Chapter 2 From Classical to Modern Law

1. The Fall of Rome

The term "the Dark Ages" is vaguely applied to European history from "the time of the fall of Rome" to "the end of the Viking age" around the start of the 12th century AD. However, the fall of the Western Roman Empire was not an *event* but rather a *process* that played out over three centuries. Likewise, the "end of the Viking age" was not marked by any event and more or less means "when the kingdoms of the main European continent and British isles achieved enough military capability to no longer be vulnerable to marauders from Scandinavia." By a convenient convention, the Battle of Hastings in 1066 is usually taken as marking "the end of the Viking age." Likewise and again by convenient convention, "the fall of Rome" is usually taken to mean the year AD 476 when an East Germanic Roman general named Odoacer conquered the city of Rome and deposed the boy-emperor Romulus Augustus. Odoacer exiled Romulus to a place near Naples and, according to legend, sent the boy's imperial robes to the Eastern Roman emperor Zeno as a message that the west no longer needed an emperor.

What we call the Dark Ages strictly applies only to Europe outside the boundaries of the Byzantine (Eastern Roman) Empire[1]. The Byzantine Empire endured for another thousand years. From the 7th to the 12th centuries AD the Islamic world achieved a high level of civilization that was essential in the preservation and advancement of philosophical, scientific, and medical knowledge. The age of Muslim Scholasticism played a key role in the European Renaissance and the end of the European Dark Ages. And, of course, Asia in the Far East and Indian subcontinent went unaffected by either the fall of Rome or the Viking era.

Why designate the fall of the (western) Roman Empire with the reign of Odoacer? Certainly he wasn't the first Roman general to usurp control of the government. Julius Caesar had done that in 44 BC by intimidating the Senate into naming him Dictator for Life. In doing so, he struck the death blow to the Roman Republic. He also, ironically, provoked a small group of Senators into assassinating him – thus making sure his lifetime appointment didn't last very long. His assassination failed to restore the Republic. Instead, after a brief civil war between Octavian Caesar and Marc Antony, Octavian established the "principate" government of what was now the Roman Empire.

The principate ended on March 28th, AD 193, when 300 soldiers from the Praetorian Guard invaded the palace and assassinated emperor Pertinax – who had only been emperor for three months by appointment of the Senate following the assassination of emperor Commodus on January 1st, AD 193. The leaders of the Guard then announced that, henceforth, the Praetorians would choose who would be emperor – and that they would sell the crown to the highest bidder. From that point on, various Roman legions fought each other to make their own generals emperor and the principate established by Octavian Caesar was in effect ended although the Empire itself persisted another two hundred and eighty three years under the rule of scores of emperors – many of whom ruled for only a very brief time before being assassinated themselves. Why, then, single out Odoacer? Could the excuse be nothing more than ethnic bigotry because he was a "barbarian ally" general of Rome and not a native-born Roman? In any case, Odoacer is remembered as, and called himself, the first king of Italy.

Rome did not fall due to just one cause. Historian Will Durant wrote,

[1] The Byzantine Empire is so called by historians because the Roman emperor Constantine moved the empire's capital out of Rome and to the city of Byzantium, which was renamed Constantinople. When the empire was divided into east and west, the western Roman Empire was a Latinized culture centered in Italy while the eastern Roman Empire was a Hellenic culture that was more Greek than Roman. Nonetheless, the people of the Byzantine Empire called themselves "Roman" and their empire "the Roman Empire." Christianity likewise was divided into the Roman Catholic Church and the Eastern Orthodox (Christian) Church.

> [The] fall of Rome, like her rise, had not one cause but many, and was not an event but a process spread over 300 years. . . . A great civilization is not conquered from without until it has destroyed itself within. The essential causes of Rome's decline lay in her people, her morals, her class struggle, her failing trade, her bureaucratic despotism, her stifling taxes, her consuming wars. [Durant (1944), pg. 665]

Historian Arnold Toynbee came to a generalized version of the same conclusion, i.e. "civilizations fall from within," during the 1930s as a result of his intensive research into vanished civilizations [Toynbee (1946)] and Durant has probably quoted him.

There has been a great deal of scholarly research and debate over reasons why Rome fell ever since Gibbon first published his *The History of the Decline and Fall of the Roman Empire* in 1776. It is not-inaccurate to say that the question remains unsettled even today but there is a high degree of agreement that a number of *partial* causes were at work in it and that some, or all, of these partial causes came together in a way that overwhelmed the Empire. Durant names several of these above and describes his views on them in more detail [Durant (1944), pp. 631-633, 665-670]. Some additional hypotheses have also been put forth; the interested reader can find a survey of them in a summary Wikipedia article with extensive references ("Fall of the Western Roman Empire" dated 12 Dec., 2022[2]). It is almost certainly true that there was no one *single* cause of Rome's fall; it is certainly true that scholars argue and debate the importance of many of the putative partial causes, and that some scholars discount some of these hypotheses entirely or almost entirely.

For example, one hypothetical factor contributing to the fall is not mentioned in Durant's summary above because he does not agree that it *was* a cause at all. This factor is Christianity:

> The greatest of historians [Gibbon[3]] held that Christianity was the chief cause of Rome's fall. For this religion, he and his followers argued, had destroyed the old faith that had given moral character to the Roman soul and the stability of the Roman state. . . .
>
> There is some truth in this hard indictment. Christianity unwillingly shared in the chaos of creeds that helped produce that medley of mores which moderately contributed to Rome's collapse. But the growth of Christianity was more of an effect than a cause of Rome's decay. The breakup of the old religion had begun long before Christ; there were more vigorous attacks upon it [the old religion] in Ennius and Lucretius than in any pagan author after them. Moral disintegration had begun with the Roman conquest of Greece, and had culminated under Nero; thereafter Roman morals improved, and the ethical influence of Christianity upon Roman life was largely a wholesome one. It was because Rome was already dying that Christianity grew so rapidly. Men lost faith in the state not because Christianity held them aloof, but because the state defended wealth against poverty, fought to capture slaves, taxed toil to support luxury, and failed to protect its people from famine, pestilence, invasion, and destitution; forgivably they turned from Caesar preaching war to Christ preaching peace, from incredible brutality to unprecedented charity, from a life without hope or dignity to a faith that consoled their poverty and honored their humanity. Rome was not destroyed by Christianity any more than by barbarian invasion; it was an empty shell when Christianity rose to influence and invasion came. [Durant (1944), pp. 667-668]

Without offering to try to settle the controversies and disagreements over why Rome fell, I do wish to give some emphasis to one of these many factors. This factor is a key common denominator in nearly all of the partial causes explanations that have been put forth over the years: namely, the factor of *human nature* in determining the social dynamics of any society. This notion of "human nature" will receive a great deal of explanation later in this treatise, but for the present I will say that, ultimately, human beings steer the course and determine the fate of any society. Mill wrote,

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[2] Wikipedia articles are periodically updated as additional facts, materials and hypotheses come to light.

[3] Durant heaps much praise on Gibbon here. Personally, I am not convinced he was "the greatest" of all historians.

> A government cannot have too much of the kind of activity which does not impede, but aids and stimulates, individual exertion and development. The mischief begins when, instead of calling forth both the activity and powers of individuals and bodies, it substitutes its own activity for theirs; when, instead of informing, advising, and upon occasion denouncing, it makes them work in fetters or bids them to stand aside and does their work instead of them. The worth of a state, in the long run, is the worth of the individuals comprising it; and the State which postpones the interests of *their* mental expansion and elevation to a little more of administrative skill or that semblance of it that practice gives in the details of a business; a State which dwarfs its men, in order that they may be more docile instruments in its hands even for beneficial purposes, will find that with small men no great thing can really be accomplished; and that the perfection of the machinery to which it has sacrificed everything will in the end avail it nothing for want of that vital power which, in order that the machinery might work more smoothly, it has preferred to banish. [Mill (1859), pg. 97]

Toynbee's thesis, that civilizations fall from within, when shorn of his enthusiasms for sometimes-mystic, sometimes-theological explanations, is a statement, in essence, that it requires real civic *unity* among its people to hold a civilization together, and that where that unity breaks down and disappears the breakdown and disintegration of the civilization invariably follows. Toynbee's excesses are merely amateur pseudo-psychology offerings of his own particular metaphysic. Durant expressed the civil and political breakup of the Roman empire in much more empirically supportable terms:

> The political causes of decay were rooted in one fact – that increasing despotism destroyed the citizen's civic sense and dried up statesmanship at its source. Powerless to express his political will except by violence, the Roman lost heart in government and became absorbed in his business, his amusements, his legion, or his individual salvation. Patriotism and the pagan religion had been bound together, and now together decayed. The Senate, losing ever more of its power and prestige after Pertinax, relapsed into indolence, subservience, or venality; and the last barrier fell that might have saved the state from militarism and anarchy. Local governments . . . no longer attracted first-rate men. The responsibility of municipal officials for the tax quotas of their areas, the rising expense of their unpaid honors, the fees, liturgies, benefactions, and games expected of them, the dangers incident to invasion and class war, led to a flight from office corresponding to the flight from taxes, factories, and farms. [Durant (1944), pg. 668]

Roman law did not save Rome in the end. It did not hold Rome's people together.

2. Lawmaking in Medieval Europe

In the East, the Byzantine Empire endured for another thousand years after the fall of Rome, and here Roman law and Roman legal administration survived. But in the territories of the old Western empire Roman law and Roman government were no more. Commerce and trade collapsed, political disunity fragmented Europe's people, urban populations plummeted, education broke down, and technology all but disappeared. These conditions constitute what is usually called a "dark age" because it is intermediary between the fall of one great civilization and the rise of a new successor civilization. Dark ages have happened numerous times and places in history and are regionally localized. The fall of Rome ushered in a European dark age in the West[4] while in the East the civilization of the Byzantine Empire continued. Medieval Europe had a thousand different political faces [Durant (1950), pp. 423-579].

