

## Natural Law and Modern Natural Right

### Introduction

Modern Anglo-American jurisprudence concentrates almost exclusively on the law as an instrument of individual and public utilitarian ends. What these ends may be, according to this tradition, cannot be derived from a single and all-encompassing vision of what constitutes the "good" life or the "just" civil society. In practice, utilitarianism more or less accepts a plethora of individual, social, and communal needs, without any inquiry into their origins or essential status, and seeks to adjust the legal and sociopolitical order so as to maximize the satisfaction of these needs. Utility in the satisfaction of needs has become the shifting measure for the evaluation not only of our laws but also of everything, including even, other individuals. Concern with the mechanics of optimizing utility has thus supplanted reflection upon the goals of civil society and the role that justice should play in both articulating those goals and in ensuring that they are maintained.

The thesis that I wish to present in this paper is that the utilitarian and positivistic dogmas of modern jurisprudence are themselves a consequence of the evolution of an ever increasing nisus towards historicism in modern thought. It will be argued that the change from traditional natural law theory to modern natural right is an aspect of the evolution of the historical consciousness in Western culture - an evolution that has now obtained absolute status for the historical consciousness. This is, of course, an exceptionally panoramic theme. I will therefore limit its scope by structuring the discussion around Natural Right and History by Leo Strauss. Post-war political philosophy was considerably influenced by Strauss. A central feature of this influence has been the discussion by Strauss and others of the idea of "historicism" and the pervasive, and less than benign effect, it has had on present day thinking, not only in jurisprudence and political science but in the complete range of the human sciences.

This paper has four divisions. First, there is a brief description of some fundamental principles embodied in natural law and natural rights doctrine. Second, the philosophy of historicism and the historical consciousness is outlined, primarily in a conceptual manner. Third, an argument will be developed that modern natural right is precursor, albeit somewhat implicit, to the intensification of historical thought in the nineteenth century. Finally, the implications of these developments for modern jurisprudence will be cursorily analyzed.

### Natural Law and Modern Natural Right

It is impossible to describe natural law in propositional or definitional form. The phrase is a catch-all for a vast range of concepts and orientations that constitute the core of traditional philosophy and political thought from the Pre-Socratics to the scientific revolution of the seventeenth century. Nevertheless it is possible to isolate a number of common and essential characteristics of the classical tradition. The concepts I have isolated in this section are, however, primarily the ones which the historical consciousness singles out for criticism or which it replaces.

The jurisprudence textbooks are unfortunately very conceptually unsystematic when describing natural law theory. Indeed, most texts simply erratically cite passages from Aristotle, Aquinas, Spinoza and so on. Often distinctively modern thought references are imposed on the older texts or else natural law is reduced to moral experience, or intuitive intellection, or *lux naturalis*, or any number of prominent themes in the classical tradition. For example, Murphy's description of natural law is put in the following amorphous terms:

"While it can be justified by reflective thought, natural law is not essentially a system of clear, abstract concepts. Both the extremes of rationalism and pure ethics are avoided. It is a knowledge of moral experience, produced in the intellect through an awareness of the ethical qualities implicit in the dispositions and inclinations of human nature. It is a knowing through congeniality: what is consonant with nature is understood as being good; and what is dissonant, bad.

Human reason knows natural law, but it does not cause it to exist. And it is not known by reason alone. Knowledge of natural law is a way of knowing in which it is impossible to maintain sharp distinctions between intellect and will. For here the intellect is allied with the affective dispositions in a collaborative effort to uncover the unwritten law which guides human destiny."<sup>1</sup>

Congeniality is hardly the key to natural law theory which traditionally sought to discover, through rigorous logical and conceptual analysis, symmetries, patterns and parallels in the order of the cosmos and in the arrangements of civil society. The essential point in this

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<sup>1</sup> C.F. Murphy, Modern Legal Philosophy (Pittsburgh, Duquesne University Press, 1978), at 173.

passage is the declaration that human reason does not cause natural law to exist. Natural law is discovered by a contemplative, not an instrumental, rationality, the latter creating what it knows, the former knowing what it does not create. The discovery made by contemplative rationality is of an order that is eternal, suprahuman, and all-embracing.

