

Chapter 2

Rights and Justice

The legal obligation to respect rights has been formally recognized by most countries since the 1948 United Nations Declaration of Human Rights. Yet as one of the members of the Declaration's drafting committee stated at the time, "We are unanimous about these rights on condition that no one asks why" (Thils, 1981: 51). The participants, it appears, decided that agreement on a common philosophical foundation for rights was unlikely to be achieved.

Rights are usually presented as a product of a modern post-Enlightenment world and associated with figures like John Locke and events such as the American and French Revolutions. There is, however, a strong case to suggest that the first substantive conceptions of rights were developed by medieval natural law thinkers whose ideas on this subject were clarified and developed further by their modern counterparts, some of whom were reacting to expansionist tendencies on the state's part.

From "*ius*" to rights

One concept that proved critical to the natural law treatment of rights was that of *ius*. Although the word *ius* first acquired momentum in Roman law, there are many debates about its precise meaning in the Roman texts. It is with Aquinas and later scholastics, most notably the Spanish Jesuit Francisco Suárez, that *ius* began taking on the character of what would be understood as "rights" today.

In Aquinas's treatment of justice, *ius* means "the just thing in itself" (ST II-II, q.57, a.2). The context of this statement establishes that by "thing" Aquinas means acts, objects, and states of affairs which are the subject matter of relationships of justice between people (ST II-II, q.57, a1.c, ad 1 and ad 2).

More than three centuries later, Suárez approached the topic in a slightly different way. In his *De Legibus*, he extended Aquinas's concept of

ius to embrace persons themselves. According to Suárez, “the true, strict and proper meaning” of *ius* is “a kind of moral power which every man has, either over his own property or with respect to what is due to him” (Suárez, 1612/2012a: I, ii, 5). *Ius*, then, is something that a person is owed either as a liberty or an entitlement of justice.

It’s important to recognize here that Suárez was working out these ideas in the context of his critique of what was called the Divine Right of Kings. This theological and political theory held that monarchs were not subject to the will of the political community, regardless of whether that will was expressed directly by all members of a community or indirectly through a parliament or assembly. Instead, monarchs were only answerable to God.

Suárez contested this position. He argued that the state arose from a type of pact on the part of its members to assist each other by guaranteeing certain freedoms and ways of realizing justice and who, on this basis, freely consent to subordinating themselves to a political authority. Consequently, Suárez’s concept of rights serves to ensure that sight is not lost of particular freedoms and protections that are owed, as a matter of *right*, to individuals in a political community (Suárez, 1612/2012a: V, 7, 3).

This stress upon rights as something pertaining to individual persons was further underlined by Suárez’s Protestant contemporary, Hugo Grotius. Grotius identified the deepest meaning of *ius* as being “a moral quality of a person, making it possible to have or to do something correctly” (1625/2005: I.1.4). In Grotius’s view, *ius* is a power possessed by people that enables them to make particular choices about their lives, use of their liberty, their property, and their reputation without facing undue interference or sanctions from the state. Grotius claimed, for instance, that people enjoy the right to self-preservation. This means that they have the power to pursue goals and interests that help them preserve their life and goods in ways compatible with everyone else’s right to do so—and they do not require the state’s permission to do so.

Grotius (and Pufendorf) break down these rights into two further categories (Grotius 1625/2005: II.25.3.3). What they called “perfect rights” are rights that are strictly enforceable in courts. Perfect rights allow us to make a direct claim on someone else: that, for instance, someone may not take my life. “Imperfect rights” are not enforceable in courts. They allow us to give or be given something lawfully, such as property, but we cannot enforce such a claim on others via the legal system. Someone in need, for example, may have

an imperfect right to my charity. The beggar cannot, however, enforce such a right under the law. Conversely, when I enter into a contract with someone, she has a perfect right claim on whatever I have promised to give her in that contract.

Rights versus unjust coercion

Moving forward a few centuries, we see natural law theorists ceasing to use the imperfect/perfect distinction but nonetheless continuing to attach the idea of rights to notions of liberty from unwarranted external coercion. A particular emphasis was also placed on the idea that the state does not create rights.

In the atmosphere of legal positivism that shaped much early- to mid-twentieth century legal discourse, it became easy for rights to become understood as whatever the state said that they were. And if rights are understood primarily in terms of whatever has been authorized by the political community, their coherence and stability becomes questionable. For if you believe that rights have no stronger foundation than the state's exercise of its sovereign powers, they may be diminished or even abolished by the state. In such circumstances, rights would simply be identified—or abolished—according to whatever a particular majority in a particular country at a particular time preferred those rights to be.