In 490 the partially-Romanized Odoacer was overthrown by the invading Ostrogoths under Theodoric, who killed Odoacer himself in March of 493. The various nomadic people who took over in the western territories had no use for elaborate governments or legal systems [Pirie (2021), pp. 147-171]. Like the

[4] Since the 19th century, this period of European history has traditionally been called "the Dark Ages." It is unclear why the term "ages" (rather than "age") came to be used. Perhaps it is because the period lasted for so many centuries before civilization in Europe again approached the level achieved under the Romans. In any case, the traditional term "*the* Dark Ages" reflects a high degree of European ethnocentricity. There have been many others.

early Mesopotamian kings, they did establish some laws and these were, likewise, *ad hoc* lists of injuries and compensations and were based on local customs and traditions. One difference between Europe and ancient Mesopotamia was that some of these people were, to a degree, partially Romanized through long contact with Rome before its fall. Some of their kings did employ their Roman subjects as advisors in running their administrations. This does not mean Roman law managed to maintain a sort of underground existence; it did not. The new rulers of Europe were different people from the Romans and thought it proper to have their own laws tailored to their own people, primitive though these law collections were. What Durant said of feudal law applies equally well to communities throughout medieval Europe:

> In the feudal regime, where the judges and executors of civil law were usually illiterate, custom and law were largely one. When question rose as to law or penalty, the oldest members of the community were asked what had been the custom thereon in their youth. The community itself was therefore the chief source of law. The baron or king might give commands, but these were not laws; and if he exacted more than custom sanctioned he would be frustrated by universal resistance, vocal or dumb. [Durant (1950), pg. 566]

As Emerson said, "The law is only a memorandum" [Emerson (1844), pg. 276].

An interesting attitude did develop, however. Rome had had a certain grandeur and a sort of celebrity in the eyes of "the barbarian tribes," out of which "having laws" came to be seen by some rulers as a marker of civilized achievement. In some cases, there was a kind of competition between different rulers over who was more civilized and in which the states' laws served as a comparative scorecard. The simple fact is: rulers make rules and, as noted earlier, seek to pacify their always potentially unruly subjects by promising them "justice" while never saying what "justice" *is*.

The prevailing and noteworthy similarity between all these different systems was that each reflected specific local prevailing customs, mores and folkways. These were, of course, very different from Rome. The divers European Societies were peppered with feuds, lacked strong general governments, and many offenses were regarded as private affairs to be settled privately. Attempts might be made to mediate disputes so as to avoid blood feuds; but if this failed revenge remained an option. Sometimes the services of itinerant judges were called upon to help mediate or settle disputes, and sometimes local judges might be appointed by the king. These judges might or might not have any formal legal background, and not infrequently they were churchmen (in those regions that had converted to Christianity) and not lawyers as Rome had had. As Friedman remarked, "In a common law system judges make at least some of the law even though legal theory has often been coy about admitting this fact" [Friedman (2005), pg. 79].

Although considered "barbarians" by the Romans, it is an error to assume these different European Societies were totally unorganized or that they lacked "unwritten laws" (traditions and customs) that guided and governed people's behavior in Society. For example, Scandinavia in the pre-Viking and Viking ages was divided up into small local or regional Societies governed by jarls or petty kings. Kings' appointments were approved by his people at a local assembly called the *ting*. All important decisions – such as "laws" or a decision to change religion – had to be approved at the *ting* [Jones (1968), pg. 83]. The political system wasn't quite a democracy but it was closer to being one than were many Greek cities during the Hellenic Age, any of the city-states of ancient Mesopotamia or the Near East, or the Roman Empire. Wherever human beings live with each other in communities, those communities are always found to have traditions, customs, and common folkways which reduce or even eliminate any perceived need of formal or written laws. Using the Nordic people as an example again, Jones wrote,

> Everywhere there would be found individuals or families distinguished for riches, landed possessions, skill in war or piracy, who by consent, election, or force, claimed support and obedience from their neighbors, and in return offered authority, protection, public ceremony, and law. [Jones (1968), pg. 83]

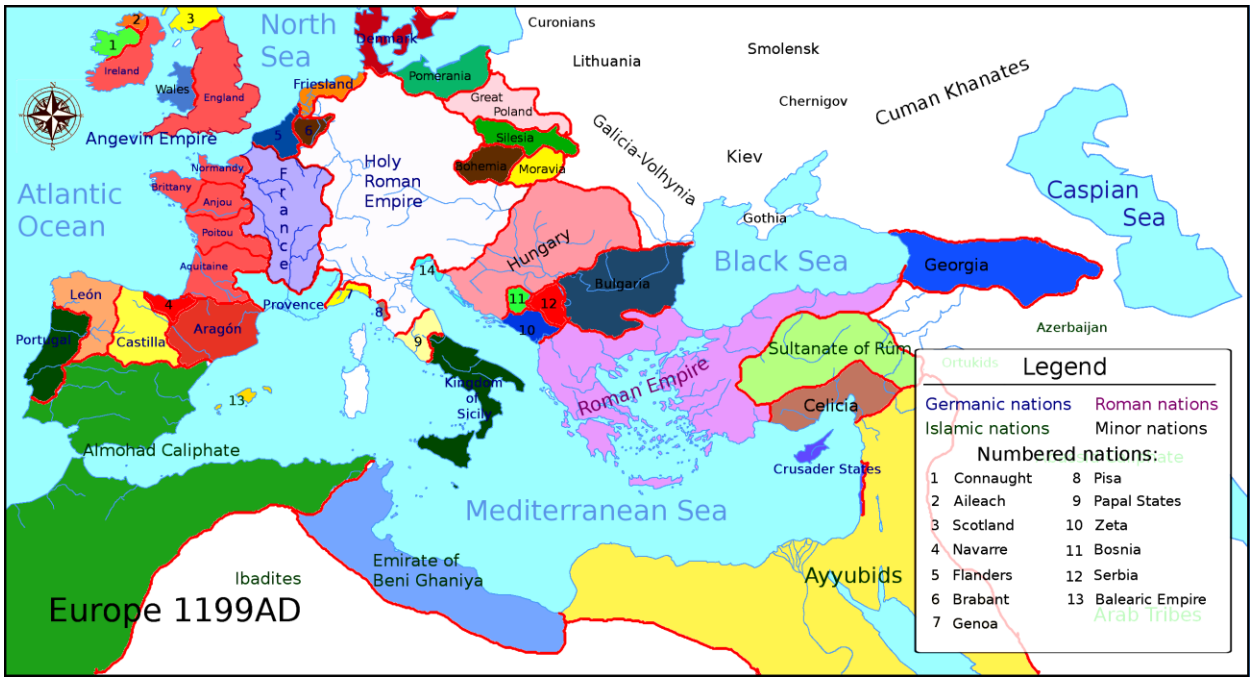

Figure 1: Europe, Islamic Africa, and the Near East in 1199 AD

As the centuries of the European Middle Ages crept slowly past, warfare and the growing influence of the Roman Catholic church gradually reconstituted nation-states in Europe. For a time in the 8th century the Franks under Charlemagne nearly succeeded in building a new empire that almost rivaled Rome's lost empire. The need to administer his new empire led to Charlemagne's attempt to restore organized education in Europe – this was the brief but much admired Carolingian Renaissance – but this attempt ultimately failed after Charlemagne's death [Pedersen (1997), pp. 67-91]. Charlemagne's empire itself was disintegrated into smaller kingdoms by his grandsons and the part of it called Normandy was ceded to the Viking chieftain known as Rollo.

As Europe rebuilt itself and the Byzantine Empire struggled with the challenges it faced, Islamic civilization rose to its pinnacle, keeping alive and making advances in medicine, mathematics, and science that later proved essential in Europe's recovery. The world's first university was founded in Morocco in 859 AD by the Muslims and Arabic scholars preserved many of the great works of Greek philosophy and mathematics. As Europe recovered and made contact with the Islamic world, these works were rediscovered and introduced to European scholars, principally those known as the Scholastics. The principal sources for the reintroduction of knowledge to Europe were Syria, Constantinople, Sicily under its Norman monarchs, and northern Spain following its re-conquest from control by the caliphate of Cordoba in 1031 AD (see figure 1) [Knowles (1988), pp. 167-174]. In the late 11th and first half of the 12th centuries the Roman Catholic Church's Scholastics began establishing European universities, beginning with the University of Bologna in 1088. These earliest European universities taught medicine, law, theology, natural philosophy, and liberal arts [Pedersen (1997), pp. 122-154].

One predictable outcome of the new law schools was that scholars soon began trying to organize and make systematic the rather haphazard hodgepodge that was European law. Quite naturally, they studied old Roman law documents. Pirie comments,

> The Bologna law school flourished as the jurists worked their way through the Roman texts. They enjoyed the intellectual challenge of the new legal science, the civil law, as their Roman predecessor had done almost a millennium earlier. . . . Over the next 150 years the scholars poured out commentaries, opinions, and glosses on the *Corpus Iuris*, and when the jurist Accursius gathered them together in 1240, his collection included 96,000 texts. For centuries to come, kings, judges, scholars

> and scribes turned to its pages to find out what the civil law was. The scholars had once again established themselves as authorities on the law. [Pirie (2021), pg. 162]

The reestablishment of European education and creation of European universities set the stage for the next evolution of legal systems in the West, beginning in the 17th century. It did, however, take a long time to reach this next evolution. And during this journey the notion of law and the notion of the authority of government became entwined:

> Most of Europe was divided into three parts. There was the Holy Roman Empire . . . and then there were the emerging Kingdom of France and Angevin England. And in all three, kings and their advisors debated the nature of royal power and authority in terms of the law. Did the ruler simply have power, or did he only have the power to declare what was lawful? Or did the people have this power? Behind these debates there was often a sense that the law was set apart from royal power, that the king could not simply declare what was lawful. And the protagonists on all sides turned to Roman sources to justify their arguments. The civil law had an authority, based on its ancient history and intellectual sophistication, that even the emperors respected. [*ibid*., pg. 163]

Religion, of course, also became entwined with all this. In particular, the old Stoic-Roman notion of "natural law" and sometimes conflicting interests between the Pope and the kings juxtaposed Canon Law alongside civil law. And, in subtle ways, the stubborn old notion of "justice" managed to intrude upon the otherwise erudite arguments of the scholars of legal science. This began coming to a head in the 17th century and altered the courses of events in the 18th century Enlightenment.

3. Imperial Chinese Law

Our focus up to this point has been centered on Near East and European laws and legal systems. Before going much further, it is appropriate to give some attention to another of the world's major legal systems, namely, that of imperial China [Pirie (2021), pp. 235-259]. Eastern religion and philosophy are markedly different in expression, background contexts, and underlying presuppositions than Western religion and philosophy – so much so that most Westerners find Chinese sources extremely difficult to follow and understand. It is no wonder that "mysticism" is the word most often used in the West to describe Chinese philosophy – and the label is not entirely undeserved[5].