MacGuigan defers to Chroust's Interpretations of Modern Legal Philosophy in order to state the following four universal characteristics of natural law:

"(a) Natural Law usually consists of one or several generalized but nevertheless essentially concrete, moral or legal 'values' or 'value judgments'; (b) these 'value judgments' are, in accordance with their 'absolute source' - 'Nature' Revelation (God) or Reason - universally valid and immutable; (c) they are within the reach of human reason properly employed and therefore, the objects of ratiocination; (d) once perceived in their absoluteness and 'pure rationality' they overrule every form of Positive Law...It never ceases to search for a unifying higher point of view which would endow the notion of law with something above its naive 'givenness'."<sup>2</sup>

Chroust's terminology, however, indicates a thought-world that natural law theorists would not recognize. This is the relativistic realm of axiology, or of value judgements, which is a uniquely later nineteenth century development that in itself presupposes and is closely linked with the expansion of the historical consciousness.

Friedmann, with essentially the same modern perspective, opens his discussion of natural law with the following trenchant statement:

"This history of natural law is a tale of the search of mankind for absolute justice and its failure. Again and again, in the course of the last 2,500 years, the idea of natural law has appeared, in some form or other, as an expression of the search for an ideal higher than positive law after having been rejected and derided in the interval. The problem is as acute and as unsolved as ever. With changing social and political conditions the notions on natural law have changed. The only thing that has remained

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<sup>2</sup> Mark R. MacGuigan, Jurisprudence: Readings and Cases 2nd ed, (University of Toronto Press), at 239-240.

constant is the appeal to something higher than the positive law. The object of that appeal has been as often the justification of existing authority as a revolt against it."<sup>3</sup>

Natural law may be looked upon as higher law which invalidates inconsistent positive law or as an ideal to which positive law ought to conform without its legal validity being questioned. Positive law recognizes only human convention in the ordering of human affairs, while natural law sought this order in the totality of the cosmos in which individuals participate.

Natural law theory embraces a number of concepts which are decidedly ahistorical or transhistorical. There is always some element of cosmological thinking or systematization in natural law. There may be a supranaturally imposed objective order which is the first cause of all things. The first principle may be immanent, as in Neo-Platonism, or separated from the natural order, as in Enlightenment deism. Natural law has also been understood as the objective or universal element in human nature. For example, in Hugo Grotius one finds right reason as the "natural law" which inheres in rational self-consciousness. Rationality itself has been taken in some traditions, such as Stoicism, as a reflection of the order around us. This leads to the view that there is an inner harmony between the order of nature and the order of mental and spiritual life. Likewise there is an indwelling moral obligation for the individual to perfect oneself so as to recognize and achieve the harmonic correspondence of inner and outer existence.

By stating the perennial and abiding, natural law theory firmly situates intelligibility in the eternal and suprahuman. What is not made by humanity or what is not uniquely sourced in human nature is the standard for a knowledge of the good and the just. Natural law frequently defines the object of knowledge in negative terms. So, for example, intelligible objects are necessary, universal, and one as opposed to finite human attributes and human affairs which are contingent, particular, and pluralistic or divided.

Closely related to the notion of a transhistorical intelligibility in most natural law theory is the concept of teleology. Political life, according to the classical Greeks, must be imbued primarily with the striving of citizens to attain virtuous living. Participation in civil society is premised on the idea of perfectibility and this idea is ineliminable if a good society and a just order are to be attained.<sup>4</sup>

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<sup>3</sup> W. Friedmann, Legal Theory (London, Stevens, 1944), at 18.

<sup>4</sup> An extensive discussion of perfectibility can be found in John Passmore, The Perfectibility of Man (New York, Scribner's, 1970), and J.B. Bury, The Idea of Progress (London, Macmillan,

Much of the realist and historicist reaction to traditional political philosophy is in essence a critique of the dogmatism into which this idealism often collapses. The classical Greeks, both in their physics and their politics, assumed that everything had its proper place. Chaos has displaced many things. Just as nature lets all the elements return to their proper place, so individuals must find their fitting positions in the political order.

For most of its history natural law was hierarchical. Today we look upon this as justifying a conservative view of the social order. We thus unmask the great chain of being as theoretical conspiracy to oppress and exploit certain groups. In other words the cosmological theory of the classical tradition is politicized. The politicization of philosophy in the modern world is a feature of the evolution of the historical consciousness. Natural law philosophers, however, would find these developments incomprehensible since most of them understood what they were doing as simply a declaration of how things are in their true sense and thus how they ought to be. Hierarchy was therefore the state of nature as it is and against this background lie the plethora of duties and obligations that constitute life in the political order.

