

## Natural Rights and Individual Sovereignty\*

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TO assert that one should come to terms with the past if one wants to understand the present would be to underline the obvious. And yet, even though we know much more of the history of natural rights theories now, especially of the origin of these theories before the seventeenth century, than we did, say, twenty years ago, this increase in knowledge seems to have had little impact on contemporary philosophical discussions about the nature of rights. Sometimes it seems that philosophers, especially the more analytically minded ones, regard the history of ideas as a separate subject with little or no relevance to their research. One of the reasons might be a tendency to regard conceptual analysis of rights as being relatively impartial between different theories in which these concepts might function. Even those who would allow for a close connection between a certain conception of the nature of rights and a theory of rights would find it prudent to distinguish more or less sharply between the question of what it means to have a right on the one hand, and the question which rights we have on the other hand. I would like to suggest that concepts of rights are the concepts of a theory and that we need to understand the theories from which they have emerged in order to fully understand contemporary rights language.

One way of making this claim plausible would be to focus on an issue that has become central to contemporary debates about rights, that is, the conception of the rights-holder as a sovereign individual. I believe that our notion of individual sovereignty wavers between two quite different conceptions of sovereignty. The difference between the two will become obvious if we consider the relation between moral rights and more general moral obligations that people might have. I will then draw attention to a recent account of the history of natural rights theories. The point of doing so is this: if the account is true, then we have to acknowledge that 'our' ideas of natural rights (and especially of the sovereignty that people are supposed to possess according to these theories) have

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changed dramatically since the times in which theories of natural rights first developed. In fact, the contemporary understanding of moral or natural rights<sup>1</sup> would seem to differ so considerably from what has recently been described as ‘the medieval understanding of rights’ that we might indeed wonder whether these theories have anything to do with contemporary ideas of rights. My thesis is that we can account for this change in a way that makes this change intelligible. A careful consideration of the historical change of ideas, moreover, will allow us to shed new light on the contemporary notion of individual sovereignty. In order to do this, I will draw an analogy between the change in the history of ideas of rights and what I believe to be a similar change in the history of ideas on the sovereignty of the prince.

### I. THE ‘LIBERAL’ CONCEPTION OF NATURAL RIGHTS

In contemporary discussions on rights a question that is often raised is the following: ‘Why do we need to speak of rights?’. It is supposed to derive its significance from the observation that a whole range of rights can very easily be transformed into duties. Thus my right to an education can be translated as the government’s duty to provide for schools, and my friend’s right to the money that he lent me can be translated as my duty to pay him back.<sup>2</sup> Yet some philosophers worried about the consequences of this position, which transforms the language of rights into a discourse on duties. They felt that the point of lending rights to people is to give them sovereignty over their moral world.

Basically, there are two ways of understanding the notion of sovereignty. The first is to interpret it as an area of freedom. Some philosophers have suggested that rights give us the freedom to act or not to act in a certain way. It has also been argued that the difference between having a right and merely being the subject of someone else’s duties lies in the freedom to impose or not to impose certain duties upon others. All these definitions contain some truth, but they do not reveal why the accommodation of rights within, say, a utilitarian framework should pose a problem. To see this one must take into account the kind of freedom that is granted. Obviously, philosophers who argue in favour of granting freedom to people are not arguing for my right, for example, to have tea or coffee with my breakfast. That kind of freedom is unproblematic. Freedom obtained through rights is problematic because it can possibly come into conflict with general moral obligations. Not everything that is considered immoral is an infringement of somebody’s rights. If I am very rich and a close relative of mine is in need of support, my refusal to help him could be considered immoral. But

<sup>1</sup>Throughout this paper the terms ‘moral rights’ and ‘natural rights’ are used interchangeably. Similarly for ‘moral law’ and ‘natural law’.

<sup>2</sup>He/him should throughout be read as he or she/him or her.

it is nevertheless my right to decide for myself how I will spend my money. One of the proponents of this view is Jeremy Waldron.<sup>3</sup>

It seems unavoidable to Waldron that, if we take the idea of moral rights seriously, we have to accept the possibility that an individual may have the right to do something that is—from a moral point of view—wrong. Thus Waldron sets out to defend what at first sight seems like a paradox. The idea is not new, however, and it has been adopted by a number of important philosophers of different persuasions, although others have explicitly rejected it. David Lyons is of the opinion that ‘we should allow in morals that there are rights which it can be wrong to exercise’.<sup>4</sup> According to Ronald Dworkin ‘someone may have the right to do something that is the wrong thing for him to do’.<sup>5</sup> Robert Nozick argues—a bit mysteriously—that ‘people sometimes have a right not to do or feel something even though they should’.<sup>6</sup> Joseph Raz has expressed the same idea in less aphoristic language:

a statement of a right to do something is not a statement that it is right to do so . . . people rarely say, ‘I am acting wrongly but I have a right to do what I am doing’. Nevertheless, they can say this. There is no contradiction in this statement.<sup>7</sup>

Despite this apparently broad consensus, we are left with a sense of paradox, because the statements imply that people have—in some circumstances and within certain limits—a moral right to be immoral.<sup>8</sup>

Now consider the second way of understanding the notion of sovereignty. It amends the first by introducing the idea that there is not just one idea of the good but many. It says that some actions cannot be judged according to a general moral principle, because a right constitutes an area of *moral* freedom. That is: within the confines defined by a right, good and evil are established by the individual morality of the right-holder. Take the sphere of religion. Most of us would agree that the right to choose one’s own religious allegiance is the mark of any civilized society. The same can be said about the freedom to hold and express political opinions or the freedom to choose how to raise one’s children, provided, of course, that their rights are not violated. These are all decisions that constitute an individual’s private morality. Characteristic of some of these decisions is that they cannot be made by anyone else: nobody can determine what religion I believe in or what my political convictions are. More importantly, nobody has the right to interfere with any of these decisions. Waldron puts it thus:

<sup>3</sup>Jeremy Waldron, ‘A right to do wrong’, *Ethics*, 92 (1981), 21–39.