There is evidence that law in China predates the time of Confucius (551-479 BC) but the earliest known Chinese legal code comes from the Qin dynasty (221-206 BC) [Alford (2014)]. The first thing that strikes one about Chinese legal codes is their highly legalistic structure, with laws that, as Pirie put it, "reached far into the daily lives of ordinary Chinese citizens," and the extensive bureaucracy that accompanied its administration [Pirie (2021), pg. 235]. Grave goods from the 4th century BC show that Chinese legalism even extended to Chinese religion and burial practices. It could hardly be more clear that imperial Chinese law was aimed, first and foremost, to the maintenance of social order – and in imperial China "social order" primarily meant "obedience to the emperor." This was promoted by a wide ranging system of education – with educational tiers specialized for different classes of people – that focused on teaching people what their duties consisted of and what kinds of behaviors were expected of them. Very harsh, even brutal, punishments could be inflicted on violators of these norms and standards. Self-*discipline* was the watchword and the expectation for individuals' behaviors.

Yet, for all this, there was a strong element of custom, tradition, and social morality permeating Chinese legal thought that bore strong resemblances to the moral teachings of Confucius. Although the Qin dynasty promoted Legalism above all else and despised Confucianism, later dynasties embraced these moral teachings. Chinese legal scholars were men selected from the ranks of Confucius scholars. They revised Qin law so as to reconstruct and reinforce the "five relationships" of Confucius [Lau (1979)].

[5] See, for example, the discussions of Chinese folk religions in Wells (2019).

It is not possible to say whether Confucius took his teachings from the moral customs of his times or if, instead, his teachings were aimed at changing or improving those customs. However, his twin emphases on rites and benevolence, when juxtaposed with some particular passages in *The Analects*, seems to favor the hypothesis that Confucius was not inventing new moral standards but rather emphasizing those of Chinese traditions. For example, we have:

> Yu Tzu said, 'Of the things brought about by rites, harmony is the most valuable. Of the ways of the Former Kings, this is the most beautiful, and is followed alike by manners great and small, yet this will not always work; to aim always at harmony without regulating it by the rites simply because one only knows about harmony will not, in fact, work.' [Lau (1979) I. 12.]
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> The Master said, 'Guide them by edicts, keep them in line with punishments, and the common people will stay out of trouble but will have no sense of shame. Guide them by virtue, keep them in line with rites, and they will, besides having a sense of shame, reform themselves.' [*ibid*. II. 3]
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> The Master said, 'The gentleman has morality as his basic stuff and by observing the rites puts it into practice, by being modest gives it expression, and by being trustworthy in word brings it to completion. Such is a gentleman indeed!' [*ibid*. xv. 18]

By the time of Confucius, Chinese civilization was already of great antiquity, as was Chinese law. While BaMbuti Society is one of the world's simplest, imperial Chinese Society is one of the world's most complex. No one really knows how old Chinese civilization is. The earliest known example of Chinese writing is the "oracle bones" of the Shang Dynasty dating from *c*. 1250-1046 BC but it is almost beyond reasonable doubt that Chinese civilization is much older than this. The earliest known imperial dynasty of China was the Shang dynasty (1600-1046 BC) but Chinese texts as far back as the 11th century BC describe an earlier Xia dynasty (*c*. 2070-1600 BC).

Like the authors of myths and legends all around the world, Chinese myth- and legend-makers have not hesitated to create stories purporting to describe the creation of the universe. Civilization, according to these stories, only began with "the Celestial Emperors." According to them,

> Before the arrival of these "Celestial Emperors," we are told, "the people were like beasts, clothing themselves in skins, feeding on raw flesh, and knowing their mothers but not their fathers" . . . Then came the emperor Fu Hsi, in precisely 2852 BC; with the help of his enlightened Queen he taught his people marriage, music, writing, painting, fishing with nets, the domestication of animals, and the feeding of silkworms for the secretion of silk. Dying, he appointed as his successor Shen Nung, who introduced agriculture, invented the wooden plow, established markets and trade, and developed the science of medicine from the curative value of plants. So legend, which loves personalities more than ideas, attributes to a few individuals the laborious advances of many generations. [Durant (1935), pp. 642-643]

We know today of archeological evidence of Chinese agriculture dating back to around 7000 BC, which is millennia before the "first Celestial Emperor" Fu Hsi. Unfortunately, we do not know what Neolithic Chinese culture was like and what we do know about Chinese Society and culture begins with imperial rule already in place and in control of the Society.

One thing we do know about it, and which provides a tantalizing clue to the origins of Chinese law, is a product of ancient Chinese theology and political philosophy called, by Westerners, "the Mandate of Heaven." This phrase translates *T'ien-ming* or "Heaven's will" but it is important to note that in Chinese theology the ideas of *Tian* and *T'ien-ming* bear very little resemblance to the ideas of God and Heaven of the Abrahamic religions. Instead, these ideas much more resemble their counterpart in Stoic philosophy with amendments very similar to the philosophy of Heraclitus [Haxton (2001)]. The basic idea is that "the universe" embodies a "natural order of things" and has a supernatural "will" that expresses this order. The "nature" of this order is manifested as a balancing of opposites, e.g.,

> From the strain of binding opposites comes harmony. [Haxton (2001), pg. 31]

The notion of *T'ien-ming* is so deeply a part of Chinese thought that we must conclude Chinese law has some notion of "natural law" at its foundations. Indeed, the Mandate of Heaven was used in ancient China to justify the overthrow of a king or an emperor and to legitimize the rule of the king or emperor who succeeded him. A just king or emperor was regarded as "the Son of Heaven" charged with the duty to provide the people with justice and order. Times of poverty, natural disasters, and great civil disorder were regarded as signs he had lost the Mandate of Heaven and his overthrow was "Heaven's will" (*T'ien-ming*). The "Sons of Heaven" took credit for bringing justice to the people much like the Sumerian king Ur-Namma had done long before them in ancient Sumer:

> I, Ur-Namma, mighty warrior, lord of the city of Ur, king of the lands of Sumer and Akkad, by the might of the god Nanna, my lord, by the true command of the god Utu, I established justice in the land. [Roth (1995), pg. 15]

For the duration of detailed written records, Chinese governments have been hierarchically organized and Chinese Society very regimented. It is uncertain how bureaucratized the ancient dynasties were. During the period from 722 BC to 221 BC the philosophies of Confucianism, Taoism, and Legalism were formulated and these "schools of thought" greatly affected how Chinese government and Chinese law took shape from 221 BC forward. Legalism, credited to Shen Buhai (400-337 BC) and Shang Yang (390-338 BC), was dominant during the Qin dynasty (221-206 BC). The philosophy of Legalism was what transformed Chinese imperial government into the centralized, bureaucratized, militarized, and highly regimented form Western scholars of Chinese political science and history have most noted. But while Legalism worked well for military expansion of the empire, during peacetime it proved to be unworkable and led to numerous protests and rebellions. The Han dynasty (206 BC – AD 220) moderated the harshness of Legalism by incorporating into it the stronger moral elements of Confucianism.

What we can infer from this is that "justice" was the foundation of Chinese law. But this is "justice" in a context of "divine justice" closely coupled to the notion of "natural law" rather than justice dictated by the will of men. Unjust emperors could exist but, by losing the Mandate of Heaven, "Heaven's will" called for and "justified" their overthrow. The tricky part, once again, lies in answering the question "what is justice?". Sooner or later, such an inquiry is taken up by philosophers.

4. Europe's Early Modern Age

The period from the late 15th century through the 18th century is regarded as a transition period from medieval Europe to the modern age. It witnessed the end of European feudalism, the transition from the system of wealth based on land ownership to wealth based on a money economy, the end of serfdom and spread of industry and commerce, the Protestant Reformation and the Catholic Counter Reformation in religion, the flowering of modern science, the secularization of government, and the evolution from kingdoms to nations in Europe. Tradesmen and artisans formed guilds to protect their new economic liberties and at the universities professors and students both formed guilds to protect their interests from university administrators and local townspeople.

The evolution from kingdoms to nations is a change perhaps subtle enough to require at least a brief explanation. Even after it took place, Europe was still ruled by kings and emperors and the nations they governed were still called kingdoms and empires. What had changed was the structuring of Society itself. In the Age of Feudalism, Society was structured by hierarchies of serial relationships defined by pledged loyalties of subordinates to superiors. For example, the serf was deemed to owe allegiance to his landlord; the landlord to his noble liege lord; the noble to the king. In a religious dimension, a person was expected to be faithful to his religion as this was explained to him by his parish priest or minister; the parish priest or minister to his immediate church superior; that superior to his until ultimately the series terminated at a

pope or other supreme leader, council, association, or assembly of the ecclesiastical polity. The economic-political and ecclesiastical dimensions not infrequently clashed at the highest levels since the "king" of a Christian ecclesiastical order is "our Lord and Savior Jesus Christ" and religious fealty tends to insist a king acknowledge himself inferior to and subservient of God. So it had been since the Mesopotamian kingdoms. This, indeed, was the underpinnings of European doctrines of "the Divine Right of Kings" – Christianity's version of the Chinese doctrine of the Mandate of Heaven. Individuals self-identified based on religion, language, or feudal allegiance.

Changes in the socio-economic-political-religious orders in the 15th to 18th centuries strained these seriated structures of loyalties and allegiances to their breaking points. Individuals began to self-identify as members of a national polity, e.g., as Englishmen, Frenchmen, Italians, etc. Societies sought to preserve their political traditions by adapting traditional terminologies to fit into the new order. In essence this amounted to trying to pretend nothing had changed when, in fact, very fundamental changes were happening. The rulers of both the political and ecclesiastical polities largely failed to recognize that socially fundamental changes were taking place until it was too late to stop them. They were reluctantly forced to adapt themselves to fit into the new *national* orders that had emerged [Durant (1957)], [Durant (1961)]. These new national orders in the private daily affairs of Europe's people is what I mean to distinguish by speaking of a transition from kingdoms to nations.

It might be that one of the reasons Europe's rulers failed to notice the sweeping social changes taking place was their preoccupation with the traditional principal role of rulers from the dawn of civilization: War. From the 14th through the 18th centuries there was hardly a year when some major conflict was *not* happening *somewhere* in Europe. Many of these wars displayed egregious brutality and were started for reasons that seem either trivial, frivolous, or reckless. In the traditional "old order" what we now call "the state" meant the ruling king or emperor and, as Gwynne Dyer noted,

> States fight wars because, in the end, that is what they are organized to do. The quarrels that are settled by law if they occur within a state are frequently settled by war between states because there is little international law and no international law enforcement. The need to prepare for and wage war has therefore been the decisive influence on the evolution of the state. It was practically the sole business of the ancient or medieval monarchy . . . States are principally organizations for the accumulation of power in the pursuit of security, and their most distinguishing characteristic is the possession of military forces. [Dyer (1985), pg. 157]

But although wars are most often fought between armies, civilians caught in between them or living in areas the armies pass through are made to suffer the grievous effects of war. In almost no part of Europe were common people spared in the course of hundreds of years of warfare, and stories and tales passed down from one generation to the next ensure the memory of it would not be forgotten. Europe was a land of perpetual warfare sometimes interrupted by brief outbreaks of peace.