The development of modern political realism in Machiavelli, Guicciardini, and other Renaissance writers and the appearance of natural right doctrine in Hobbes, Locke, and Rousseau radically altered some of the presuppositions of natural law theory. The doctrine of natural rights is a distinctively post-Renaissance development while natural law is ancient and medieval. Hobbes signifies the decisive break with the ancient tradition, though in many respects he continues and subtly reshapes and applies classical thought. The Hobbesian world is not concerned with the attainment of a higher, more perfect society by the assent of individuals through ever more rarefied orders of intellectual contemplation and virtuous living. In natural rights doctrine the focus changes dramatically to the unsocialized individual in the state of nature. The attention of mental life shifts in Hobbes from a transhistorical moral and suprasensible world to an anthropocentric universe which derives meaning and intelligibility solely from the human in nature, per se, and what humanity makes of this situation in order to preserve itself. This is the beginning of a fundamental historicization and relativization of human thought. It remained, however, for the nineteenth and twentieth centuries to make fully explicit what is ambiguously, and in many way reservedly, stated in the philosophies of Hobbes and Locke. Some of these concepts now need to be further specified.

Teleology is the first casualty in the Hobbesian reorientation of traditional political

philosophy.<sup>5</sup> An epistemology based on the assumption that the eternal and the whole can be known is fictionalized by Hobbes and supplanted with a principle of intelligibility that has its ultimate root in human needs. The latter are a historical and natural given. Needs cannot be altered, transformed, or sublimated in a process of moral and intellectual purification. The organizing principle of civil society is therefore to be found in human needs and natural law in the modern sense is derived from needs as the "prima naturae" of human existence.

Hobbes' position is significant for the development of the historical consciousness since natural law is no longer to be explicated in terms of a teleological epistemology but in terms of humanity's origins and beginnings.<sup>6</sup> In addition, reason is no longer looked upon as the "primum mobile" of political life for it is now replaced with passion. And the most powerful passion of all is the fear of death. The desire for self-preservation becomes, in Hobbes, the basis for natural law and the source of justice and morality. A future oriented perfectibility guided by reason in classical natural law is thus replaced by an anteriorly focused elevation of need and passion to the status of first principles.

This is no longer natural law in the strict sense, but really a "rights" doctrine. Hobbes continually talks about rights and rarely if ever about duties. In the Leviathan he states;

"The right of nature, which writers commonly call jus naturale, is the liberty each man hath, to use his own power, as he will himself, for the preservation of his own nature;...Naturally every man has right to every thing."<sup>7</sup>

Natural rights doctrine has thoroughly pervaded modern Western culture. The Canadian Charter of Rights and Freedoms, for instance, preserves rights, culture, democratic, legal, etc.; it does not impose a series of obligations on the citizenry or enjoin individuals with duties to achieve greater magnanimity, benevolence, and nobility.

Classical political philosophy assumed civil society as a prerequisite for human perfectibility, or at least for the modicum of perfection that could be achieved in the corporeal world. With the reorientation towards origins and history in Hobbes, the atomistic individual is obviously now viewed as prior to civil society. Even more importantly, it must now be understood that the rights of civil society are derivative from those of the individual. In classical

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<sup>5</sup> Leo Strauss, Natural Right and History (University of Chicago Press, 1953), at 176-177.

<sup>6</sup> Id., at 180.

<sup>7</sup> Thomas Hobbes, Leviathan (New York, Collier, 1962), at 103.

philosophy the individual can only become whole and complete within the context of the political order. The Hobbesian doctrine of natural right understands the individual to be whole and self-enclosed before entering the civil order. The latter thus becomes what individuals make of it and not how it may form and cultivate otherwise malleable individuals. Natural rights doctrine is a reflection of the emphasis Hobbes and others put on labour and what is produced by humanity.<sup>8</sup> This reorientation gave history a new-found status because human institutions which were uniquely created by humanity, as opposed to the natural order or the cosmos, now become the objects of epistemological and scientific inquiry and this means that the study of civil society takes precedence over natural inquiry.