<sup>4</sup>David Lyons, ‘The correlativity of rights and duties’, *Noûs*, 4 (1970), 45–55 at p. 50.

<sup>5</sup>Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977), p. 188.

<sup>6</sup>Robert Nozick, *The Examined Life* (New York: Simon and Schuster, 1989), p. 288.

<sup>7</sup>Joseph Raz, ‘Legal Rights’, *Oxford Journal of Legal Studies*, 4 (1984), 1–21 at pp. 20–1.

<sup>8</sup>It is this apparent paradox that Waldron tries to resolve in his paper.

*The adoption of a conception of the good* is what gives meaning and direction to an individual's life . . . If an individual has been forced or cajoled into conformity with a conception of the good, then coercion or deception has been driven to the heart of that individual's self-constitution as a moral being; his life has now no meaning except a coerced or deceived meaning.<sup>9</sup>

Waldron means that everyone should form his or her *own* conception of the good, not that everyone should arrive, without being forced or cajoled, at the correct conception of the universal good. Of course, this does not imply 'that any autonomously chosen conception of the good is as worthy as any other'.<sup>10</sup> But it does follow that different conceptions of the good are possible, and that to choose one's own conception is of crucial importance for an 'individual's self-constitution as a moral being'. Self-constitution (autonomy, freedom) thus implies the freedom to choose, within certain limits, what is good or bad. Some conceptions, when compared to others, will be considered less worthy or even unworthy. More important than these conceptions themselves, however, is the fact that everyone has the power to choose among them.

It will be clear by now that there is a problem involved in upholding the truth of both conceptions of sovereignty. The first allows for acts to be called immoral but nevertheless someone's moral right as well. According to the second proposition those same actions should properly be viewed as an exemplification of another conception of the good. Even if one allows for some conceptions of the good to be more 'worthy' than other conceptions, one cannot call an act immoral unless one is prepared to call the conception of the good from which it springs wrong. But this is not what Waldron has in mind. People make decisions about what is good for them and the ability to make these decisions is what gives meaning to their life. If we ask what makes something 'good' according to this theory, the answer, it would seem, is that something is good *as long as it is so defined by the person who has a right to make that decision*. Not only is it possible to speak of different 'conceptions' of the good: if this idea is consequently thought through, I think that it is hard to avoid the consequence that any private conception of the good is as 'good' as any other (because what is good is what makes my life good *for me*). Few people would agree with such a radical statement, which in fact reduces ethics to rights. Nevertheless, the position is implied in the notion that people are entitled to exercise control over their lives. If people are considered sovereign of their own lives, and if sovereignty is the ability to act according to one's own conception of the good, then it seems not possible to conceive of binding ethical considerations that compel people to make certain decisions—at least not within the area over which someone is sovereign. Of course, most people would agree that this area of freedom is severely limited, but that makes no difference in the relationship between rights and ethics.

<sup>9</sup>Jeremy Waldron, 'Galston on rights', *Ethics*, 93 (1983), 325–7 at p. 326. (my italics)

<sup>10</sup>Ibid.

## II. THE 'MEDIEVAL' CONCEPTION OF NATURAL RIGHTS

Let me now present a third account of rights, which—if it succeeds—amounts to the claim that rights do not imply sovereignty of either of the above kinds. This thesis has been expounded—mostly implicitly—by Brian Tierney in a number of articles and, recently, a book on the history of natural rights theories.<sup>11</sup> According to Tierney, previous historians have misunderstood the history of natural rights theories. In arguing that pre-seventeenth-century theories of natural rights have been distorted by scholars such as Tuck and Villey, Tierney has put forward two interrelated claims. *First*, as he constantly reiterates, there is no real conflict between natural rights and natural law. The widespread view that natural law and natural rights are contradictory<sup>12</sup> is 'based on a mistaken idea that modern rights theories are derived entirely from Hobbes and on simple ignorance of the history of the concept of *ius naturale* before the seventeenth century'.<sup>13</sup> The incompatibility of natural rights and natural law was the main theme in the writings of Michel Villey. According to Villey, Ockham's theory leaves no room for any conception of objective right. He found in Ockham a system of rights that revolved around the power of the individual, with the emphasis on notion of power. The entire juridical order was constituted by powers that could apparently be used at whim.<sup>14</sup> The result is a universe where natural law has no place: 'Subjective individual rights have filled the space resulting from the loss of natural law'.<sup>15</sup> Tierney argued that the idea of natural rights derived from natural law can be found at every stage in the history of the doctrine. The same theme reappears under a different guise in an argument against Tuck, who began his inquiry with the well-known distinction between active and passive rights theories. According to Tierney 'these various ways of understanding the concept of a right are commonly treated in the modern literature as representing opposed theories; but . . . they are not really incompatible with one another, and they may

<sup>11</sup>See the following works by Brian Tierney: 'Tuck on rights: some medieval problems', *History of Political Thought*, 4 (1983), 429–41; 'Villey, Ockham and the origin of individual rights', *The Weightier Matters of the Law: Essays on Law and Religion*, eds John Witte Jr and Frank S. Alexander (Atlanta: Scholars Press, 1987), pp. 1–31; 'Conciliarism, corporatism and individualism: the doctrine of individual rights in Gerson', *Cristianesimo nella storia*, 9 (1988), 81–111; 'Origins of natural rights language: texts and contexts, 1150–1250', *History of Political Thought*, 10 (1989), 615–46; 'Marsilius on rights', *Journal of the History of Ideas*, 52 (1991), 3–17; 'Aristotle and the American indians—again', *Cristianesimo nella storia*, 12 (1991), 295–322; 'Ius and metonymy in Rufinus', *Studia in Honorem Eminentissimi Cardinalis Alphonsi M. Stickler* (Rome: Libreria Ateneo Salesiano, 1992), pp. 549–58; and *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150–1625* (Atlanta: Scholars Press, 1997).