Among the effects of the new order came a re-questioning of notions of law and justice; and here the verdicts of many people held that the legal system had become too often a system of *in*justice. Will & Ariel Durant said of Elizabethan England,

> The nature of man, despite many centuries of religion and government, still resented civilization, and it voiced its protest through a profusion of sins and crimes. Laws and myths and punishments barely stemmed the flood. . . . The courts were by common consent corrupt. One member of Parliament defined a justice of the peace as "an animal who, for half-a-dozen chickens, would dispense with a dozen laws" . . . "Plate sin with gold," said Shakespeare's saddened Lear, "and the strong lance of justice hurtless breaks." As judges were removed at the Queen's pleasure, they weighed it in their judgments, and royal favorites accepted bribes to induce her interference with decisions of the courts. Jury trial was mandated except for treason, but the juries were often intimidated by the judges or other officers of the Crown. . . .
>
> Criminal law relied on deterrents rather than surveillance or detection; laws being weak,

> punishments were severe. Death was the statutory penalty for any of over two hundred offenses . . . Torture was illegal but the Star Chamber used it. [Durant (1961), pp. 54-55]

Philosophy, after its own centuries-long Dark Age, had been revived by European Scholasticism, although Scholasticism was primarily aimed at theology in its foundations; the revival of philosophy *properly* so-called was a side effect and consequence of this theological interest[6]. Scholasticism regarded theology as part of philosophy – its most important part – but the birth of modern science ("natural philosophy") brought out paradoxes between the teachings of theology and the discoveries of science.

Scholasticism itself came under criticism even before Galileo was tried for heresy in 1633, beginning with the criticisms levied against it by Francis Bacon [Bacon (1605); (1620); (1624)]. A stream of new 17th century philosophers followed: Hobbes; Descartes; Locke; Spinoza; and others. Their work set the stage for the great 18th century philosophical and literary renaissance known as the European Enlightenment.

While "justice" was not especially investigated in the studies and reflections of the new philosophers, ideas such as "rights" were brought forth and clothed in new technical language that was frequently vague enough to allow different interpretations of the philosophy by different people. Despite its unsystematic theory and the diversity of speculations that grew out of it, this new way of viewing the relationship between law and justice had major impacts on the development and refinement of European law [Pirie (2021), pp. 315-338]. New philosophies about "the nature of law" also occasionally questioned and challenged the legitimacy of what a king could and could not do and pitted the king against his own judges and councilors. To cite one important example,

> In the early 17th century, James I, less politically astute than his predecessor, claimed that the king was the source of all law, that he owned it, and that he had the right to define, regulate, and administer it. Neither Parliament nor the king's judges could accept these claims, and even James' chancellors, Lord Ellesmere and Sir Francis Bacon, argued that the king's legal powers ultimately derived from the common law. . . . Thomas Hedley argued, in 1610, that the common law was the product of reason and immemorial custom which had evolved in response to the particular experiences of England and its people. It was the common law, he maintained, that had established the authority of Parliament to make statutes. [Pirie (2021), pg. 322]

Often this idea of "rights" meant *natural* rights divinely decreed in the "nature" of man independently of and superior to the dictates of kings or parliaments. This was not a completely new notion; its origins can be traced back to Aristotle's notion of "natural justice" (see Chapter 1) and its further development in Christian contexts by the Scholastics (especially but not exclusively Thomas Aquinas). At other times writers used it in connotations for which the word "liberty" was more correct, "rights" and "liberties" not being synonyms[7]. Hobbes, for example, was prone to making this homonymous misuse of the word "right". In fairness to him, the vocabulary of the topic was being co-developed as the philosophy of the subject-matter was being formulated and for that reason terminology was still somewhat ambiguous.

This ambiguity was matched by that of European laws at the beginning of the 17th century. Pirie notes,

> In the seventeenth century, European laws were partial, overlapping, and unsystematic. Yet, over the course of the next two centuries, movements for codification in continental Europe transformed the

[6] Under an epistemology-centered metaphysic, theology and philosophy are distinct fields of human inquiry differing by the topic of their Object of interest. For an explanation of this, see chapter 1 of Wells (2019).

[7] In Critical epistemology, "freedom" is the capacity for one's Self-determination to take some action; "liberty" is freedom plus the ability to realize (make actual) the action undertaken; a "right" is any object defined by convention that is regarded under that convention as an intangible property possessed by specified holder(s) of that right in accordance with that convention. Where no convention exists no right exists either. [Wells (2016)]

> civil law into a number of organized national legal systems, while judges in England rationalized and expanded the reach of the common law. Their work was also taken up on the other side of the Atlantic where the new American colonies were enthusiastic proponents of law in their quest for independence. Amidst wars, revolution, and colonial conquests, the rising European states developed powerful new forms of law. [Pirie (2021), pp. 116-117]

Whenever one might be prone to think lawmaking and legislating are simple things that simple people do well, it is worth remembering that Europe took two centuries to go from what Pirie called "an amalgam of the civil law and [countries'] own customary rules" to the legal systems we know today.

It was part of the aforementioned transition from kingdoms to nations that people began to ask what the proper relationship was between law and government. That ancient notion of "natural law" in the context of manmade statutes played a significant part in the developing theories of both legal scholars and the new philosophers. James I was certainly not the first king to claim ownership of the law. But,

> Still, the idea that the common law had an existence and authority of its own, apart from that of the monarchs and their parliaments, did not disappear. Both Radicals and Whigs, when they were in opposition, cited the common law as a guarantor against arbitrary and tyrannical rule. It represented a series of fundamental rights, they claimed, which the government was bound to protect and which it could not alter without the people's consent. They took inspiration from the theories developed by philosophers and legal scholars about natural rights. Hugo Grotius, the Dutch legal philosopher, had laid the basis for these ideas in the early seventeenth century in his influential work on natural law, which he had equated with Christian principles. The English philosopher John Locke further developed these ideas in the seventeenth century in his influential writings on property ownership. He argued that individuals had natural rights to own property on the basis of the labor they put into it. [*ibid*., pg. 331]

Grotius was perhaps the first legal philosopher of early modern Europe to propose approaching an understanding of "natural law" by searching for patterns that might be found in common law:

> Hugo Grotius, in the early seventeenth century, argued that natural law could be discovered by observing rules common to the laws of all civilized people. The theories of Grotius and his colleagues soon commanded respect throughout Europe, and scholars began to look for principles of natural law in Roman texts. Some, like the German jurist Samuel von Pufendorf, sought to align the idea of natural law with Christian theology. . . . But not all scholars were so theologically minded. The German mathematician and philosopher Gottfried Leibniz advocated a system of laws based on logic. . . . As in England, continental scholars were developing powerful ideas about a form of law that transcended political authority and, in this case, political divides, whether it was rooted in ancient tradition, Christian theology, logic, or common humanity.
>
> The turmoil of the Thirty Years War in the seventeenth century encouraged scholars to think more pragmatically about the purposes of the law and what it could achieve. Many became convinced that they needed a system of impartial law that could transcend 'human passions' and antagonism of their rulers, whose wars had done so much to devastate lives and livelihoods in northern Europe. [*ibid*., pp. 334-335]

Grotius (1582-1648) lived and worked during the time known as the scientific revolution, which is conventionally defined as the period from Copernicus (1543) to the publication of Newton's *Principia* (1687). However, to study legal patterns is not to study human beings and presupposition of the existence of "natural law" as an object and a *cause* of human social behavior is an ontology-centered prejudice that neither reflects the scientific reasoning of Copernicus nor of Newton. Copernicus wrote,

> For it is the job of the astronomer to use painstaking and skilled observation to gather together the history of the celestial movements and then – since he cannot by any line of reasoning reach the true causes of these movements – to think up or construct whatever causes or hypotheses he please such

> that, by the assumption of these causes, those same movements can be calculated from the principles of geometry for the past and for the future too. This artist is markedly outstanding in both of these respects: for it is not necessary that these hypotheses should be true, or even probable; but it is enough if they provide a calculus which fits the observations [Copernicus (1543), pg. 505]

The "cause" proposed by Copernicus to explain his astronomical observations was simply that the earth and planets revolved around the sun, a hypothesis that contradicted that of Ptolemaic astronomy. This is merely a mathematical hypothesis that does not reify the cause and can have epistemological significance without requiring ontological significance. If Copernicus had proposed some sort of celestial railroad tracks that *made* the planets revolve around the sun then *that* would have reified the cause as an object and introduced ontological significance into the hypothesis. But that is not what he did. In a similar spirit Newton would later write,

> These Principles[8] I consider, not as occult Qualities, supposed to result from the specific forms of things, but as General Laws of Nature, by which the things themselves are formed; their Truth appearing to us by Phenomena though their Causes be not yet discovered. For these are manifest Qualities and their Causes only are occult. And the *Aristotelians* gave the Name of Occult Qualities, not to manifest Qualities, but to such Qualities only as they supposed to lie hid in Bodies and to be the unknown Causes of manifest Effects. Such would be the Causes of Gravity, and of magnetic and electric Attractions, and of Fermentations if we should suppose that these Forces or Actions arose from Qualities unknown to us and uncapable of being discovered and made manifest. Such occult Qualities put a stop to the improvement of natural Philosophy, and therefore of late years have been rejected. To tell us that every Species of Things is endowed with such an occult specific Quality by which it acts and produces manifest Effects is to tell us nothing; But to derive two or three Principles of Motion from Phenomena, and afterward to tell us how the Properties and Actions of all corporeal Things follow from these manifest Properties, would be a very great step in Philosophy, though the Causes of those Principles were not yet discovered [Newton (1730), pp. 401-402].