The natural right of the individual to self-preservation also means that each individual is the sole judge of what are the right means to achieve self-preservation.<sup>9</sup> If each individual is the best judge of what is conducive to his self-preservation, this means that consent is elevated above wisdom and rational reflection. Authority, and not truth, thus becomes the basis of the laws. This is Hobbes' well-known doctrine of sovereignty as a fundamental compact made by individuals who by consenting to such a compact achieve peace which is a prerequisite for self-preservation. This does not mean that the rights of sovereignty are conventions or based in positive law. Rather, these rights are natural laws which flow from individual rights. Sovereignty is legal doctrine that is based ultimately on the fundamental right of self-preservation. It was also Hobbes' way of ensuring that no political order would have to succumb to the disorder that was the English Civil War.

There is another theme in Hobbes that is important with regard to the historicization of modern thought and that is the concept of power. Following Machiavelli, and in tandem with Bacon, Hobbes concentrates on power as the *raison d'etre* for the existence of science and knowledge. The study of power, as both potentially and "dominium," is pivotal in Hobbes and on through Nietzsche and the twentieth century. The exercise of power becomes an intrahistorical end and is to be distinguished from the end for which it is used or ought to be used. In Nietzsche the essence of reality is understood as power and a theory of the will takes precedence over intellection and ideation.

John Locke's political philosophy is also founded on certain assumptions about the state

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<sup>8</sup> A theory of knowledge based on what humans' make is elaborated by Giambattista Vico, The New Science, trs. Thomas G. Bergin and Max H. Fisch (Ithaca, Cornell University Press, 1978).

<sup>9</sup> Strauss, op. cit., at 185.

of nature.<sup>10</sup> The latter would be, for Locke, a state of peace if the law of nature were obeyed without civil society. Unfortunately, this is not the case. The state of nature is anarchic and penurious. However, in the state of nature there can be found the desire for happiness. This is not the eudaemonic quest for harmony of the classical tradition but an innate and universal natural right. For Locke there can be no innate natural duties. Government is the only remedy for the state of nature since in this state all individuals can do what they think fit to achieve their own happiness and this obviously leads to continual conflict. Law, in Locke's view, formulates the conditions of public happiness. It is not law that inheres in nature per se but a product of understanding. This is a significant development in natural law thinking because law is now no longer the discovery of what is in the things themselves but a notion in the mind. The Lockean philosophy in this regard reflects a moment in the development of the modern principles of subjectivity.

Though Locke shares with Hobbes many of the profound implications of the change from classical natural law theory to natural rights doctrine, he could not agree that the right to self-preservation requires absolute government or the supreme right of sovereignty. Freedom, for Locke, meant precisely the freedom from absolute and arbitrary power. Government therefore needs to be severely limited. However, by way of fundamental contract everyone must submit to the determination of the majority. Both Hobbes and Locke stress the right of the individual to resist the established government whenever self-preservation is endangered. Civil society is therefore in one sense put on a fluid and historical foundation in natural rights doctrine, especially if the political order begins to run counter to the natural rights, which it is originally established to guarantee. This contrasts sharply with the classical tradition where one has a duty, epitomized by Socrates, to submit to the legal determination of the city-state. Classical metaphysics was not premised on an aversion to violent death, indeed death was a release from the night of the corporeal prison, and thus submission to authority could never be justified in terms of self-preservation. In another sense, however, natural right was an attempt to find stable universal principles for the political order in times of general upheaval.

Locke's doctrine of property is central to his political thinking. It is a fundamental natural right that is direct corollary of the right of self-preservation. Strauss succinctly points out with regard to the Lockean view of property that:

"If everyone has the natural right to preserve himself, he necessarily has the right to everything that is necessary for his

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<sup>10</sup> Id., at 221.



self-preservation."<sup>11</sup>

This right has, of course, to be limited, otherwise there would be no peace and little preservation. Taking things that others have appropriated is therefore contrary to natural right.