<sup>12</sup>See e.g. Michael P. Zuckert, 'Do natural rights derive from natural law?' *Harvard Journal of Law and Public Policy*, 20 (1997), 695–731.

<sup>13</sup>Tierney, 'Villey, Ockham and the origin of individual rights', p. 20 n.

<sup>14</sup>Cf. Michel Villey, 'La genèse du droit subjectif chez Guillaume d'Occam', *Archives de philosophie du droit*, 9 (1964), 97–127 at p. 125. 'Tous sont des pouvoirs absolus. On peut en user à son gré'.

<sup>15</sup>*Ibid.*, p. 126. 'Et il n'y a rien d'autre . . . Les droits subjectifs des individus ont comblé le vide résultant de la perte du droit naturel'.

all be needed to explain adequately the idea of a right as the term is used in contemporary discourse'.<sup>16</sup>

The second claim is directed against both Tuck's and Villey's characterization of the kind of control that a rights-subject has over his rights and the things to which he holds a right. Villey suggested that, according to Ockham, the entire legal order derived from the will of God as opposed to an impersonal order. God gave human beings the right to acquire property and the right to appoint superiors. The elected superiors received from the people the right to legislate, and consequently human legislation originated from the legislative power of these superiors. The idea of an arbitrary will that reigned uncontrolled was at the core of Tuck's account of active natural rights theories. Tuck argued that the Gersonian identification of *ius* with *dominium* implied that all rights conferred on the holder a kind of control that resembled the dominion of God over his creation.

The central area of convergence between Gersonian rights theory and Gersonian theology comes in the belief that man's relationship to the world was conceptually the same as God's. Basic to Gerson's theology . . . was a conviction that man could come to be the same kind of being as God . . . Gerson kept a distance between God and man, but it was not a categorical break between two different kinds of being . . . The arbitrary freedom of God's will was necessarily matched by a similar freedom of man's will. There could be no opposition between them.<sup>17</sup>

Tierney challenged both accounts by emphasizing, for example, that Ockham always grounded his definitions of natural right in right reason. 'He did not . . . abandon the idea of a rational natural law by emphasizing arbitrary divine commands and then fill the resulting void with a body of natural rights based on individual wills . . . For Ockham natural right was not an assertion of naked will but a power conformed to reason'.<sup>18</sup> And further that 'Gerson associated *ius* with the idea of *synderesis*, which he called a "superior" kind of reason, a capacity for moral discernment akin to our conscience. So, for him, *ius* was primarily an innate power to act rightly according to reason and conscience'.<sup>19</sup> Hence, the faculty of *ius* did not imply arbitrary dominion over its content. Other

<sup>16</sup>Tierney, 'Aristotle and the American Indians—again', p. 14. It is difficult to see whether Tierney is considering a terminological problem or a theoretical one. A shortcoming in much of his criticism of Tuck seems to originate from his refusal to consider the difference between active and passive rights as a difference in theories, rather than a difference in 'kinds' of rights—see e.g. Tierney *The Idea of Natural Rights*, pp. 218–19. See also *ibid.*, p. 58, where he identifies this difference with the distinction between *ius in re* and *ius in rem*. This may explain why Tierney is not interested in presenting an argument for the claim that the approach to the idea of rights in the modern literature is wrong. He seems satisfied with the evidence that medieval authors were as willing as he is to regard different conceptions of rights as complementary.

<sup>17</sup>Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979), p. 30.

<sup>18</sup>Tierney, *The Idea of Natural Rights*, p. 199.

<sup>19</sup>Tierney, 'Origins of natural rights language', p. 624. Tierney is aware that this 'is not quite what we mean by a natural right in modern discourse' (*The Idea of Natural Rights*, p. 53). But he does not consider any consequences of this observation in the rest of his work.

definitions of *ius* contained even more explicit references to the good. Rufinus, for example, wrote that ‘Natural *ius* is a certain force instilled in every human creature by nature to do good and avoid the opposite’.<sup>20</sup> This meaning of *iura* persisted in most of the classical rights theories. According to Suarez ‘*ius* is called a moral power (*facultas*) which anyone has concerning his own property or something due to him’. Grotius defined *ius*, apart from its objective meanings, as ‘a moral quality of a person enabling one to have or do something justly’.<sup>21</sup> Burns, perhaps following Tierney, makes exactly the same point in his book *Lordship, Kingship, and Empire*. Referring to Gerson’s definition of *jus*, ‘an immediate faculty or power pertaining to anyone according to right reason’, he explains that,

In specific cases this *jus* may be divine or ‘evangelical’, it may be natural, it may be human; but in every case it is to be understood as a power pertaining immediately to its possessor, being at the same time a power *exercisable only in accordance with ‘right reason’*.<sup>22</sup>