Grotius, and his followers and contemporaries, did not follow these prescriptions but, rather, reified the idea of natural law – thereby regarding it as a thing that caused other things to happen – and this is nothing else than what Newton called an occult Quality. Most scholars agree Grotius' idea of natural law had theological underpinnings even if his writings made an effort to cast a wide theological net in which Catholic, Protestant, Islamic, Chinese, and Stoic theologies could all be swept up (all of these positing in one form or another an occult idea of natural law). He is remembered for his statement,

> What we have been saying would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness: that there is no God or that the affairs of men are of no concern to Him. [Grotius, *De iure belli ac pacis*, *Prolegomini* XI]

With the notable exception of Hobbes, European legal scholars and philosophers during the transition period subscribed to theologically-based presuppositions about "natural law" and, even allowing for some nonsectarian revisions later, most of their concrete notions regarding universal human rights, human liberty, and the purpose of government are familiar to and embedded into today's Western legal systems. During the transition period the most influential earlier writers included Aquinas, Albert the Great, Cicero, Augustine of Hippo, and Paul's *Epistle to the Romans*. Nonetheless, these still current notions about "rights" remained as vague, occult, and dictated by fiat as their notions of "justice."

5. Notions of Social Contracting

Theology and "natural law" is not the only starting point possible for studying ideas of justice. Another – and, from the viewpoint of science, an *objectively valid* one – is through the study of strictly *human*

[8] I.e., the principles of Gravity, fermentation, and the cohesion of physical bodies.

nature. Such was the starting point of the interesting English philosopher, Thomas Hobbes. Hobbes originated the notion of a "social contract" entered into by people living in peaceful association with one another to their mutual benefit and for their mutual self preservation [Hobbes (1651)].

Hobbes did use the phrase "natural law" but he meant something very different by this than what was meant or implied by theology-grounded scholars. For Hobbes "natural laws" meant what Newton would later call "Principles" of natural phenomena. His context for the phrase "natural laws" or "laws of nature" is, therefore, a context to which modern scientific methodologies can be applied in manners that in no way depend upon theology[9]. On the other hand, his personal metaphysic rejected the notion of psychological causality except as a sort of epiphenomenon of the "mechanical motions" he thought were the causes of thinking and reasoning in the brain. Psychology as a science did not yet exist in Hobbes' day and so his nineteen "laws" set out in chapters 14-15 of Hobbes (1651) were products of his own dialectic reasoning and self reflection, and not products of scientific research. Jean Piaget – considered by many to be the greatest psychologist of the 20th century – said,

> What I have said so far may suggest that it can be helpful to make use of psychological data when we are considering the nature of knowledge. I should like now to say that it is more than helpful; it is indispensable. In fact, all epistemologists refer to psychological factors in their analyses, but for the most part their references to psychology are speculative and are not based on psychological research. I am convinced that all epistemology brings up factual problems as well as formal ones, and once factual problems are encountered, psychological findings become relevant and should be taken into account. The unfortunate thing about psychology is that everybody thinks of himself as a psychologist. [Piaget (1970), pp. 7-8]

Hobbes' social contract theory comes up short when judged by this criterion of Piaget's, both because there was no science of psychology for him to draw from and because his own personal metaphysic was ontology-centered instead of epistemology-centered.

The most significant departure from the more popular theologically-based doctrines proposed by others is that Hobbes placed the cause of human social behaviors immediately within individual human beings rather than assigning it to any supernatural agency. Human motivations, he holds, are rooted in self interests and, especially, in each individual's self interest in the preservation of his own life and wellbeing. He proposed the following set of definitions:

> THE RIGHT OF NATURE, which writers commonly call *Jus Naturale*, is the liberty each man has to use his own power, as he will himself, for the preservation of his own Nature, that is to say, of his own LIFE, and consequently of doing anything which, in his own judgment and reason, he shall conceive to be the apt means thereunto.
>
> By LIBERTY is understood, according to the proper signification of this word, the absence of external impediments, which impediments may oft take away part of a man's power to do what he would; but cannot hinder him from using the power left him, according as his judgment and reason shall dictate to him.
>
> A LAW OF NATURE (*Lex Naturalis*) is a precept, or general rule found by Reason, by which a man is forbidden to do that which is destructive of his life or takes away his means of preserving the same; and to omit that by which he thinks it may be best preserved. For though they who speak of this subject use to confound *Jus* and *Lex*, Right and Law; yet they ought to be distinguished because RIGHT consists in liberty to do or to forebear; whereas LAW determines and binds to one of them so that Law and Right differ as much as Obligation and Liberty, which in one and the same matter are inconsistent. [Hobbes (1651), pp. 79-80)]

[9] Hobbes' "way of looking at the world" (his metaphysic) was materialistic, empirical, and ontology-centered. In this he was a sort of philosophical descendant of the ancient Greek atomists. He rejected teleological causation and sought mechanistic explanations of phenomena ("manifest Effects"). [Marías (1967), pp. 250-251]

There is a subtle but troubling ambiguity in Hobbes making "right" a species of "liberty." It will return to cause us trouble later when we discuss the distinction between civil rights and civil liberties. This is because, deontologically, a *right* is an intangible possession of an individual but a *liberty* is freedom to do something (or to forebear doing it) *plus* the ability to make actual ("realize") the object of one's action. Hobbes' terminology is terminology in transition from ancient and medieval usages of these terms to the usages of these terms going into the European Age of Enlightenment. As Hobbes defines his terms, a man has "a natural right" to kill or enslave another man, or to steal that other man's property, if only he has the strength or cunning to accomplish it. This is a subtle nod to the ancient aphorism, "Might makes Right." Hobbes believes,

> Hereby it is manifest, that during the time when men live without a common power to keep them all in awe, they are in that condition which is called War; and such a war as is of every man against every other man. [Hobbes (1651), pg. 77]

Hobbes' prescription to cure this state of anarchy he calls "war" is government ruled by a king. In this way his *Leviathan* becomes a *de facto* treatise on government as well as one about laws and rights. His belief in the benevolence of rulership under a king was criticized two centuries later by John Stuart Mill:

> The struggle between Liberty and Authority is the most conspicuous feature in the portions of history with which we are earliest familiar . . . But in old times this contest was between subjects, or some classes of subjects, against the tyranny of their political rulers. . . . [The rulers'] power was regarded as necessary, but also as highly dangerous; as a weapon which they would attempt to use against their subjects no less than against external enemies. To prevent the weaker members of the community from being preyed upon by innumerable vultures, it was needful that there be an animal of prey stronger than the rest, commissioned to keep them down. But as the king of the vultures would be no less bent upon preying on the flock than any of the minor harpies, it was indispensable to be in a perpetual attitude of defense against his beak and claws. [Mill (1859), pp. 1-2]

A victim of Hobbes' "Natural Right" wouldn't be likely to concede that his attacker had "a right" to kill, enslave, or rob him. As Rousseau would later put it,

> Suppose for a moment that this so-called "*right*" exists. I maintain that the sole result is a mass of inexplicable nonsense. For, if force creates right, the effect changes with the cause: every force that is greater than the first succeeds to its right. As soon as it is possible to disobey with impunity, disobedience is legitimate; and the strongest being always in the right, the only thing that matters is to act so as to become the strongest. But what kind of right is that which perishes when force fails? . . . Clearly the word "right" adds nothing to force: in this consideration, it means absolutely nothing. [Rousseau (1762), pg. 5]

We may also note that Hobbes' definitions omit one for "justice." In the English language we get the word "justice" from the Latin word "*Jus*" (or "*Ius*")[10] but in Latin *Ius* is used to mean "right" and "law." Hobbes' thesis does nothing to resolve our questions of "what is justice?" and "what is the relationship between 'law' and 'justice'?". However, he *does* offer an indirect explanation of "justice" in the third of his nineteen "Laws of Nature":

> [The third Law of Nature is] *That men must perform their Covenants made*, without which Covenants are in vain and but empty words; and the Right of all men to all things remaining, we remain in a condition of War.
>
> And in this Law of Nature consists the Fountain and Original of JUSTICE. For where no Covenant has preceded, there has no Right been transferred and every man has a Right to every thing; and consequently, no action can be Unjust. But when a Covenant is made, then to break it is *Unjust*. And

[10] The Latin alphabet doesn't include the letter "J". Latin scholars today think "*ius*" was pronounced "yus."

> the definition of INJUSTICE is no other than *the not Performance of Covenant*. And whatsoever is not Unjust is *Just*. [Hobbes (1651), pg. 88]

For Hobbes there is an additional implication. Because his social covenant requires the people to submit to an absolute ruler whose laws are, by definition, always “just” it follows that injustice is anything contrary to law and, therefore, justice is compliance with the law. The legal profession in the West today adopts this same opinion of what “justice” means [Garner (2019)].

Rousseau would later take what Montesquieu might have called the "spirit" of this "law" as one of two essential starting points in his treatise and idea of "the Social Contract." The second he took from Hobbes' fifth "Law of Nature":

> A fifth Law of Nature is COMPLEASANCE; that is to say, *that every man strive to accommodate himself to the next*. [*ibid*., pg. 93]

Hobbes' word "compleasance" is generally thought to be a misspelling of the word "complaisance," which means to be willing to accept what other people are doing without complaining, i.e., to "fit in" with everyone else or, in a word, to be "sociable." We will see below that Rousseau expresses this idea more clearly.

Hobbes' other seventeen "Laws of Nature," like these two, tend to sound more like good advice, wise aphorisms, or good manners rather than what Newton would call a manifest Principle of nature. He gives reasonable arguments why these "laws" are how a prudent person not seeking to make enemies or stir up trouble should conduct himself. They can even be regarded as good maxims to follow. But it is too much of a stretch to claim for them the lofty status of "laws of (human) nature." A law of nature is a principle by which, given particular conditions, a manifest effect follows as a determination. Hobbes' "laws" have more of a moral "ought to" flavor instead of the flavor of a scientific principle in Newton's sense. Scientific laws do not determine as an "ought to" and have no "moral" tint whatsoever.

Hobbes' notion of a social "contract" follows as a logical deduction from his nineteen "Laws of Nature." His conclusion is again in the form of an "ought to." He defines a "contract" as "the mutual transferring of Right" between two parties, and by "Right" he means "Natural Right" as defined above. Given that the "natural state" of humankind is a state of "war of every man against every other man," the benefit of men giving up *some* of their natural rights and contracting with each other to peacefully coexist looks obvious:

> Whatsoever is consequent to a time of War, where every man is Enemy to every other man, the same is consequent to the time wherein men live without other security than what their own strength and their own invention shall furnish them withall. In such condition there is no place for industry because the fruit thereof is uncertain; and consequently no Culture of the Earth; no Navigation nor use of the commodities that may be imported by Sea; no commodious Building; no instruments of moving and removing things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Leisure; no Society; and which is worst of all, continual fear and danger of violent death; And the life of man solitary, poor, nasty, brutish, and short. [Hobbes (1651), pg. 78]

It follows that individuals are motivated to enter into social contracts with one another in order to better safeguard themselves from harm and to better secure their own wellbeing. *This* conclusion was accepted by all subsequent scholars and political theorists including Locke and Rousseau.