The doctrine of property in Locke leads to one of the main historicist consequences of natural rights theory. All knowledge is now looked upon as something acquired. It is a filling of a mental tabula rasa and not the recollection ( ), via natural principles of understanding, of what is already there. Knowledge therefore depends on labour. Homo faber has begun to replace homo sapiens in Western thought as the measure of what is valuable. Strauss captures this re-orientation in the following way:

"Through the shift of emphasis from natural duties or obligations to natural rights, the individual, the ego, had become the center and origin of the moral world, since man - as distinguished from man's end - had become that center or origin, Locke's doctrine of property is a still more "advanced" expression of this radical change than was the political philosophy of Hobbes. According to Locke, man and not nature, the work of man and not the gift of nature, is the origin of almost everything valuable: man owes almost everything valuable to his own efforts."<sup>12</sup>

In this lie the seeds of the main themes of modern sociological and historical positivism. As will be seen in the next section, individuality and the molding of individuality by historical and social determinants are the predominant concepts of historicism.

### The Philosophy of Historicism

Although natural right doctrine in itself contributed to a refocusing of modern thought from the ought to the is, from the transhistorical to historical, it also was subsequently subjected to criticism from the historical standpoint because of the residual universals, and in many cases historical myths, still presupposed by it. In Hobbes and Locke passion and the nisus towards self-preservation undergird rational activity, but do not annihilate it or radically delimit what is discernible by human reason. Natural rights are matters which must be universally

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<sup>11</sup> Id., at 235.

<sup>12</sup> Id., at 248.

acknowledged. Natural right by no means negated the immutability of the principles of justice. The mutability of the principles of justice is a direct consequence of the historicization of modern thought in the nineteenth century. Natural rights made the human condition as it is before the creation of civil society the locus classicus for the elaboration of the universal principles of justice and civil society. Historicism assumes in a sense the natural rights position of the individual, as the ultimate arbiter, as solitary in the state of nature, as thrown into an unfathomable historical destiny, but is also goes one step further and denies the existence of universal norms altogether.

Historicism essentially elevates the particular, the local, and the temporal above any form of abstract universality and turns systematic intelligibility into a mythology.<sup>13</sup> It inverts Platonism by locating more meaning in the sensible and the temporal than in the unconditional and the eternal. Strauss states:

"It would be more cautious to say that radicalizing the tendency of men like Rousseau, the historical school asserted that the local and the temporal have a higher value than the universal. As a consequence, what claimed to be universal appeared eventually as derivative from something locally and temporally confined, as the local and the temporal in statu evanescenti."<sup>14</sup>

In a sense, natural rights doctrine attacked the efforts of the classical natural law tradition to transcend the actual by making the individual's situation in the world the basis for the political. One therefore only needs to transcend naturally given rights in civil society to the extent that such a transcendence is necessary to preserve those rights. Classical natural law, on the other hand, saw the best political order as being fundamentally different from what is and least of all did it see the justification of such transcendence as the preservation of what is naturally given. For the ancients the naturally given is a falling away from what is worthy of preservation or what will preserve itself when relieved of the corporeal. The hyletic field is for them a realm of pure potentiality and lack of definiteness, and for this reason the opposite of the intelligible.

Although nineteenth century historicism has roots that go well back into the Enlightenment, the Romantic emphasis on heritage, genesis, the epochal, and the 'Volksgeist'

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<sup>13</sup> Friedrich Meineck in Die Entstehung des Historismus translated as Historism: The Rise of New Historical Outlook by J.E. Anderson (London, Routledge and Kegan Paul, 1972) described historicism as assuming the "individuum est ineffabile."

<sup>14</sup> Strauss, op. cit., at 14-15.

dramatically intensified the elevation of historical situation above transcendent authority. This can clearly be seen in what the nineteenth century view as constituting the 'objective'. Classical natural law looked upon the objective as residing exclusively in the universal - in the Platonic *eide*. The finite and the temporal, because of its sheer transitoriness and conditionality, participates in the objective order of intelligible forms but does not in any sense constitute what is objective in that order. Historicism turns this view upside down and declares that the 'objective' lies precisely in the concrete particulars of history. The evanescent thus becomes the substantial - Spinoza's finite modes are turned into attributes, and thus the objects of knowledge are radically altered. All abstract universals, that is, all standards are relativized to particular historical situations. The result was that historical studies came to occupy the position of the first or primary science or inquiry. As Strauss points out:

"Historicism now appeared as a particular form of positivism, that is, of the school which held that theology and metaphysics had been superseded once and for all by positive science or which identified genuine knowledge of reality with the knowledge supplied by the empirical sciences."<sup>15</sup>

Sociological historicism laid stress on environmental determinants and in doing so its empirical research showed that such things as social contract and the solitary individual in the state of nature were myths.

