the will of the sovereign and omnipotent God, and hence are real laws, or merely 'theorems', 'conclusions' set by human reason in order to secure peace, which could only be called laws in a metaphorical sense (rules of the game, so to say).[7]

In his early Latin work on natural law John Locke takes over Hobbes's strict separation of law and right, law of nature and right of nature. As he claims, 'law of nature' should be conceptually differentiated from 'natural right',

> for right is grounded in the fact that we have the free use of a thing, whereas law is what enjoins or forbids the doing of a thing. Hence, this law of nature can be described as being the decree of the divine will discernible by the light

[5] All references to *Leviathan* will be to C. B. Macpherson's edition (1982).

[6] Ibid.: 'The Right of Nature, which Writers commonly call *Jus Naturale*, is the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing, which in his own Judgement, and Reason, hee shall conceive to be the aptest means thereunto. […] 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.'

[7] Ibid. ch. 15, 216–217: 'These dictates of Reason, men use to call by the name of Lawes; but improperly: for they are but Conclusions, or Theoremes concerning what conduceth to the conservation and defence of themselves; whereas Law, properly is the word of him, that by right hath command over others. But yet if we consider the same Theoremes, as delivered in the word of God, that by right commandeth all things; then are they properly called Lawes.'

> of nature and indicating what is and what is not in conformity with rational nature, and for this very reason commanding or prohibiting. (*Essays on the Law of Nature* 110–111)[8]

Later, in the *Two Treatises of Government*, he modifies his opinion and asserts that law not so much limits as directs free and intelligent human beings according to their real interests.[9] The true end of law is thus 'not to abolish or restrain, but to preserve and enlarge Freedom' (ibid. 306, emphasis omitted). On the other hand, Locke's concept of man as the 'owner of himself', which grounds natural rights, seems, in the final analysis, incompatible with his other fundamental argument that provides the basis for natural law, stating that man as God's creature belongs to God as His property. Consequently, in certain cases Locke has to give up, even if implicitly, the latter argument – for instance, by allowing suicide in certain cases (Zuckert 1997, 725).[10]

The alternative story

So far, our historical analysis seems to justify Strauss's and Villey's discontinuity thesis. The main reason for this might be indicated by the fact that modern natural law theorists were inclined to regard natural law as a sum of moral precepts that strictly prescribe or prohibit certain acts, thus impeding the individual's freedom of action. As a result of this formalist or legalist approach, they could not formulate natural rights on the basis of natural law, only parallel to the laws of nature, or rather against them.

However, as I suggested above, if we extend our study to the period between Aquinas and Hobbes (or Grotius), the problem of the relationship between natural law and natural rights appears in a different light. In his classical edition of the *Leviathan* from 1946, Michael Oakeshott was one of the first to warn that

[8] I am using Wolfgang von Leyden's edition and translation of 1970. 'Haec lex his insignita appellationibus a jure naturali distinguenda est: jus enim in eo positum est quod alicujus rei liberum habemus usum, lex vero id est quod aliquid agendum jubet vel vetat. Haec igitur lex naturae ita describi potest quod sit ordinatio voluntatis divinae lumine naturae cognoscibilis, quid cum natura rationali conveniens vel disconveniens sit indicans eoque ipso jubens aut prohibens.'

[9] *Two Treatises of Government* (Peter Laslett's edition, 1988) bk. 2, ch. 6, § 57, 305: 'For *Law*, in its true Notion, is not so much the Limitation as the direction of a free and intelligent Agent to his proper Interest, and prescribes no farther than is for the general Good of those under that Law. Could they be happier without it, the Law, as an useless thing would of it self vanish; and that ill deserves the Name of Confinement which hedges us in only from Bogs and Precipices' (emphasis omitted).

[10] In the *Two Treatises of Government* (bk. 2, ch. 4, § 23, 284) Locke writes of the slave who, 'by his fault, forfeited his own Life' that 'whenever he finds the hardship of his Slavery out-weigh the value of his Life, 'tis in his Power, by resisting the Will of his Master, to draw on himself the Death he desires.'