Twentieth century natural law thinkers consequently underscored the necessity of grounding rights on a moral foundation that was not subject to revision or amendment by the state. Jacques Maritain, for instance, insisted that rights were inviolable insofar as they protected the capacity of individuals to make choices freely in order to realize particular moral goods and virtues that are central to human flourishing (Maritain, 1943). Taking natural rights seriously, for Maritain, thus meant taking natural law seriously.

Let us use the example of religious liberty to show how a right is derived from the good. Why, it might be asked, do we have people have a right to religious liberty? Some might say that religious belief is a purely subjective matter; hence, religion belongs to that sphere of personal autonomy with which the state may not interfere. A pragmatist might claim that we must accord people the right of religious liberty because it helps to maintain social order.

The natural law case for religious liberty is different to these positions. It holds that the right to religious liberty is grounded upon the good of religion, understood as the truth about the transcendent and ultimate meaning

of the universe and what that means for how we live our lives. Whether we are a theist, agnostic, or atheist, we can agree that religion is a basic reason for action, inasmuch as we all have reason, without appeal to ulterior motives, to ascertain the truth about ultimate or transcendent realities and order our lives to accord with that reality.

No further explanation is necessary for the right of religious liberty: it gives direct effect to this *good* of religion as truth-seeking about the transcendent. Searching for the truth about the transcendent presumes the freedom to do so. You cannot pursue knowledge of the transcendent without the constant interior decision to do so. To force someone to be religious or an atheist, or to force someone to be Buddhist rather than Jewish, is to eliminate the element of the interior choice for the good of religious truth by overwhelming it with the inner deliberation to avoid being harmed (George, 1999: 125-138).

Acknowledgment of this right inevitably raises the issue of political structures. By saying that individuals have a natural right to religious freedom—and, by extension, a right to be part of communities based on pursuing religious truth—natural law implicitly condemns any political system which denies that liberty as a matter of policy. In that sense, the natural law account of rights reveals important truths about the structure of rightly ordered political arrangements. The state that recognizes religious liberty in the sense outlined above is by definition a *limited* state, and acknowledges its fundamental incompetence in important spheres of private life and civil society.

The legal and political questions do not stop here. How, for example, do we resolve the inevitable conflicts between people's legitimate exercise of this right and other rights? Natural law theorists have addressed many of these questions in their treatment of justice.

Justice, virtue, and the common good

A distinctive feature of natural law ethics is that it identifies justice as a virtue: that is, the habit of giving others what they are due. This is to be found in Aristotle's treatment of justice which he commences by describing the notion of general justice. By this, Aristotle meant comprehensive virtue with regard to relationships with other persons (Aristotle undated/1980: V.1.1129b12–14). Justice-as-a-virtue was subsequently understood in the natural law tradition as having a uniquely social dimension in the sense that one of its defining elements is *other-directedness*.

As a virtue, general justice properly understood involves one's general willingness to promote what is called the "common good" of the communities to which one belongs. In natural law theory, common good is not a synonym for common ownership, let alone collectivism. As far as the political realm is concerned, the common good consists of those conditions that help promote the flourishing of individuals and groups within a given political community.

Some of these conditions can be found in the rights affirmed by natural law. Without some protection of rights like religious liberty or economic freedom, the scope for actively pursuing goods like truth or skillful performance is radically diminished. Other conditions of the common good have an institutional form. One example is the rule of law. Though it's not impossible for people to do good and avoid evil in the absence of the rule of law, it is much harder without it.

Another element of justice that presents itself very early in the natural law tradition is that of *duty* in the sense of what we owe to others. This is closely associated with a third element: *equality*. This should not be understood in the sense of equal outcomes or equal starting points in life. Instead equality means *fairness* as expressed in the Golden Rule: doing unto others as you would want them to do to you. And what one should want others to do unto you is what is reasonable and just—the objective measure that requires rational impartiality between persons.

These three elements—other-directedness, duty, and the Golden Rule—are linked and overlap with each other. But attention to all three elements underscores that the same common good that is the end of general justice requires more than simply a broad inclination on the part of individuals and groups to promote the flourishing (in the sense of growing in virtue and participating in goods like life, work, health, truth, beauty etc.) of others and themselves. On one level, Aquinas specifies, it is a particular concern of the rulers since they have a certain responsibility to promote the common good (Aquinas, 1265-1273/1975: III, c.80, nn.14, 15) of the political community. But Aquinas also notes that it is a concern of every citizen. Working out how this common good is realized is how natural law theorists identify the different types of justice that apply to different relationships in which people engage different types of rights.