Dias states:

"Research into the early history of society exposed the mythical nature of the contract. The unit in early society was the family, or clan, not individuals. There was, moreover, the technical difficulty that the social contract theory endeavoured to ascribe the validity of law to contract whereas normally the reverse is the case. Some rule has to be presupposed which prescribes that agreements ought to be kept."<sup>16</sup>

Analytical and historical positivism could not accept such natural rights postulates as individuals must always seek society or humans necessarily selfish. Furthermore, the nineteenth century became increasingly preoccupied with a collectivist outlook on life. This view is closed

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<sup>15</sup> Id., at 16.

<sup>16</sup> R.W.M. Dias, Jurisprudence 4th ed. (London, Butterworths, 1976), at 663.

intertwined with historical and sociological jurisprudence. Acceptable community standards are frequently alluded to today in Canadian court cases. There are still many dubious metaphysical assumptions in natural rights doctrine and the historical school sought to expunge these from reflection on the nature of human social evolution. In becoming a critical science, however, history quickly transformed itself into the arbiter of all empirical studies of humanity. And since knowledge in the modern world has become thoroughly anthropocentric, history must be the highest authority for evaluating everything that comes from and returns to the human.

Another important aspect of the detranscendentalization and the politicization of classical philosophy is that historical process itself became unhinged from any overarching pattern or from sacred powers which gave it meaning and made possible its sufferance. The historical process was thus degraded, from the classical perspective, to a meaningless series of happenings thoroughly contingent and denuded of teleology. In natural rights theory civil society still performs the task of preserving rights that are universally given and which ought to be universally acknowledged. The standards thrown up by a historical process that had become absolute unto itself have no *raison d'être* whatsoever, except that they are the free choice of the individual. The choice may be good or bad, but this matters little since there are no criteria for making such a determination. What is significant is that a choice is made, for in this alone the being and the capacity of the individual have their source. At this point, however, we are at the portals of modern existentialism. Strauss declares that historicism culminates in nihilism:

"The attempt to make man absolutely at home in this world ended in man's becoming absolutely homeless."<sup>17</sup>

Concentration on the variable and the unique is, of course, not a distinctively modern habit. The ancients were overwhelmed with change and variability. They felt a strong compulsion, however, to encapsulate this variability within the permanent totality of the cosmos. Infinite change, just like infinite horizons, meant nothing to them. Modern historicism is a key to understanding both the extent and significance of our total inversion of the classical world. The task for future speculative thought is to bring modernity and classicism together as reciprocal moments of a more comprehensible principle.

The Straussian critique of historicism has both a logical and an experiential dimension that cannot be gone into here in detail. The formal logical flaw in extreme historicism is that it

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<sup>17</sup> Strauss, *op. cit.*, at 18.

"inconsistently exempts itself from its own verdict about all human thought."<sup>18</sup> Of course, if it did not make such an exemption it would not be able to sustain its own position. Historicism is therefore radically self-contradictory. All thought is inherently historical, yet this thought itself is transhistorical and absolute, and must be so in order to think the radical historicity of all thought.<sup>19</sup> Contradictoriness in itself is no reason to dismiss a position. The problem, however, with historicism is that it never really subjects this issue to rigorous conceptual analysis.

The Straussian experiential critique of historicism deals with the "committed" character of the historicist:

"The radical historicist asserts, then, that only to thought that is itself committed or "historical" does other committed or "historical" thought disclose itself, and, above all, only to thought that is itself committed or "historical" does the true meaning of the "historicity" of all genuine thought disclose itself. The historicist thesis expresses a fundamental experience which, by its nature, is incapable of adequate expression on the level of noncommitted or detached thought. The evidence of that experience may indeed be blurred, but it cannot be destroyed by the inevitable logical difficulties from which all expressions of such experiences suffer. With a view to his fundamental experience, the radical historicist denies that the final and, in this sense, transhistorical character of the historicist thesis makes doubtful the content of that thesis. The final and irrevocable insight into the historical character of all thought would transcend history only if that insight were accessible to man as man and hence, in principle, at all times; but it does not transcend history if it essentially belongs to a specific historic situation. It belongs to a specific historic situation: that situation is not merely the condition of the historicist insight but its

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<sup>18</sup> Id., at 25.