Not until Hobbes, then, do we find a formulation of right in which the human will is unrestrained and can basically do as it pleases. Hobbes distinguished sharply between *lex* and *ius*. He gave an exclusively subjective definition of *ius* and excluded the idea of rightness from his definition, whereas earlier natural rights theories had always included an objective definition of *ius*. Thus, according to Tierney, Hobbes was the first to disconnect the content of a right from right reason or conscience. ‘This was indeed an aberration. (For Suarez and Grotius *ius* was a *moral* power, a *moral* quality.) But later authors developed Hobbes’s distinction in ways that restored the moral content of a natural right’.<sup>23</sup> In the eighteenth century Christian Wolff held that natural law obliges each individual to seek self-perfection. The fulfilment of natural law required a certain freedom of action and, Wolff declared, ‘This faculty or moral power of acting is called a right (*ius*)’.<sup>24</sup>

An obvious objection to this account is that the moral content of natural right may have been restored in Wolff’s theory, but it was certainly not restored in the mainstream political thought of the period. Hegel protested in terms similar to the ones Tierney uses against Hobbes, but directed against what he took to be

<sup>20</sup>Ibid., p. 632.

<sup>21</sup>Ibid., pp. 621–2.

<sup>22</sup>J. H. Burns, *Lordship, Kingship, and Empire: The Idea of Monarchy, 1400–1525* (Oxford: Clarendon Press, 1992), p. 36. Emphasis added.

<sup>23</sup>Tierney, ‘Origins of natural rights language’, p. 622. Tierney’s work can be read as a defence of the doctrine of natural rights. See e.g. ‘Aristotle and the American Indians—again’, p. 304: ‘there may still be a core of real human rights and good reason to insist on them in our modern world’. Both Tuck and Villey were critical of natural rights theories. Villey is explicitly hostile to the idea of natural rights in almost all of his writings. For Tuck, see especially ‘The dangers of natural rights’, *Harvard Journal of Law and Public Policy*, 20 (1997), 683–93. If Tuck and Villey started from a misconception of natural rights, this would have led them to an unjustified rejection of the idea of natural rights.

<sup>24</sup>Tierney, ‘Origins of natural rights language’, p. 622.

an almost universally accepted point of view. For Hegel, freedom was both the substance and the goal of right. But he put great emphasis on the fact that freedom should properly be understood not as the ability to do what we please but as conformity to the good.<sup>25</sup> However, Hegel also made it clear that this understanding of the subject was not the dominant one in his era. On the contrary,

The crucial point in both the Kantian and the generally accepted definition of right . . . is the ‘restriction which makes it possible for my freedom or self-will to co-exist with the self-will of each and all according to a universal law’ . . . [This definition of right] involves that way of looking at the matter, especially popular since Rousseau, according to which what is fundamental, substantive, and primary is supposed to be the will of a single person in his own private self-will, not the absolute or rational will, and mind as a particular individual, not mind in its truth. Once this principle is adopted, of course the rational can come on the scene only as a restriction on the type of freedom which this principle involves.<sup>26</sup>

The restriction of each individual’s freedom is necessary because the kind of freedom that Kant envisaged was the private self-will of a person, the ability to do as we please.<sup>27</sup> My suggestion is that this is the way we now commonly understand the idea of a right. To have a right is to be able to make independent decisions about the thing to which one has a right. This understanding is in agreement with the kind of conception of *ius* that Tierney finds in Hobbes, where the idea of rightness is excluded from the definition of *ius*. According to Tierney, this was an aberration (Hegel would probably agree). If this account of medieval natural rights theories turns out to be correct, the Hobbesian understanding of rights is a deviation from the medieval tradition; a deviation that Hegel saw growing popular from Rousseau onwards.

The corollary of accepting this analysis is that we end up with two different traditions: a ‘sound’ theory that grew in the humanistic jurisprudence of the

<sup>25</sup>See G. W. F. Hegel, *Philosophy of Right*, trans. T. M. Knox (Oxford: Oxford University Press), §15: ‘If we hear it said that the definition of freedom is the ability to do what we please, such an idea can only be taken to reveal an utter immaturity of thought. Also §123, addition (‘freedom is not genuinely free in its own eyes except in the good, *i.e.* except when it is its own end’) and §129 (‘The good is the Idea as the unity of the concept of the will with the particular will . . . The good is thus freedom realized, the absolute end and aim of the world’).

<sup>26</sup>Hegel, *Philosophy of Right*, § 29. There is still debate over the question whether Hegel’s reading of Kant is adequate. See *e.g.* Sally Sedgwick ‘Hegel, McDowell, and recent defenses of Kant’, *Journal of the British Society for Phenomenology*, 31 (2000), 229–47. For an extremely insightful defence of Hegel against the charges that his critique of Kant rests on a misinterpretation, see Hans Lottenbach and Sergio Tenenbaum, ‘Hegel’s critique of Kant in the *Philosophy of Right*’, *Kant-Studien*, 86 (1995), 211–30.