Distributive, commutative, and legal justice

The first of these forms of justice is *distributive justice*. It embraces the relationship between individuals and communities when it comes to the distribution of common resources in a just manner, according to criteria such as merit, function, and need. In the case of distributive justice, there has been considerable attention paid to its meaning for property arrangements.

The second type of justice is *commutative justice*. This concerns relations between individuals and groups engaged in particular exchanges. Commutative justice has been understood as principally applicable to questions such as contract and the adjudication of disputes arising within such relationships.

The question of the stability of the meaning of commutative justice and distributive justice vis-à-vis each other has always been the cause of much discussion within the natural law tradition. Consideration of what commutative justice demands in seeking to determine what two people owe each other in a set of mutually agreed-upon arrangements often involves, for instance, reflection upon the criteria associated with distributive justice.

We see such overlaps at work in bankruptcy law (Finnis, 1980: 188-192). When a business fails, courts charged with determining what individuals and groups owe each other on the basis of pre-existing agreed-upon contracts (the realm of commutative justice) invariably end up employing criteria such as merit, need, and function (the realm of distributive justice) to decide who gets what from whatever is left of a set of common resources upon which there are competing claims.

In Aquinas's thought, all these modes of justice flow from general justice insofar as they are all ultimately derived from everyone's responsibility to the common good. For some time after Aquinas, however, the natural law tradition lost sight of this point. This is apparent in the attempt by early modern natural law thinkers like Thomas Cajetan (1469-1534) to clarify the relationship between general, commutative, and distributive justice. Cajetan specified that:

There are three species of justice, as there are three types of relationship between any "whole:" the relations of the parts among themselves, the relation of the whole to the parts, and the relations of the part to the whole. And likewise there are three justices:

legal, distributive and commutative. For legal justice orientates the parts to the whole, distributive the whole to the parts while commutative orients the parts one to another. (Cajetan, 1518: II-II, q.61, a.1, cited in Finnis, 1980: 1985)

Notice how Cajetan essentially places general, distributive, and commutative justice on the same level. Unlike Aquinas, he does not posit general justice as the foundation of the other modes of justice. The effect of this was to gradually separate commutative and distributive justice from the demands of general justice, thereby narrowing the scope of commutative and distributive justice. Commutative justice came to be seen as strictly limited to dealings between two or more private parties and not derived from the concern for the common good to which general justice points. Likewise, distributive justice became focused strictly upon the relationship primarily between the individual and the state when it came to the allocation of material resources, rather than the multiple relationships that exist between individuals, numerous non-state communities, and political and legal institutions.

And social justice?

It is in this context that the idea of social justice developed within the natural law tradition from the mid-nineteenth century onwards as a way of trying to address these problems. As demonstrated by Paul Dominique Dognin (1961), Catholic natural law thinkers deployed the term social justice to restore general justice to its central place in the natural law tradition's treatment of justice. This was given direct expression by Pope Pius XI in his 1937 encyclical condemning Communism, *Divini Redemptoris*:

Now it is of the very essence of social justice to demand for each individual all that is necessary for the common good. But just as in the living organism it is impossible to provide for the good of the whole unless each single part and each individual member is given what it needs for the exercise of its proper functions, so it is impossible to care for the social organism and the good of society as a unit unless each single part and each individual member—that is to say, each individual man in the dignity of his

human personality—is supplied with all that is necessary for the exercise of his social functions (Pius XI, 1937: 55).

The context of these remarks is a discussion of the relationship between employers and employees. But the broader point being made here is that everyone must go beyond excessively narrow conceptions of commutative justice when thinking about what justice requires. Instead, they must take into account conditions outside this particular relationship which affect the wider community. The reference to the common good serves to specify this as the goal of social justice, thereby reestablishing general justice as foundational to natural law reasoning about these matters.

Within the natural law tradition, social justice is thus the *habit* or *disposition* to be committed to promoting the conditions that promote the well-being of others. This takes us full-circle back to the idea of justice as a *virtue*. And virtues, as previously noted, are only realized when a person *freely* commits himself to choosing the good. It follows that a pre-condition for realizing social justice is a high degree of free self-determination. To realize social justice in this sense means that, at some level, I must decide *freely* to commit myself to the well-being of others and to the common good—and I must do so continuously.

This leaves us, however, with an important question. How does natural law conceive of the state's role in promoting the common good? Does concern for the common good give government officials a license to do more or less whatever they deem necessary to ensure that the conditions that facilitate human choices for fundamental goods prevail. As we will see in the next chapter, the natural law answer to that question is a firm “no.”