<sup>19</sup> This theme is developed by Emil Fackenheim, Metaphysics and Historicity (Milwaukee, Marquette University Press, 1961).

source."<sup>20</sup>

The idea of commitment is reminiscent of certain themes in existentialism. Heidegger's Being and Time, for instance, elaborates a historicist doctrine.

Strauss also points out that the law is also self-contradictory. On the one hand it is good and noble, that which saves cities. On the other it is the function of common opinion or the decision of the multitude of citizens, which could be, and often is, the work of folly, baseness, and narrow self-interest.<sup>21</sup> Natural rights doctrine, because it is essentially a transitional philosophy if one juxtaposes the older classical natural law with radical historicism, sees law as a convention which is necessary to protect the absolute natural rights of the individual. It is not therefore a position of strict legal conventionalism, nor is it onesidedly cosmological. But it does attempt to combine, or rather, interrelate the decision of the multitude with what is naturally given. In doing so it tries to contain the self-contradiction embedded in law.

Another aspect of the transitional character of natural right is that it presupposes philosophy in the classical and original meaning of the discipline and at the same time it created some of the reorientations necessary for the establishment of historicism in the nineteenth century. Strauss points out that historicism either ignores or distorts the simple experiences regarding right and wrong which lie at the basis of early natural right theory.<sup>22</sup> Natural right, it can be argued, tries to bridge the conflict between historicist and nonhistoricist philosophy. The discovery of the theoretical historicity of the individual is tempered by the contractual strictures of civil society in natural right doctrine. Radical historicism totally did away with the necessity and universality of these strictures. It is the implicit radical historicism present in natural right that must now be examined.

### The Implicit Historicist Foundation of Modern Natural Right

Rousseau was one of the first to espy the crisis in modern historicist thought, although he did not conceptualize this crisis in historical and transhistorical terms. He sought a remedy in classicism, but equally embraced modernity. The omnipresence of positive law and human legislation, and the growth of acquisitiveness had displaced the duties of virtuous living in the

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<sup>20</sup> Strauss, op. cit., at 27-28.

<sup>21</sup> Id., at 101.

<sup>22</sup> Id., at 32.

modern state. In Hobbes and Locke the state of nature is not preferable to civil society, hence the necessity for a convention - the social contract. In Rousseau there is an obvious tension between the city and the state of nature. The state of nature, its freedom from convention, restraint, and authority, was for Rousseau in many ways preferable to civil society.

In basic agreement with Hobbes, Rousseau saw natural law as having its roots in principles which are prior to reason. Classical natural law saw the individual as by nature fully capable of employing reason to fulfil the obligations of virtuous and patriotic living. Rousseau also understands the right of self-preservation to be fundamental. The basic contradiction in Hobbes' position is that on the one hand he denies that the individual is by nature social and yet he attempts to elucidate the character of the natural individual by way of the experience of socialized individuals.<sup>23</sup> Rousseau also went one step further than Hobbes by pointing out that the social virtues themselves must be directly rooted in passion and not be seen as the result of the dictates of reason.

This criticism of Hobbes led Rousseau to the conclusion that the individual is by nature good. This means, however, that the individual in a state of nature is subhuman, or has no natural and definable constitution. In other words, in a state of nature humanity is capable of becoming either good or bad. The specific constitution of the human is a function of convention.<sup>24</sup> With this development, natural rights has taken another towards historical positivism.

The infinite malleability of human nature in Rousseau clears the way for a central theme in the evolution of the historical consciousness - the doctrine of progress. Turgot, and later Condorcet, were the most systematic French exponents of the intrahistorical perfectibility of the human race.<sup>25</sup> The self-unfolding of spirit (Geist) as the historical development of mind in Hegel's Encyclopedia of the Philosophical Sciences is a more subtle and expansive explication of the principle of progress. Hegel, somewhat like Rousseau though with infinitely greater systematic effort, wished to combine in speculative reason the modern principle of subjectivity with the objective dialectic of the ancients. Modern philosophies of perfectibility assume the homo faber of natural right doctrine. If humanity is to liberate itself from evil and create social

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<sup>23</sup> Id., at 268.

<sup>24</sup> Id., at 271.