<sup>27</sup>Kant distinguished between a negative and a positive conception of freedom. Negatively, freedom of choice is independence from being determined by sensuous impulses or stimuli. Positive freedom is only possible by the subjection of the maxim of every action to the condition of its qualifying as a universal law. But ‘since the maxims of human beings, being based on subjective causes, do not of themselves conform with those objective principles, reason can prescribe this law only as an imperative that commands or prohibits absolutely’. See ‘Metaphysics of Morals’, *Practical Philosophy*, ed. Allan Wood, trans. Mary J. Gregor (Cambridge: Cambridge University Press, 1999), pp. 213–14.



twelfth century and found an impressive formulation in Hegel's *Philosophy of Right* and an 'aberration' that was probably first formulated by Thomas Hobbes and was already becoming popular in Rousseau's time. According to the first tradition, every human being has 'a certain force . . . by nature to do good and avoid the opposite', and to have a right is to enjoy the freedom to act 'in accordance with the dictates of right reason'. The second tradition sees a right as an individual's power to act as he or she pleases or as an area in which a person's arbitrary will reigns uncontrolled. The danger of this dualistic analysis is that we find ourselves making lists of 'good' and 'bad' natural rights theories. There is another possibility, however. If we can argue that these two ideas became inherently interrelated ingredients of a solution to a conceptual problem, and further that it is possible to account for the evolution in the history of these ideas, we can hope to achieve a better understanding of the history of natural rights, without having to 'choose sides'. In other words, it must be possible to explain the fact that the idea of moral action central to the understanding of natural rights was gradually dissociated from that understanding, to such a degree that it became possible to say that one has the right to do wrong. The best way to understand this process of dissociation is by analogy with the evolution of another idea.

### III. THE SOVEREIGNTY OF THE PRINCE

The question whether a right does involve arbitrary freedom or whether rights can be—so to speak—internally restricted, is a question of the relationship between 'Right' and moral obligation or natural law. One area in political or legal thought where this problem has seemed particularly important is the issue of the relationship between the Prince (king, pope, emperor) and the law—a topic that has attracted much attention in recent historical surveys of medieval and early modern political thought. At the most general level, the issue is whether medieval and early modern authors had a conception of the sovereignty of a ruler that was not limited by any ideas about justice, common good, the rights of subjects, and the like. In other words: was the Prince free to rule as he pleased or did the law bind him? And if he was bound, was he bound by divine or natural law or even human law? We can already appreciate the relevance of these discussions for our problem. Rights of rulers were often treated as cognate with rights of people in general. The right of a sovereign was often considered as much of a subjective right as any other. It seems natural, then, to expect that the problems with natural rights doctrine in general are reflected in this special case of the rights of rulers. Because the problem of the sovereignty of rulers has received much more attention than the issue of individual sovereignty, I would like to pursue a better understanding of the latter through the former.

The point of departure in recent discussions has been the conclusion, reached by earlier historians, that theories of tyrannical government were formulated as

early as the Middle Ages. The prince was often considered *legibus solutus*, that is, not bound by the law. He was also said to have been ‘called to a plenitude of power’. Frequently a distinction was made between the ordained powers of a prince and his absolute power. By his ordained power he was subject to law, whereas in his absolute power he could abrogate or deviate from the law. Furthermore, his will was sometimes considered to be reason for his subjects (in much the same way as God’s will is reason for his creation). It is not surprising that such language has led historians to conclude that theories of arbitrary government were not an invention of, say, the seventeenth century.<sup>28</sup> As I said, this conclusion has recently been challenged. Historiography has emphasized the limits placed on the power of a prince and brought to attention a system of norms that guided medieval legal thought.<sup>29</sup> According to these norms, the prince was not bound by law but subjected himself to it of his own free will. He could deviate from, sometimes even abrogate, the law through his absolute power but the use of this power was mostly limited to special circumstances.

Now, we need to consider two points. First, it is possible to discern an evolution in the legislative competence of a prince (most historians would probably concur, even if many feel that differences have been overemphasized in the past). In the early middle ages, we are often reminded, law was ‘not made but found’. Before the twelfth century a clear-cut concept of legislative power was, if not absent, at least much more problematic. Raoul Van Caenegem has pointed out that the lack of legislation before the twelfth century had something to do with ideas about the very nature of the law: ‘These concerned particularly the notion that the law was a God-given ancestral treasure which man could not manipulate but at most “find”, *i.e.* declare or define. The law was something fixed or eternal like the stars, not made by man or to be altered to suit his whim, but to be preserved with reverence’.<sup>30</sup> Recent historiography has established that at least from the twelfth century onwards jurists did have a concept of the prince’s legislative power. In the later middle ages the ideas of jurists on the authority of the prince still underwent important transformations. Pennington has characterized them as follows:

<sup>28</sup>The classical study is Michael Wilks, *The Problem of Sovereignty in the Later Middle Ages: The Papal Monarchy with Augustinus Triumphus and the Publicists* (Cambridge: Cambridge University Press). Wilks should be read together with the work of William D. McCready, ‘Papal Plenitudo Potestatis and the source of temporal authority in late medieval papal hierocratic theory’, *Speculum*, 48 (1973), 654–74; ‘The problem of the empire in Augustinus Triumphus and late medieval hierocratic theory’, *Traditio*, 30 (1974), 325–9; ‘Papalists and antipapalists: aspects of the church/state controversy in the later Middle Ages’, *Viator*, 6 (1975), 241–73; ‘The Papal sovereign in the ecclesiology of Augustinus Triumphus’, *Mediaeval Studies*, 39 (1977), 177–205.

<sup>29</sup>See recently Kenneth Pennington, *The Prince and the Law, 1200–1600: Sovereignty and Rights in the Western Legal Tradition* (Berkeley: University of California Press, 1993).

<sup>30</sup>Raoul Van Caenegem, ‘Government, law and society’, *The Cambridge History of Medieval Political Thought*, ed. J. H. Burns (Cambridge: Cambridge University Press, 1988), pp. 174–210 at pp. 181–2. For similar remarks in older literature, see the references in Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford: Clarendon Press, 1999) p. 38, n. 130.