> Hobbes was born into the world, not only of modern science, but also of medieval thought. The scepticism and the individualism, which are the foundations of his civil philosophy, were the gifts of late scholastic nominalism; the displacement of Reason in favour of will and imagination and the emancipation of passion were slowly mediated changes in European thought that had gone far before Hobbes wrote […] the greatness of Hobbes is not that he began a new tradition in this respect but that he constructed a political philosophy that reflected the changes in the European intellectual consciousness which had been pioneered chiefly by the theologians of the fifteenth and sixteenth centuries. (Oakeshott 1991, 278)

Since then several books and articles have pointed at the medieval origins of the idea of natural rights – with different emphases and in different ways. Even if some of their statements seem questionable today, Georges de Lagarde's and Michel Villey's works were pioneers in this regard. Both French authors were convinced that the fourteenth-century philosopher and theologian William Ockham could be regarded as the 'father' of natural rights (Lagarde 1934–1946, Villey 1975).[11] Richard Tuck's *Natural Rights Theories* constituted a similar breakthrough in Anglo-American historiography. On the one hand, Tuck traced the concept of natural rights back to the revival of legal science in the twelfth century; on the other hand, he claimed that the first 'fully fledged' theory of natural rights was developed in the fifteenth century by the conciliarist and mystic Jean Gerson (Tuck 1979, 13, 25).

Research in this field has been definitely blossoming in the last decades[12] and reached its peak in Brian Tierney's and Annabel Brett's overarching, thorough monographs. Both discuss the continuous medieval evolution of the idea of natural rights in detail, from twelfth-century canon law to the so-called 'Second Scholasticism' of the sixteenth and seventeenth centuries (Tierney 1997, Brett 1997). We clearly get the impression from these works that modernity inherited not only the concept of natural law but also that of natural rights from scholasticism – and then transformed them into its own image. As Tierney pertinently noticed, 'if a doctrine of rights had not grown up in an earlier, more religiously oriented culture, there would, so to speak, have been nothing there to secularize' (Tierney 2006, 195–196). This picture fundamentally contests the common view that the idea of natural rights is a distinctively modern phenomenon that first appeared in the seventeenth century, as a political-legal consequence of the rise of modern science and market economy and the philosophical individualism of the age.[13]

[11] See also Lagarde (1956–1970), Villey (1962), Villey (1964).

[12] The main fruits of this blossoming are the following books and studies: McGrade (1980), Tierney (1988), Tierney (1989), Reid (1991), Pennington (1993), Mäkinen (2001), Oakley (2005), Mäkinen and Korkman (2006).

[13] Perhaps the most prominent representatives of this view are – in their very different ways – Leo

But let us return to our original problem concerning the conceptual relationship of natural law and natural rights. According to modern deontic logic, a plausible way of grounding rights is to derive them from permissive norms (see e.g. Kalinowski 1964). However, the formalist approach of seventeenth-century natural law theorists, as we have seen, seems to exclude this possibility.[14] Medieval legal thinking, on the contrary, knew the concept of 'permissive natural law'. The essence of this idea is that natural law does allow and approve certain courses of action, without however commanding (or forbidding) them, and thereby gives freedom of choice to man – within the framework determined by the precepts and prohibitions of natural law.

Just like the idea of natural rights, the doctrine of permissive natural law has its roots in twelfth-century canon law, and was originally inspired by the problem of private property. Gratian's theory caused great interpretative difficulties to the Decretists. At the beginning of the *Decretum* Gratian gave a definition of *ius naturale* – taken from Isidore of Seville – encompassing both common possession and acquisition of things.[15] Then he attributed common property to natural law and private ownership to human positive law and custom, writing a bit later that human laws contrary to natural law are invalid.[16] It was Rufinus whose solution to this difficulty became the most widely accepted. He contrasted natural law commands and prohibitions with *demonstrationes* (indications), 'which nature does not forbid nor command but shows to be good', and classified common property only under the *demonstrationes* of natural law susceptible to change by human law.[17] It was another Italian canonist of the twelfth century, Huguccio, who developed this distinction further and thus introduced the notion of 'permissive natural law':

Strauss and Crawford Brough Macpherson; see Strauss (1953), Macpherson (1962). To take another illustrative example of this modernist standpoint, in Norberto Bobbio's book on Hobbes and the natural law tradition, we can also read that 'the theory of natural rights is born with Hobbes' (Bobbio 1993, 154).

14 Although Grotius and Locke sometimes refer to the permissive norms of natural law, these references remain sporadic.

15 *Concordia discordantium canonum* d. 1 c.7: 'Ius naturale est commune omnium nationum, eo quod ubique instinctu naturae, non constitutione aliqua habetur, ut viri et feminae coniunctio, liberorum successio et educatio, *communis omnium possessio* et omnium une libertas, *acquisitio eorum, quae celo, terra marique capiuntur*; item depositae rei vel commendatae pecuniae restitutio, violentiae per vim repulsio' (emphasis added). Isidore offered this definition in *Etymologiae* 5.4.1–2.

