

Natural Law and divine Law: Ulrich Huber and the Lutheran Legacy of Justice

Prof. A.W.G. Raath

Samevatting

Alhoewel die Nederlandse regsrywer, Ulrich Huber, deur sy toepassing van bepaalde aspekte van Hugo Grotius se politieke sienswyses, elemente van verligte verbondsdenke geantisipeer het, het sy verbondenheid met die natuurreg en die noue band daarvan met goddelike reg, die vroeë Lutherse perspektiewe oor geregtigheid, gebaseer op die voorskrifte van die Bybel, gevolg. Die Bybelsgefundeerde teorie van natuurreg het gedien as 'n brug vir die voortsetting van beginsels wat in die Reformatoriese tradisie ontwikkel is, gedien.

1. Introduction

Ulrich Huber, in his work *De concursu rationis & sacrae scripturae, liber: ad ... Johannem vander Waeyen et Hermannum Alexander Röell*,

1 Ulrich Huber, *De concursu rationis & sacrae scripturae, liber: ad Reverendos Viros, DD. Johannem vander Waeyen et Hermannum Alexandrum Röel SS. Theol. Doctores & Professores. &c. &c. Praefixa est Epistola, de occasione scripti, & subjectae quaedam theses examinatae*, Franeker 1687. On the back of the title page it is stated *inter alia* that: "Examinatus & approbatus est hic liber secundum leges Ecclesiae d. X. Febr. MDCLXXXVII.'). A summary of this book was published by Huber in *DJC* (3rd ed.) (1694), Liber I, sectio VI 'De Principio cognoscendi divinitatem sacrae Scripturae & fidei Christianae' (pages 173-198). This section contains the following chapters: I. 'Quo status controversiae, quae est hac de re, formatur' II. 'Quo verum Principium cognoscendi divinitatem Sacrae Scripturae & veritatem Religionis Christianae, probatur esse Lumen infusum à Ratiocinatione distinctum'. III. 'Quo probatur: Rationem non esse Principium cognoscendi divinitatem S. Scripturae'. IV. 'Quo objectiones adversus priorem; & fundamenta posterioris sententiae remouentur'. V. 'De Testimonio obsignante Fidem receptam'. VI. 'In quo occupantur adhuc objectionis quaedam, & locus concluditur.'

protested against the Cartesian understanding of the authority of the Holy Scriptures. Huber found the Cartesian statements offensive, both to his beliefs as a Christian, and to the theistic foundations of Public Law. To Huber the general norms of constitutional law are composed of rules of natural law, *ius gentium* and divine law, whilst the “institutions of the nations” also shed light on the field of Constitutional Law. In Huber’s philosophy of public law, nature (created by God), the will of the nations in agreement therewith and the will of God posit the formal sources of constitutional law. As a consequence, natural law theory, legal comparison and theology are relevant to the components of the field of constitutional law in general.

Huber deals with the foundations of constitutional law generally in the first six chapters of his *De Jure Civitatis*, viz. the introduction, natural law, the divergent views of Hobbes (and in the third edition also the view of Spinoza), the *ius gentium*, the *ius divinum*, positive law and justice. In this context he applies the Protestant perspectives on justice, and strongly opposes the enlightened views of Hobbes. Huber’s perspectives are important because of his continuance of reformational jurisprudence and the possibilities for further development of his perspectives for human rights jurisprudence – in particular Martin Luther’s thought on law, justice and natural right.

One of the strongest opposing theories of justice to protect the integrity of the private sphere of the subjects in the legal order was developed by Huber. In his criticism of Hobbes’s theory of political absolutism, Huber made pioneering observations regarding the role and function of natural law and constitutionalism to protect private interests in the state. He based his theory of constitutionalism on a system of Biblically based natural law (in the wake of the Lutheran tradition) and Roman law conceptions of legal personality to curb the infringement of government action in the private sphere. Huber’s efforts to use natural law arguments in formulating a theory of constitutionalism for protecting the integrity of private rights, represent pioneering developments in the development of constitutionalism in public law. For this reason Huber’s discourse with Hobbes on constitutionalism is still of importance today.

2. Luther on the origins of justice and the dichotomy between divine and human justice

2.1 The absolute standards of divine justice and man’s relative justice

Luther’s theory of justice revolves around three basic perspectives: firstly, he maintains a strict distinction between the absolute justice (or right) of

God, and the justice (or right) of man; secondly, Luther traces the origin of human justice to God's creation of man in the divine image and likeness, and thirdly, he maintains that human justice functions relative to God's will, man's calling in the world and man's duties and rights in the kingdom of creation.² Luther's statements on justice in society with relation to man's calling, governance and functions in worldly affairs must be evaluated against the background of his basic perspectives on justice in society. The foundations of Luther's thinking on issues of right and justice affecting society are of particular relevance, because of the fact that he set the tone for the concerns for justice in the reformational tradition and the width of the message carried by his views on justice in society.