By the middle of the fourteenth century, a new doctrine of authority had emerged in the writings of the jurists that penetrated every crack and crevice of the *ius commune* . . . As the jurists defined the authority of the prince with greater precision and subtlety, they discovered that the older norms, even with new names, could not be easily incorporated into the new jurisprudence of power. A prince who was 'legibus solutus', whose will was the source of all positive law, whose decrees abrogated any custom, who exercised 'plenitudo potestatis' and, occasionally, 'potestas absoluta', became a being who was no longer constrained by vague notions of cause, necessity, the public good, natural law, and reason.<sup>31</sup>

The analogy with the history of natural rights must be clear by now. Jurists in the centuries to come were more and more willing to grant the prince sovereign powers. If the idea of 'ruling well' was ever central to the definition of the power of the prince,<sup>32</sup> it grew increasingly detached from that definition, just as acting according to one's conscience became disconnected from the idea of natural rights.

But what is the dynamic behind this evolution towards sovereignty? In order to see this we have to consider a second point. It concerns the difficulties that historians have encountered in understanding the ideas of medieval jurists on the power of the prince. A medieval author could write that the prince was bound by law and yet at the same time consider him to be above the law. The classic text for this problem is *Bracton on the Laws and Customs of England*.<sup>33</sup> On the one hand, there is a set of passages that depict the king as a supreme ruler, emancipated from any legal restraint. On the other hand, there are passages that seem to imply that the king is limited in some ways. The literature on this problem shows two tendencies. A number of scholars have attempted to reconcile the two strands of Bracton's thinking.<sup>34</sup> Others have maintained that there is a genuine problem in the text.<sup>35</sup> Whether or not Bracton's text avoids

<sup>31</sup>Pennington, *The Prince and the Law*, p. 119.

<sup>32</sup>See e.g. Cary J. Nederman, 'The royal will and the baronial bridle: the place of the Addicio de Cartis in Bractonian political thought', *History of Political Thought*, 9 (1988), 415–29.

<sup>33</sup>See *Bracton on the Laws and Customs of England*, trans. Samuel E. Thorne (Cambridge, Mass.: Harvard University Press, 1968–1977). The same problems appear in other medieval treatises such as the Laws of Edward the Confessor and the treatise known as Fleta. I have used the searchable Latin–English html version of 'Bracton', available at <http://bracton.law.cornell.edu/bracton/Common/>.

<sup>34</sup>See recently Cary J. Nederman, 'Bracton on kingship revisited', *History of Political Thought*, 5 (1984), 61–77; 'Bracton on kingship first visited: the idea of sovereignty and Bractonian political thought in seventeenth-century England', *Political Science*, 40 (1988), 49–66; 'The royal will and the baronial bridle'; and Michael Blecker 'The king's partners in Bracton', *Studi Senesi*, 96 (1984), 66–118. Further see especially Gaines Post, *Studies in Medieval Legal Thought: Public Law and the State, 1100–1322* (Princeton: Princeton University Press, 1971). Ewart Lewis, 'King above law? "Quod principi placuit" in Bracton', *Speculum*, 39 (1964), 240–69. And Brian Tierney 'Bracton on Government', *Speculum*, 38 (1963), 295–317. '“The prince is not bound by the laws”: Accursius and the origins of the modern state', *Comparative Studies in Society and History*, 5 (1964), 378–400.

<sup>35</sup>By far the best treatment is in Donald W. Hanson, *From Kingdom to Commonwealth: The Development of Civic Consciousness in English Political Thought* (Cambridge, Mass.: Harvard University Press, 1970), pp. 97–133. Also Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca, N.Y.: Cornell University Press, 1940), pp. 67–92. Walter Ullmann, *Principles of Government and Politics in the Middle Ages* (London: Methuen, 1978).

inconsistencies need not concern us here. What is important for us is the nature of the problem that Bracton was trying to solve. The problem, I would like to suggest, is that there are two quite different conceptions of law present in the early development of what is now seen to have been the growth of the idea of the rule of law. The reason, in other words, why a prince can at the same time be under and above the law is that the law is two different things at the same time. Thus we can better understand medieval jurisprudence (and, indeed, the western legal tradition) if we think of it as a continued struggle to combine these opposed conceptions, which represent the ideal–typical beginning and end of the evolution of ideas about the sovereignty of the prince.

The first of these conceptions considers the law to be God-given. Consequently, the law is not a human invention but a discovery. Justice was immanent in the concept of the ruler's authority. If the prince were unjust, if his laws were not based on right reason, he was not a real prince but a tyrant. The logical consequence is that the will of the prince can only be law if it conforms to the good and the just. According to this theory, then, the right of a ruler consists only of the proclamation and enforcement of the law.<sup>36</sup> In other words, the prince is not sovereign at all; he is bound by the will of God, the only true sovereign. This creates a number of difficulties. If God is sovereign, any kind of government becomes problematic. Why would anybody obey any earthly prince if his commandments go against God's? Medieval jurists wavered between two alternatives. The first was a utilitarian argument: if everybody were to feel free to question the acts of the prince, anarchy would follow. Therefore, the law must not be questioned. The weakness of this solution is that it provides a pragmatic answer to a problem of legitimacy—an answer that is bound to be unpersuasive in cases where the authority of a prince to make new laws is being challenged. The other alternative would have been to revert to the second conception of law: God has (perhaps only temporarily) conferred his sovereignty upon the prince; therefore he is a true sovereign in this world. This second conception of law only deviates from the first in its identification of the prince as sovereign. Since he is sovereign, his will is law to his subjects, who are therefore bound to obey him.