16 *Concordia discordantium canonum* d. 8 ante c.1: 'Nam iure naturae sunt omnia communia omnibus […] Iure vero consuetudinis vel constitutionis hoc meum est, illud vero alterius.' Ibid. post c.1: 'Dignitate vero ius naturale simpliciter prevalet consuetudini et constitutioni. Quecunque enim vel moribus recepta sunt, vel scriptis comprehensa, si naturali iuri fuerint adversa, vana et irrita sunt habenda.'

17 *Summa decretorum* d. 1: 'Consistit autem ius naturale in tribus, scilic.: mandatis, prohibitionibus, demonstrationibus. Mandat namque quod prosit, ut: "diliges Dominum Deum tuum"; prohibet quod ledit, ut: "non occides"; demonstrat quod convenit, ut "omnia in commune habeantur", ut: "omnium una sit libetas", et huiusmodi. […] Detractum autem ei est non utique in mandatis vel

> By natural law something is mine and something is yours, but this is by permission, not by precept, since divine law never commanded that all things be common or that some things be private, but it permitted that all things be common and some private, and so by natural law something is common and something private. (*Summa decretorum* d. 1 c. 7)[18]

The idea of permissive natural law soon pervaded not only canon law but also theology and was frequently invoked as a ground of natural rights. Its most detailed exposition was provided by the Spanish Jesuit theologian Francisco Suárez at the beginning of the seventeenth century.[19] For Suárez, permissive natural law plays a primordial role in the foundation of natural rights. Generally speaking, permissive natural law defines an area within which human persons can licitly exercise their inherent power of free will and free choice. More concretely, when natural law permits an otherwise intrinsically good act, 'it not only does not prohibit it, but since it is good, it also grants a positive faculty or licence, or a certain right to it.'[20] It should be stressed that for Suárez there cannot be a contradiction between the permissions and the precepts of natural law: permissive natural law can never permit or give right to immoral acts that are contrary to preceptive natural law. Thus the commands and prohibitions of natural law set bounds to the exercise of natural rights and prevent right-holders from abusing their rights (Tierney 2002, 401, 405–406). Finally, what is perhaps even more important, preceptive natural law obliges others to respect the rights conferred by permissive natural law:

> The right to all these things is natural, that is, they are all permitted by the law of nature. And in the same way the obligation of one person not to violate such a right of another is of natural law. (*De legibus* 2.18.7)[21]

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prohibitionibus, que derogationem nullam sentire queunt, sed in demonstrationibus – que scil. natura non vetat non precipit, sed bona esse ostendit – et maxime in omnium una libertate et communi possessione; nunc enim iure civili hic est servus meus, ille est ager tuus.'

18 'De iure naturali aliquid est meum et aliquid est tuum, set de permissione, non de precepto, quia ius divinum numquam precipit omnia esse communia vel aliqua esse propria, set permittit omnia esse communia et aliqua esse propria et ita de iure naturali aliquid est commune et aliquid est proprium'. Cited by Weigand (1967, 353). It should be noted that Huguccio himself did not adopt the above 'common explanation'. Instead, he argued that natural law commands that everything be common (*communis*) only in the sense that private possessions are to be shared (*communicanda*) with others in time of need (Tierney 2001, 385 n. 16).

19 I have analysed Suárez's conception of permissive natural law and its organic relation to the traditional (Thomist) and subjective understandings of *ius* in Tattay 2011.

20 *De legibus* (Pereña edition, 1971–1981) 1.15.11: 'Nam quando permissio dicitur de actu alias bono, non solum non prohibet illum: sed etiam cum sit bonus, dat positivam facultatem, seu licentiam, vel ius aliquod ad illum.'

21 'Nam ius ad haec omnia naturale est, id est, haec omnia licita sunt iure naturae. Et eodem modo obligatio unius ad non violandum tale ius alterius, naturalis legis est.'

So Suárez attaches natural rights to natural law in at least three ways. First, it is permissive natural law that constitutes their normative basis. Secondly, the commands and prohibitions of preceptive natural law set limits to natural rights and ensure their lawful exercise. Thirdly, the same law protects natural rights against violation by others.

Conclusion

At the end of our investigation in the history of the ideas of natural law and natural rights we need to revise our temporary judgement and arrive at the following conclusion: Not only is there no necessary organic relationship between the ideas of natural law and natural rights, there is no necessary conceptual opposition between them either. While the tension between these two ideas was palpable in the modern, seventeenth- and eighteenth-century doctrines of natural law, it was essentially absent from earlier scholastic theories. On the whole, their historical encounter can be regarded as accidental, for it is possible to found a coherent theory of natural law merely on natural obligations. Nevertheless, under certain conditions they can complement each other favourably. The concept of permissive natural law provides a theoretical framework for such complementarity.

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