Locke's social contract treatise [Locke (1690)] is widely credited with laying the philosophical groundwork of the Western liberal constitutional state [Macpherson (1980), pg. vii]. Some aspects of it lie in agreement with Hobbes' conclusions but other aspects of it are diametric opposites of them. Here Locke's underlying metaphysic and his employment of theologically based viewpoints of Natural Law directly lead to his differences with Hobbes. Locke's treatise was widely esteemed in England and had a very fundamental influence on the Founding Fathers of the United States of America. It also played a role, albeit an indirect one, in "justifying" the conquest by force of American lands occupied by the

Native Americans during the United States' westward expansion across North America [Pirie (2021), pp. 343-346] – an historical epic most present day Native Americans regard as an "injustice."

Like Hobbes, Locke draws a distinction between men living in a "state of nature" and men living in a "civil state." He describes the state of nature as "a state of perfect freedom" and "a state of equality" but notes that while it is a "state of liberty" it is not a "state of license" [Locke (1690), pp. 8-9]. He tells us:

> The *state of nature* has a law of nature to govern it, which obliges everyone; and reason, which is that law, teaches all mankind, who will but consult it, that being all *equal and independent*, no one ought to harm another in his life, liberty, or possessions [Locke (1690), pg. 9].

"Reason" is the governing "law" of "the state of nature"? From the viewpoint of modern science (the study of nature) this statement is absurd. From the theological viewpoints of the ancient Stoics as well as those of medieval Christian theology, this statement is accepted as necessarily true. In Stoicism,

> Stoic physics is based on materialism or, more precisely, on the concept of corporeality. This physics establishes two principles, an active and a passive; that is, *matter* and *reason* residing in matter. This reason is called *God*. . . . Stoicism identifies God with the world; God is the ruler of the world, but he is in turn substance, and the whole world is the substance of God. Nature, which is governed by this principle of reason, is identified with the Deity. This divine principle binds all things together by means of a *law*, which is identified with universal reason [Marías (1967), pg. 92].

Stoicism tends to be antagonistic to the idea of human beings possessing "free will" in the context of the freedom of a person to determine his own actions and the outcomes of those actions[11], and Locke departs from Stoic physics in his explanation of what *he* means by "reason." In *An Essay Concerning Human Understanding*, Locke's pseudo-psychology theory of human understanding, he tells us,

> The word reason in the English language has different significations: sometimes it is taken for true and clear principles; sometimes for clear and fair deductions from those principles; and sometimes for the cause, particularly the final cause. But the consideration I shall have of it here is in a signification different from all of these, and that is, as it stands for a faculty of man, that faculty whereby man is supposed to be distinguished from beasts, and wherein it is evident he much surpasses them. [Locke (1706), pg. 573]

Locke, of course, supposes that "the reason" people have this "faculty" (ability) is because God made us that way. He further supposes this "faculty" is substantially the same for every human being. If each of us is governed by our own "reason" and this "faculty of reason" is the same for everyone, then it logically follows from these premises that Locke's "law of nature" is universal among human beings. What, then, about people who are "unreasonable" or do not do as they "ought" to do or harm other people? Such people, Locke tells us, are "degenerate":

> Besides the crime, which consists in violating the law, and varying from the right rule of reason, whereby a man so far becomes degenerate, and declares himself to quit the principles of human nature, and to be a noxious creature, there is commonly *injury done* to some person or other, and some other man receives damage by his transgression [Locke (1690), pg. 11].

It follows, according to Locke, that the injured party has the "right" to enact revenge for his injury as well as to seek reparations for it. This he can do because the criminal shows himself to be "a noxious creature" to whom reason's "natural law" does not apply. In the state of nature, vigilantism is "just" and "lawful." Or so says Locke. Except for Locke's theological premises, he and Hobbes agree that in the state of nature it is the "right" of one man to wage retaliatory "war" on another because this is justified by "natural law":

[11] "The Fates guide the man who wishes to be guided; the man who does not wish to be guided they drag along."

> And that all men may be restrained from invading others' rights, and from doing hurt to one another, and the law of nature be observed, which wills the peace and *preservation of all mankind*, the execution of the law of nature is, in that state, put into every man's hands, whereby everyone has a right to punish the transgressors of the law to such a degree as may hinder its violation: for the *law of nature* would, as all other laws that concern men in this world, be in vain if there were nobody that in the state of nature who had *a power to execute* that law, and thereby preserve the innocent and restrain offenders. [Locke (1690), pp. 9-10]

Locke was aware that the conclusion just quoted would be challenged by many. He wrote, "I doubt not but this will seem a very strange doctrine to some men" [*ibid*., pg. 10]. His defense of it was rather weak, inconclusive, and amounted to his replying to the question by asking a question: by what right could a prince or a state punish people? This echoes a very old and long debated moral question, *viz*., "Under what circumstances is it moral for a group to do that which it is not moral for a member of that group to do alone?" Does "natural law," as this term is understood in Christian theology, actually endow men living in a state of nature with the "right" Locke claims they have? How, precisely, *is* natural law understood in that theology? Aquinas wrote,

> I answer that . . . law, being a rule and a measure, can be in a person in two ways: in one way as in him that rules and measures; in another way, as in that which is ruled and measured, since a thing is ruled and measured insofar as it partakes of the rule or measure. Therefore, since all things subject to Divine providence are ruled and measured by the eternal law, as was stated above, it is evident that all things partake somewhat of the eternal law in so far as, namely, from its being imprinted on them they derive their respective inclinations to their proper acts and ends. Now among all others, the rational creature is subject to Divine providence in the most excellent way, in so far as it partakes in a share of providence, by being provident both for itself and for others. Therefore it has a share of the Eternal Reason, by which it has a natural inclination to its due act and end; and this participation of the eternal law in the rational creature is called the natural law. [Aquinas (1267-1273), vol. II, Question XCI, Art. 2]

If a human being's "share of Eternal Reason" is "imprinted on him" and gives rise to natural inclinations then these inclinations are to be seen as "that which is ruled and measured" in him by natural law and he is blameless for following his inclinations to act that he judges to be "proper." Locke's premise has a firm standing on theological grounds. Nonetheless, his deduction above seem to open the door to a complete jungle anarchy *unless* it is *also* posited that *all* men possess the *same* inclinations under the same circumstances. It simply won't do to declare by fiat that those who *in one person's judgment* act criminally are *ipso facto* "degenerates" or "noxious creature," somehow less than human, and reprobated from divine providence[12]. The unspoken premise of universal inclinations is logically part of Locke's syllogism. But this premise is merely speculative. It is called egocentrism by modern psychological science, which rejects it as being false. The false premise makes Locke's "everybody has a right to punish" conclusion logically invalid according to the rules of formal logic (both modern and classical). Vigilantism is *not* "justified" in the state of nature as science sees it. Neither is it "unjustified."

Now what about life in a "civil state"? Here the differences between Hobbes' and Locke's views are very minor. Locke writes,

> If man in the state of nature be so free, as has been said; if he be absolute lord of his own person and possessions, equal to the greatest and subject to nobody, why will he part with his freedom? why will

[12] "To providence, however, it belongs to permit certain defects in those things which are subject to providence . . . Thus, as men are ordained to eternal life through the providence of God, it is likewise part of that providence to permit some to fall away from that end; this is called reprobation." [Aquinas (1267-1273), vol. 19, Question XXIII, Art. 3] But also, as Paul said, "Who are you to judge the servant of another? To his own master he stands or falls" [Romans 14:4].

> he give up this empire, and subject himself to the dominion and control of any other person? To which it is obvious to answer, that though in the state of nature he has such a right, yet the enjoyment of it is very uncertain, and constantly exposed to the invasion of others: for all being kings as much as he, every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very insecure. This makes him willing to quit a condition, which however free is full of fears and continual dangers: and it is not without reason that he seeks out, and is willing to join in society with others, who are already united or have a mind to unite for the mutual *preservation* of their lives, liberties and estates, which I call by the general name, *property*.
>
> The greatest and *chief end*, therefore, of men's uniting into commonwealths, and putting themselves under government, *is the preservation of their property*. To which in the state of nature there are many things wanting. . . .
>
> Thus mankind, notwithstanding all the privileges of the state of nature, being but in an ill condition while they remain in it, are quickly driven into society. [Locke (1690), pp. 65-66]

As Hobbes also did, Locke recognizes people's self-interests as providing the motivation and foundation of civil society. Unlike Hobbes, Locke does not require that a society have some *one* person "to keep the others in awe" – no "king of the vultures," as Mill later put it. Rather,

> every one of its members has quitted this natural power, resigned it up into the hands of the community in all cases that exclude him not from appealing for protection to the law established by it. And thus all private judgment of any particular member being excluded, the community comes to be umpire, by settled standing rules, indifferent and the same to all parties; and by men having authority from the community for the execution of these rules, decides all the differences that may happen between any members of that society concerning any matter of right; and punishes those offenses which any member has committed against the society with such penalties as the law has established [*ibid*., pp. 46-47].

The "men having authority from the community" are easily recognized to be the officials, magistrates, and legislators ("law makers") whose collective activities are called "the government" of the community.