The rise of this second conception of law was partly a reflection of the rise of strong central authorities, both ecclesiastical and secular, during the renaissance of twelfth century Europe. It was in this era the first modern western legal systems were created, the first of these being the system of canon law of the Roman catholic church. Pope Gregory VII proclaimed the legal supremacy of the pope over all Christians and declared the power of the pope alone to make new laws (secular princes were soon to follow the example set by the pope).<sup>37</sup>

<sup>36</sup>See e.g. Kenneth Pennington, *Pope and Bishops: The Papal Monarchy in the Twelfth and Thirteenth Centuries* (Philadelphia: University of Pennsylvania Press, 1984), p. 21: 'The canonists [before the thirteenth century] believed that law must contain reason . . . Without reason, law was not valid, no matter who the source of legislation was'.

<sup>37</sup>See Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass.: Harvard University Press, 1983), p. 535.

By the end of the twelfth century, Pope Innocent III felt confident to defend his authority to transfer bishops from one diocese to another by describing his authority as divine, rather than human: ‘God, not man, separates a bishop from his church because the Roman pontiff dissolves the bond between them by divine rather than by human authority’.<sup>38</sup> This was a bold statement, even for a pope, but in defending papal authority the canonists developed this idea further in ways that increasingly strained the link between law and justice. A quote from Laurentius Hispanus may serve to illustrate this. Commenting on the statement of Innocent III, he wrote

Hence [the pope] is said to have a divine will . . . and O, how great is the power of the Prince. He changes the nature of things by applying the essences of one thing to another . . . he can make iniquity from justice by correcting any canon or law; for in these things that he wishes, his will is held to be reason.<sup>39</sup>

For the jurists there existed an intrinsic link between reason and law, between law and justice, and, paradoxical as it may seem, it may well have been this intrinsic connection that led them to associate the authority of the pope with the power of God.<sup>40</sup> If law were only valid if it were just, there seemed to be no other way to understand the pope’s ability to create new laws other than to relate it to God’s power to define justice.

Both these conceptions of law had their problems. The first was simply unworkable as a theory of government. If a law were valid only if it was in accordance with right reason, and there was no sure way to decide whether it actually was, this would sooner or later lead to mere anarchy. Such a theory would appear increasingly implausible to lawyers involved in the process of daily government. More importantly, canonists in the era after the investiture struggle were firmly convinced that the pope had a right to issue new laws, just as the civilians were convinced that secular rulers had a similar right to legislate. The problem was with the conceptual apparatus available to the jurists: they thought of law as having its origin in the will of a sovereign. However, the second conception—to conceive of the prince as sovereign—was equally problematic. Unlike God, a human prince is not by definition just. Medieval lawyers were not prepared to equate justice with the prince’s will. In other words, they did not really consider him sovereign.

The result of the struggle between these two concepts was a hybrid theory that I would like to baptize the theory of absolute government.<sup>41</sup> Most medieval

<sup>38</sup>Cited in Pennington, *Pope and Bishops*, p. 16.

<sup>39</sup>Cited in Pennington, *Pope and Bishops*, p. 17. On passages like these, see also Gaines Post, ‘Vincentius Hispanus, ‘Pro Ratione Voluntas’ and medieval and early modern theories of sovereignty’, *Traditio*, 28 (1972), 159–84.

<sup>40</sup>My understanding of the importance of these passages diverges from, but is not inconsistent with, those of Pennington, Post and Tierney. For them, the major challenge posed by these glosses was to explain that they did not imply an arbitrary power of the prince.

<sup>41</sup>Glenn Burgess makes the same distinction between absolute and arbitrary government in his historical account of the development of absolutism in early modern England. He argues that

theories of natural law did not constitute a significant limitation on the legislative competence of governments. Natural law was a basis for deciding whether a given enactment was a good and just law, not for deciding whether it was a valid one. The subjects of a prince should obey him even when it was not clear to them that his law did in fact conform to reason. If the prince abused his sovereignty by making unjust laws, he committed a sin. But only God could judge him if that were the case. Government is absolute because subjects cannot legitimately challenge it, but it is not arbitrary because it is agreed that the prince *should* not abuse his power. Again, this theory has its problems, or, better maybe, it is very dubious as a theory *tout court*. It requires people to regard their prince as a sovereign whose will is law, but at the same time maintains that he is not sovereign, because the only true sovereign is God. Finally, the theory became an anachronism (historians are still arguing about the date). It lost credibility because it was unable to maintain a grip on reality, as Pennington has noted:

A prince who was ‘legibus solutus’, whose will was the source of all positive law, whose decrees abrogated any custom, who exercised ‘plenitudo potestatis’ and, occasionally, ‘potesta absoluta’, became a being who was no longer constrained by vague notions of cause, necessity, the public good, natural law, and reason.<sup>42</sup>

We all know what happened: when it became clear that these notions were unable to restrain the power of the sovereign, to speak of them became a waste of time. Law was identified with the will of the sovereign. Let me call this a theory of arbitrary sovereignty. Today, most people believe that this kind of sovereignty can only legitimately rest with the majority of adults in a given territory. Because it is commonly believed that the sovereignty of the state is now in good hands—not in a monarch’s but in the people’s hands—the problem of adequately limiting sovereign power presents itself with less urgency. When the problem is debated, it takes another form altogether. Limiting (state-) sovereignty is now a question of adequately defining the domains of those other sovereigns, the people. These domains limit the state’s sovereignty by defining the boundaries it is not supposed to cross in exercising that sovereignty. In Hegel’s terminology, the freedom (or self-will) of the state must be restricted in order for it to be able to co-exist with the freedom of its citizens. With this qualification in mind, it is fair to say that today in most western countries sovereignty is an accomplished fact.<sup>43</sup> The notion of arbitrary sovereignty is reflected in the idea that law is legitimate because the majority of the people have approved it.

opponents of the Stuart monarchy deliberately misconstrued Royalist defences of it as theories of arbitrary monarchy for polemical purposes. See Burgess, *Absolute Monarchy and the Stuart Constitution* (New Haven & London: Yale University Press, 1996), esp. chs 2–4.