<sup>25</sup> For example, see, Antoine-Nicholas de Condorcet, Sketch for a Historical Picture of the Progress of the Human Mind, tr. June Barraclough, (London, Weidenfeld and Nicolson, 1955).

orders which allow the realization of the full capacity of the individual, then it is solely by itself, and not by the intervention of any divine power, that this is achievable. Likewise, Rousseau perceives that humanity is capable of limitless degradation.

Rationality is not a given but an acquisition in Rousseau's philosophy. Reason emerges in the process of the satisfaction of human needs. This is a basic precept of modern evolutionary thinking and of contemporary sociological-biological utilitarianism. For the ancient Greeks rationality, like the cosmos, is always there, and always will be; neither created nor destructible. Rousseau puts invention above intellectual cognition. He understands the progress of the mind as a natural process. In Hobbes what is characteristically human is given in the state of nature. Natural right sought the characteristically human outside the rubric of civil society. Rousseau abandoned altogether this premise of early natural right theory. In a state of nature, according to Rousseau, individuals lack completely human traits. The characteristically human, that is, the rational, the inventive, the civilizing process, is wholly an outcome of the historical process.<sup>26</sup> In classical natural law humanity is a reflection of transcendental pattern - *imago dei*. With early natural right doctrine the uniquely human is to be found in the individual in a state of nature. Rousseau transforms this doctrine into a result-determined historicism. The distinctively human is now looked upon as nothing more than a consequence of human effort.

It is not surprising that Rousseau believed freedom to be a higher good than life. Freedom by the individual to mold and create an infinitely malleable capacity is the ultimate good because only in such freedom can life, as it ought be humanly lived, have meaning and significance. The most fundamental right of individuals is therefore freedom. This doctrine has enormous significance for the historicization of modern thought since it was the eventual separation of freedom from any sense of moral duty or social obligation that led to the most deleterious consequences of historicism in modern political life.

Rousseau was not a radical historicist. Freedom as the primary right makes possible the establishment of unconditional duties. Strauss accurately points out that for Rousseau freedom is self-legislation.<sup>27</sup> Virtuous living does not make individuals free, but rather freedom engenders virtue in the individual. Self-legislation, however, necessitates that every individual surrender to the will of a free society. Fundamental natural rights become social rights. The

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<sup>26</sup> Strauss, *op. cit.*, at 281.

<sup>27</sup> *Id.*, at 281.



general will thus takes the place of natural law. Since the people do not always see what is good for the people, the general will sometimes errs. The general will therefore requires enlightened individuals. The good that they see may, however, conflict with their private good. In order to resolve this difficulty, Rousseau resorts to the classical notion of a superior legislator; a Solon or a Lycurgus.

This democratic doctrine is significant for the development of historicism since it isolates the societal, which reflects the general will, as wholly a product of human legislative freedom. Natural law therefore is completely excluded from the system of laws. Theology and metaphysics have thus been cleared off the palimpsest of jurisprudential thinking and eventually replaced by modern sociological and historical positivism.

### Conclusion: Historicism and Modern Jurisprudence

Even though some rhetorical notice is still given to supernatural principles, such as in the preamble to the Charter, the modern legal universe takes historicism and positivism as unchallengeable first principles. Natural law is no longer a comprehensible or useful doctrine. In essence the triumph of the historical consciousness means that legal validity is now sourced wholly in the humanly legislated and what is judicially determined.

An inevitable consequence of anthropocentric positive law is that the coercive is more predominant than the voluntary. If all law is positive, then so must be all sanction. This leads often to an unworkable complexity, and much disorder and inequity in the application of laws. The onerous proliferation of laws was summarily and expeditiously dealt with by the Romans:

"The Decemvirs had neglected to import the sanction of Zaleucus, which so long maintained the integrity of his republic. A Locrian who proposed any new law stood forth in the assembly of the people with a cord round his neck, and, if the law was rejected, the innovator was instantly strangled."<sup>28</sup>

Until the absolute principle of the moral becomes the foundation of civilization, and law is understood, not as the glue of civil society, but merely as an imperfect external codification of moral principle, then positive law in itself will contribute to the decline of modern culture rather than be the source of its secular salvation, which was its original intention and purpose.

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<sup>28</sup> Edward Gibbon, The Decline and Fall of the Roman Empire, (London, Methuen, 1909), Vol.IV, at 476.

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