What, then, does Locke mean when he says "the *community* comes to be umpire"? Wouldn't the "men having authority from the community" be the actual "umpires" deciding "all the differences that may happen between any members of that society"? Locke's explanation perhaps might seem obvious to those of us today who have lived all our lives in a representative democracy, but it was not clear nor obvious to many people in his day – particularly not to the monarchs of 18th century Europe but also not to many people, then and now, who have never lived even a single day in one. Historically Locke's answer has been phrased *by the consent of the governed*, although this is *not* what Locke actually said[13]:

> Men being, as has been said, by nature all free, equal, and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent. The only way whereby anyone divests himself of his natural liberty, and puts on the *bonds of civil society*, is by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any that are not of it. . . . When any number of men have so *consented to make one community or government*, they are thereby presently incorporated and make one *body politic* wherein the *majority* have a right to act and conclude the rest. [Locke (1690), pg. 52]

This was not an original idea with Locke; Athens had operated under the principle of majority rule two millennia before Locke wrote these words and, by long habit and acclimation, a great many people today regard majority rule as obviously what "consent of the governed" must mean, as if this phrase and the

[13] "Consent of the governed" was the phrase used by Thomas Jefferson in the American Declaration of Independence.

phrase "majority rule" were synonymous. Locke further goes on to say,

> For when any number of men have, by the consent of every individual, made a *community*, they have thereby made that *community* one body, with a power to act as one body, which is only by the will and determination of the *majority* . . . and it being necessary to that which is one body to move one way, it is necessary the body should move that way whither the greater force carries it, which is the *consent of the majority* or else it is impossible it should act or continue, one body, *one community*, which the consent of every individual that united into it agreed that it should . . .
>
> And thus every man, by consenting with others to make one body politic under one government, puts himself under an obligation to everyone else of that society to submit to the determination of the *majority*, and to be concluded by it; or else this *original compact*, whereby he with others incorporates into *one society*, would signify nothing and be no compact . . . For if *the consent of the majority* shall not, in reason, be received as *the act of the whole*, and conclude every individual, nothing but the consent of every individual can make anything to be the act of the whole; but such a consent is next to impossible ever to be had [*ibid*., pg. 52-53].

"Next to impossible" does not mean "impossible." Is unanimous consent often extremely difficult to achieve? Yes, it is. Is it impossible? No, as BaMbuti Society demonstrates. Does anyone know how to make a consensus democracy, like that of the BaMbuti, work in a country like France, Germany, or the United States? I have heard of no one who makes a plausible claim to know how to do this. Locke makes agreeing to abide by majority rule a *necessary condition* of his idea of a social contract – i.e., that if a person "desires to unite himself with others" in a community then part of the price of membership he must pay is an obligation to subjugate himself to the rule of the majority. However, Locke does not *balance* this obligation by any equally explicit *reciprocal* obligation on the part of the *other* members of the community. And this is a serious problem:

> In time, however, a democratic republic came to occupy a large portion of the earth's surface, and made itself felt as one of the most powerful members of the community of nations; and elective and responsible government became subject to the observations and criticisms which wait upon a great existing fact. It was now perceived that such phrases as "self-government" and "the power of the people over themselves," do not express the true state of the case. The "people" who exercise the power are not always the same people over whom it is exercised, and the "self-government" spoken of is not the government of each by himself, but of each by all the rest. The will of the people, moreover, practically means the will of the most numerous or the most active *part* of the people; the majority, or those who succeed in making themselves accepted as the majority; the people, consequently, *may* desire to oppress a part of their number; and precautions are as much needed against this as against any other abuse of power. The limitation, therefore, of the power of government over individuals loses none of its importance when the holders of power are regularly accountable to the community, that is, to the strongest party therein. [Mill (1859), pg. 3]
>
> After all, the practical reason why, when the power is once in the hands of the people, a majority are permitted, and for a long period continue, to rule is not because they are most likely to be in the right, or because this seems fairest to the minority, but because they are physically the strongest. But a government in which the majority rule in all cases cannot be based on justice, even so far as men understand it. Can there not be a government in which majorities do not virtually decide right and wrong, but conscience? – in which majorities decide only those questions to which the rule of expediency is applicable? . . . I think that we should be men first, and subjects afterward. It is not desirable to cultivate a respect for the law as for the right. . . . Law never made men a whit more just [Thoreau (1849), pg. 2]
>
> Republics abound in young civilians, who believe that the laws make the city; that grave modifications of policy and modes of living, and employments of the population; that commerce, education, and religion may be voted in or out; and that any measure, though it were absurd, may be imposed on a people if only you can get sufficient voices to make it a law. But the wise know that

> foolish legislation is a rope of sand, which perishes in the twisting; that the State must follow and not lead the character and progress of the citizen; the strongest usurper is quickly gotten rid of; and they only who build on Ideas build for eternity; and that the form of government which prevails is the expression of what cultivation exists in the population which permits it. The law is only a memorandum. [Emerson (1844), pg. 276]

Locke is a little more specific regarding what the individual is required to do by the social compact:

> Whosoever therefore out of a state of nature unite into a *community* must be understood to give up all the power, necessary to the ends for which they unite into a society, to the *majority* of the community, unless they expressly agreed to any number greater than the majority. And this is done by barely agreeing to *unite into one political society*, which is all the *compact* that is, or need be, between the individuals that enter into or make up a *commonwealth*. . . . And that is that, and that only, which did or could give beginning to *any lawful government* in the world. [Locke (1690), pg. 53]

Locke tells us there are two powers (abilities) a man living in the state of nature must alienate (give up) in order to join a civil society:

> The first power, viz., *of doing whatsoever he thought for the preservation of himself*, and the rest of mankind, he *gives up* to be regulated by the laws made by society so far forth as the preservation of himself, and the rest of that society, shall require; which laws of the society in many things confine the liberty he had by the law of nature.
>
> Secondly, *the power of punishing he wholly gives up*, and engages his natural force . . . to assist the executive power of the society, as the law thereof shall require [*ibid*., pg. 67]

Locke does, however and at last, place *one condition* on the society as it is constituted by its social compact. The condition is

> But though men, when they enter into society, give up the equality, liberty, and executive power they had in the state of nature into the hands of the society, to be so far disposed of by the legislative as the good of society shall require; yet with it being only with an intention in everyone the better to preserve himself, his liberty and property; (for no rational creature can be supposed to change his condition with an intention to be worse) the power of the society, or *legislative* constituted by them, can *never be supposed to extend further than the common good*; but is obliged to secure everyone's property by providing against those three defects above mentioned that made the state of nature so unsafe and uneasy. And so whoever has the legislative or supreme power of any commonwealth is bound to govern by established *standing laws*, promulgated and known to the people, and not by extemporary decrees; by *indifferent* and upright *judges*, who are to decide controversies by those laws; and to employ the force of the community at home *only in the execution of such laws*, or abroad to prevent or redress foreign injuries and secure the community from inroads and invasion. And all this is to be directed to no other *end* but the *peace, safety*, and *public good* of the people. [*ibid*., pg. 68]

Locke's influence was such that a social compact understood as he expressed it above is, by and large, the casual understanding of it in all Western representative democracies today. People who study it more keenly, however, discover there are problems and inadequacies latent in the idea as expressed above.

One of them is the primacy Locke implicitly gives *law* over *justice*. If "the legislative" promulgated only *just* laws that would be one thing; but history proves that legislators do not in fact always craft just laws. Sometimes they are unjust by accidental omission or lack of foresight; sometimes they are deliberately unjust. Here I use the terms "just" and "unjust" to mean *congruent with the intention of the social compact* ("just") and *contrary to or incongruent with the intention of the social compact* ("unjust"). For example, during the Industrial Revolution parliaments and legislatures passed many laws that gave "rights" to employers and denied these same rights to their employees. They made no laws restricting the power of

employers to form combinations among themselves for the purpose of holding down wages but did pass laws forbidding employees to form combinations to raise wages or resist wages being lowered. There were instances when the "executive power" of the government sent in police or armed soldiers to violently stop workers from holding strikes (in which not only strikers but also women and children were killed) but did nothing to prevent employers from hiring new workers while negotiations with striking employees were still ongoing. Legislatures have passed laws discriminating against some people's religions (usually but not always non-Christian religions) but not others – usually "justified" under the thin veil of a claim that the law intended no religious discrimination when, in fact, the *effect* of the law *did* singly discriminate against particular religious groups. These are only a few of many historical examples demonstrating that unjust laws have existed and do exist right to this day.

Locke cannot be accused of overlooking the role of intent in the making of social compacts:

> The great end of men's entering into society, being the enjoyment of their properties in peace and safety, and the great instrument and means of that being the laws established in that society; *the first and fundamental positive law* of all commonwealths is *the establishing of the legislative* power; as the *first and fundamental natural law*, which is to govern even the legislative itself, is *the preservation of society* and (as far as it will consist with the public good) every person in it. [*ibid*., pg. 69]

Locke did, of course, have more to say regarding the extent of legislative power – and not everything he said on that topic is consistent with the first and primary objective of preserving the Society and every citizen in it – but here he at least points to a "reason" why people voluntarily join into societies and to the obvious obligation for government "to control itself" (as James Madison said in *The Federalist*, no. 51). One does not have to see the objective of preservation of the Society as a "natural law"; it is obvious and clear enough that any actions contrary to *preservation* of the Society are also contrary to the *purpose* of forming one in the first place.

With regard to principles of justice, there are very few specified or implied in Locke's treatise. It is clear that retaliation and retribution are among them, as evidenced by remarks he makes concerning the "noxious creatures" who break whatever "positive laws" a civil Society might have. The other principle on which he discourses is "protection of individuals' properties." Here Locke's arguments [Locke (1690), pp. 18-30] are primarily theological and his theological premises leave him with the problem of explaining how *private* property can come to exist in the first place out of state of nature beginnings. He clearly holds that private property exists in the state of nature because it is, in part, to *protect* that property that people form civil Societies. He holds that it is the "labor bestowed" in acquiring private possessions by which *possessions* are removed from a "common state" in nature and become private *property* instead. Here, however, Locke's arguments are quite specious because, e.g., robbery and pillaging are just as laborious activities as crop growing or animal domestication – and robbery and pillaging are two "labors" he conveniently ignores in making his arguments. His arguments beg the question of how "private property" becomes "property" in the first place. Even so, it is clear that Locke's principles of justice include: protection of individual's safety; protection of his private property; retaliation; and retribution.