<sup>42</sup>Pennington, *The Prince and the Law*, p. 119.

<sup>43</sup>A possible objection to my account may be that it depends on an Austinian conception of sovereignty and therefore neglects the critiques of this conception formulated in the past fifty years. My only defence is that I think this objection is misdirected, if it is presented against what I take to be the commonsense conception of popular sovereignty.

## IV. RIGHTS AND SOVEREIGNTY

I started the previous section with a clear task: to see if we can avoid resorting to the idea that the history of natural rights is the history of two conflicting doctrines. The analogy with the right of the prince revealed the same drift we noticed in the history of natural rights: the prince gradually assumes the features of an arbitrary sovereign. My claim is, of course, that the structure of this process is similar to that at work in the history of natural rights. In order to appreciate that the history of natural rights exhibits the same dynamic, we need to consider in some detail the problems that the 'medieval conception of natural rights' faces.

Let us, for the sake of argument, accept the medieval definition of a natural right as a power exercisable only in accordance with 'right reason'. Since medieval jurists thought that a prince could only use his power in accordance with right reason (according to the conception of a God-given law), they must have thought that an individual course of action could only be called a right if it, too, conformed to right reason. The people who have these rights live by a (moral) law, like a prince who is not really sovereign but governs according to a law that exists independently of his rule. Because these people are not sovereign, but are supposed to live by the law, in many cases their rights coincide with their duties. Only in cases where there is a choice between two courses of action, and it is in fact morally irrelevant whether people choose one or another, do these rights also permit 'freedom of action'. This right to 'do good and avoid the opposite' is not what *we* would call a right. What is more, to the extent we would like to agree that everybody has a duty to do good, one might wonder about the relevance of the additional 'right' to do what one *must* do, in the course of duty. The answer is that it prevents others from imposing a duty on me to do the opposite of good. The right to do what I have a (moral) duty to do thus implies that no one can impose another duty on me that is contrary to my duty to do good. It does not require much imagination to expect such a right to become important in a culture that is immersed in the idea of a personal duty to obey the commandments of the Lord.

Natural rights were indeed constantly associated with conscience and *synderesis*, its loftier counterpart. Medieval theologians and jurists agreed that human beings are unique because they partake of God's divine reason. Human reason is able to discern universal principles of good and to derive rules of conduct from these principles. It is here that problems begin to arise. Medieval minds were certainly aware of the possibility of an erring conscience. If conscience is to decide what I have a right to do, who will decide when different consciences disagree? The defenders of natural rights replied that a person has a right to do what his conscience tells him to do.<sup>44</sup> In other words, other people

<sup>44</sup>In this sense Aquinas was also a defender of natural rights, though his account was not very consistent. For a good treatment of Aquinas' doctrine of freedom of conscience, see Eric D'Arcy, *Conscience and its Right to Freedom* (London: Sheed & Ward, 1961).

are not allowed to interfere with that person's behaviour if they think him to be led by a misguided conscience, or, by consequence, even if he does not seem to be following the dictates of right reason at all. Here, natural law does not permit freedom of action in the sense that the individual is morally bound to do the good. The (natural or moral) law *does* prescribe a specific course of action, but it permits 'freedom of action' in the sense that it does not allow anyone to interfere if a person does not abide by the law. That person is not sovereign, in the sense of being free from obligations, but he is 'free to act as he pleases' because no one may interfere with his course of action. This move, however, is not without theoretical drawbacks. Like a prince according to the theory of absolute government, an individual is sovereign as far as the possibility of interference by others is concerned. But he is not truly sovereign because it is agreed that he should do good. This makes the theory impure. The impurity is reflected in the ambiguity of the answer to the question whether an individual has 'a right to do wrong'. One could, with equal plausibility, answer yes or no. Yes, because the prohibition of interference gives people in effect a 'right' to be immoral. But it is important to realize that this yes is quite independent of any argument in favour of an individual following his own conception of the good. The reason why an individual is considered to have a right to do wrong is simply that he has a right not to be interfered with if he does so. From another point of view, the answer is no. This natural right of non-interference is not at all a right to do wrong, because the moral duty to do good still stands.<sup>45</sup>

Our popular conception of individual (natural) rights vacillates between this account and the theory of arbitrary sovereignty, between the right to be immoral and the right to follow one's own conception of the good. To the extent that people still assume that an individual should conform to general moral obligations (that is, apart from respecting the moral rights of other people), the account of rights is equivalent to what we have called the theory of absolute government. But the 'freedom' that a right is supposed to grant (and the reason for granting rights) has increasingly become the freedom to decide for ourselves how we will live our lives: not the ability to know right from wrong (conscience) but the ability to choose our own way of life has become the foundation of our natural rights. In other words, people have become (arbitrary) sovereigns. They are not bound by any law: the only moral law they recognize, if any, is the law that they themselves proclaim—their own conception of the good. Our freedom of action is thus complete or, if you will, is only restrained by the boundaries imposed by the presence of other sovereigns.

<sup>45</sup>In Hohfeldian terms: even though a person has no liberty (privilege) to perform a certain kind of action, the agent is nevertheless protected by claim-rights against interference if he violates his duty not to do it.