Seven decades after Locke's *Second Treatise on Government*, the subject of social contracts was again the topic in Rousseau's book, *The Social Contract* [Rousseau (1762)]. By then Europe was deep into the European Age of Enlightenment, and popular resentment and rumblings against European monarchies, church authority, and even religion itself were coming to a head. People questioned how their societies were organized and ruled, and what changes to those societies ought to be made. And,

> Europe was ready for a gospel that would exalt feelings above thought. It was tired of the restraints of customs, conventions, manners, and laws. It had heard enough of reason, argument, and philosophy; all this riot of unmoored minds seemed to have left the world devoid of meaning, the soul empty of imagination and hope; secretly men and women were longing to believe again. [Durant (1967), pg. 3]

Into the turmoil of 18th century Europe there came a man whose voice was widely despised in his lifetime, who many regarded as a madman, and to whom all of Europe listened posthumously. The student of history can only marvel at the enigma who was Jean Jacques Rousseau:

> How did it come about that a man born poor, losing his mother at birth and soon deserted by his father, afflicted with a painful and humiliating disease, left to wander for twelve years among alien cities and conflicting faiths, repudiated by society and civilization, repudiating Voltaire, Diderot, the *Encyclopédie*, and the Age of Reason, driven from place to place as a dangerous rebel, suspected of crime and insanity, and seeing, in his last months, the apotheosis of his greatest enemy – how did it come about that this man, after his death, triumphed over Voltaire, revived religion, transformed education, elevated the morals of France, inspired the Romantic movement and the French Revolution, influenced the philosophy of Kant and Schopenhauer, the plays of Schiller, the novels of Goethe, the poems of Wordsworth, Byron, and Shelley, the socialism of Marx, the ethics of Tolstoy, and, altogether, had more effect on posterity than any other thinker or writer of that eighteenth century in which writers were more influential than they had ever been before? [*ibid.*]

Rousseau begins his treatise with what some have called "the most famous words in political thought":

> Man is born free; and everywhere he is in chains. One thinks himself the master of others, and still remains a greater slave than they. How did this change come about? I do not know. What can make it legitimate? That question I think I can answer. [Rousseau (1762), pg. 2]

Rousseau's answer is the social compact. His reasoning for why men enter into social compacts, and so form Societies, echoes Hobbes and Locke but he paints a somewhat broader context for it.

> I suppose men to have reached the point at which the obstacles in the way of their preservation in the state of nature show their power of resistance to be greater than the resources at the disposal of the individual for his maintenance in that state. That primitive condition can then subsist no longer; and the human race would perish unless it changed its manner of existence.
>
> But, as men cannot engender new forces, but only unite and direct existing ones, they have no other means of preserving themselves than the formation, by aggregation, of a sum of forces great enough to overcome the resistance. These they have to bring into play by means of a single motive power and cause to act in concert. [Rousseau (1762), pg. 13]

Human beings, then, band together out of self interest and self preservation. Rousseau makes the not-unreasonable assumption that no person would agree to such association if by doing so he adjudged himself to be worse off than he was prior to uniting himself, to some extent, with these new associates. The benefits of joining must outweigh the costs and with some acceptable-to-him balance between aesthetical and practical considerations. Rousseau is speaking here of what I will call *civil* association, by which I understand people coming together to form a union with each other without any member of this union *coercing* any of the others to join. From the time of the earliest civilizations, it was not uncommon for the leader of an army to offer the inhabitants of a city the choice of surrendering to him without resistance - and in return being allowed to continue to live essentially as they had been living before he came - or facing total annihilation and destruction if they exhibited the least resistance to his demand. This is what I mean by *coerced* association. Self interest and self preservation are in play in both cases but the practical base motivations for forming a union are obviously quite different for these two cases.

Rousseau proposes that, in the case of civil association, each individual requires a *condition* that must be met if he is to agree to become a member of the association. He also proposes that the others reciprocally require a prospective associate to agree to a *term* he must fulfill in order to gain membership in the association. Between the individual and the group there is a *quid pro quo* required. Rousseau states the condition required by the individual in the following way [*ibid.*]:

> The association will defend and protect with the whole common force the person and goods of each associate, and in uniting himself with all the individual may still obey himself alone and remain as free as before.

At first glance, this condition might seem self-contradictory but it is not. The key to understanding how the apparent self-contradiction is resolved lies in the concept of freely given and accepted obligations and duties. Obligation and duty are *moral* terms, and this treatise will discuss the human nature of these ideas in much more detail (and non-theologically) later on.

As for the term the association requires every member to fulfill, Rousseau states this in the following way [*ibid*., pg. 14]:

> Each member puts his person and all his power in common under the supreme direction of the general will, and, in their corporate capacity, every member receives each other member as an indivisible part of the whole.

The practical meaning of the term "the general will" has long been perhaps the most contentious point of controversy between proponents of social contract theory and its critics. It must be admitted at the outset that Rousseau's proposed way of determining what "the general will" might be is fundamentally impractical and was based on ungrounded and specious statistical premises. In many ways, Rousseau was not a very practical man. The shortcomings and problems of his idea of "the general will" have always provided detractors of social contract theory with their strongest arguments against the theory. There is, however, a solution to the problem of "the general will" and we will likewise address this later in this treatise.

Rousseau's statements of the term and the condition of social contracting are stated as conclusions he offers without providing any discussion of his reasoning behind them. Perhaps he simply regarded them as too self evident to require discussion. He as much as hints at this when he writes,

> The clauses of this contract are so determined by the nature of the act that the slightest modification would make them vain and ineffectual, so that, although they have perhaps never been formally set forth, they are everywhere the same and everywhere tacitly admitted and recognized, until, on the violation of the social compact, each regains his original rights and resumes his natural liberty, while losing his conventional liberty in favor of which he renounced it. [*ibid*., pg. 14]

Things that "go without saying" often don't. Kant later provided a somewhat more rigorous rationale for Rousseau's theory, but it has to be said that his treatment of the subject also fell short of being satisfactory. Consequently, as institutions of justice evolved from the 18th century to the present, social contract theory only played a minor role in philosophies of government and law. The role played by the philosophy of utilitarianism was much more prominent in later developments as representative democracies and constitutional monarchies came to replace the old empires of Europe and Anatolia.

Utilitarianism is properly said to be the philosophical and economic doctrine that the best social policy is that which does the most good for the greatest number of people [Garner (2019)]. Such eminent philosophers as John Stuart Mill were utilitarians [Mill (1863)]. It is also, at root, a moral philosophy belonging to that genus of moral philosophies called consequentialism, although this foundation in moral theory tends to escape mention in political and legal writings. It should be noted that a moral factor is also embedded in Rousseau's theory:

> At once, in place of the individual personality of each compacting party, this act of association creates a moral and collective body composed of as many members as the assembly contains voters, and receiving from this act its unity, its common identity, its life, and its will. [Rousseau (1762), pg. 14]

> The passage from the state of nature to the civil state produces a very remarkable change in man by substituting justice for instinct in his conduct and giving his actions the morality they had formerly lacked. [*ibid*., pg. 19]

Rousseau did not dwell very much on the topic of morals in his treatise but turned his attention to topics of government and institutions. Kant, on the other hand, made moral theory the central topic of his contributions to social contract theory.

6. Toward a Post-Contemporary Science of Justice

In contemporary times, Rawls developed a more comprehensive contractual and anti-utilitarian theory of justice [Rawls (1971); (1999)], and Wells developed a theory of social contracts from an epistemological treatment of human nature [Wells (2012)]. While these contemporary theories do make major corrections to many elements of Rousseau's, Locke's, and Kant's treatments of the subject, they still do support Rousseau's "terms and conditions" statements. Rawls provided a statement of the relationship between the idea of a social contract and the meaning of "justice" when he wrote,

> My aim is to present a conception of justice which generalizes and carries to a much higher level of abstraction the familiar theory of the social contract as found, say, in Locke, Rousseau, and Kant. In order to do this we are not to think of the original contract as one to enter into a particular society or to set up a particular form of government. Rather, the guiding idea is that the principles of justice for the basic structure of society are the object of the original agreement. They are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association. [Rawls (1999), pg. 10]

Any legal system is comprised of laws and of institutions and institutional means for administration of those laws. Rawls expresses this more elegantly when he says,

> A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation. When these rules are just they establish a basis for legitimate expectations. They constitute grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled. . . . These features simply reflect the fact that the law defines the basic structure within which the pursuit of all other activities take place. [Rawls (1999), pg. 207]

A legal system, at any given moment in time, *defines* this basic structure of *pursuits*; but note that the *object* of this structure is that which is intended *by* principles of *justice* and *these* principles are objects of a social contract. More simply put, a social contract sets the conditions for what is to be regarded as just or unjust; these conditions set principles of justice (in a given Society); and these principles of justice are then the standards *just* laws (and institutions) must meet and to which they must conform. In social contract theory, *justice takes precedence over law*, and laws, when they are just, *must conform to* the principles of justice; the latter principles take their meanings from whatever the detailed terms and conditions of a given Society's social contract are, and these details often tacitly include a Society's mores and folkways.

This is not to say that all Societies establish the same detailed terms and conditions of their social contract; neither is it to say that social contracts may not be amended (by a Society's members) over time as conditions change or people become more enlightened or better educated or elect to make evolutionary changes in their traditions, mores, and folkways; nor does it imply that a people's original social contract must be formally worked out in all its details before a socially-contracted association can commence. Indeed, Rawls devotes a considerable amount of discussion to the fact that no Society known to us has ever, in its very beginnings, met the ideal of having its "original contract" formally worked out in all its details. This is the subtle import of his oft repeated phrase "that free and rational persons would accept"

appearing in so many places in his treatise.

But always, at the core of a social contract, is found the basic term and the basic condition Rousseau set out in *The Social Contract*. To be resident in a community is not necessarily to be a deontological citizen and member of its association. Every Society has its outlaws and criminals embedded within its populace. A *citizen*, as I shall use this word in this treatise, is a person who *obliges himself* to make a personal commitment to be a member of the association - hence the necessity of Rousseau's condition - and the other members of it (the other citizens) must agree to accept him as a member - hence the necessity of Rousseau's term of association.

Rawls emphasizes that principles of justice are recognized as being what "free and rational persons would accept" in their mutually cooperative interactions with one another. There is nothing wrong with this, although it leaves hanging the questions "what *would* a free and rational person accept and *why* would he accept it?". Even with these questions left hanging, the scope of Rawls' treatise is quite large as he develops his proposition that "justice is fairness." The idea of "fairness," however, is relative to individuals who are doing the judging of what is "fair" and what is not. As Mill pointed out,

> When we talk of the interest of a body of men, or even of an individual man, as a principle of determining their actions, the question of what would be considered their interest by an unprejudiced observer is one of the least important parts of the whole matter. As Coleridge observes, the man makes the motive, not the motive the man. What it is the man's interest to do or refrain from depends less on any outward circumstance than upon what sort of man he is. If you wish to know what is practically a man's interest, you must know the cast of his habitual feelings and thoughts. [Mill (1861), pg. 71]

Hobbes' view that it is fair for society to be ruled by an absolute monarch is quite different in many ways from how Locke views what is "fair" in government. The human factor cannot be legitimately ignored in discussing the topic of justice. This is a basic premise applied in Wells (2012).

To use Allan Bloom's colorful metaphor, human beings are the "social atoms" of every Society. To carry the metaphor further, a Society is a social molecule composed of these social atoms. Considerations of human nature enter in directly when we must face the "would" and "why" questions posed above. These considerations will occupy the remainder of this treatise.

7. References

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