All Luther's comments on justice in the world in general and human society in particular, proceed from God's absolute justice and man's ability to know justice because of man's createdness in the image of God. His point of departure in thinking about justice is the Word of God in the Scriptures and its foundational importance for man in the world. From the Biblical perspectives on justice Luther distinctly states his commitment to the transcendental standard of absolute justice contained in the divine image and in God's love for justice. God's justice, to Luther, transcends man's limited understanding of the standards of justice, and man's application of the standards of justice contained in the Decalogue, compared to God's true justice and unfathomable benevolence.

In his commentaries on the various books of the Bible, Luther describes in almost poetic style the absolute standards of God's justice and His absolute love for justice. In his comments on the statement that God ("the Rock") and His work are perfect, "for all His ways are justice"³, Luther describes God as "faithful, without sin, righteous, and true".⁴ Furthermore it entails that the whole life of God's believers is right and true, going forward in the Word and commandment, not in their own ways and ideas.⁵ To Luther, in this verse, Moses' statement is expressive both of the nature of God, and of God as He is worshipped and believed in by His children.⁶ God's justice is elevated above the thrones of rulers and princes.⁷ Because God condemns those who do not

2 See A. Raath, 2006, The justness of love: The essence and status of justice in Luther's theology, *Studia Historiae Ecclesiasticae*, 32(1): 335-354.

3 Deuteronomy 32: 4.

4 *LW*, 9: 290.

5 *LW*, 9: 290.

6 For the meaning of this distinction, see Luther's comments on Psalm 51: 1 (*LW*, 12: 312-314.

7 *LW*, 11: 267.

keep His Law, His judgement is right and He saves those who keep it, “and this is the justice of a just Judge”.⁸ Sinful man acts unjustly by neglecting God’s absolute justice, His wisdom and His virtue, by neglecting judgement, and by setting up his own righteousness, wisdom, and virtue.⁹

Compared to God’s absolute justice, man’s standards of justice are sinful and imperfect – they represent an endless human quest like reaching for the stars; they are in need of constant improvement. In his comments on Psalm 45: 7, Luther elaborates on the insufficiency of man’s “second-hand” standards of justice.¹⁰ He contrasts the unjust rule of earthly kings with God’s perfect justice in Christ: all kings are tyrants and have no sceptre of equity; their rule is not carried on without offences, crimes and tyranny. In distinction from earthly rulers Christ alone has in His kingdom a sceptre of equity. With reference to Aristotle’s comparison of moral points with mathematical points in his ethics, Luther observes that a lawyer who propounds the law, “does not touch the mathematical or the invisible”: it is enough to have touched “the circumference,” so that the closer to the centre the better it is. “He does not hit the bull’s eye at all; it is enough if he does not completely miss the target”.¹¹ Luther adds: “In matters of justice or injustice one should make the point two paces wide, but the circumference should be about as large as a city. If you do this, you will not miss the mark completely”.¹² Luther observes that nowhere are there laws that are devoid of defects, “nowhere are there kings who rule without injustices”.¹³ It is enough, says Luther, that laws and kings try to hit the mark so that they do not miss the mark altogether: “It is on this account that the study of law is an endless study, since it aims at a physical and divisible point. So it must be that many books grow out of it. For, given some law, an exception immediately presents itself, which is followed then by ten others. So they extend to infinity, and the laws cannot be reduced to a mathematical and indivisible point ...”.¹⁴ Therefore, civil justice and laws, says Luther, are in themselves full of defects, even though men obey them. Man’s reason cannot comprehend all the various instances that might arise to make it necessary to amend the law: “For that reason they acknowledge with one voice that a measure of moderation must be exercised with the laws. One must mend and patch them and on occasion dig in the veins of ore, so that the

8 *LW*, 11: 504.

9 *LW*, 11: 346.

10 *LW*, 12: 238.

1 *LW*, 12: 238.

12 *LW*, 12: 238.

13 *LW*, 12: 238.

14 *LW*, 12: 238.

laws and civil justice are really like a beggar's cloak stitched from many patches. Because of the variety of cases, it has to be amended and corrected, expanded and trimmed".¹⁵ Therefore, if the governments and kingdoms of this world are compared with the kingdom of Christ in this respect, says Luther, "they are altogether nothing".¹⁶ God's sceptre is "straight", because Christ's teaching and the Laws of His kingdom are altogether straight and pure,¹⁷ namely that we should believe in Christ and love God and our neighbour. There is no error in this Law (of love), but there are errors in us; "for we do not believe enough, we do not love enough, we are not strong enough in tribulation".¹⁸

The golden thread in Luther's dealing with divine justice is the fact that the justice of God transcends human comprehension: if God's righteousness were such that it could be judged to be righteous by human standards, it would clearly not be divine and would in no way differ from human righteousness. But since God is the one true God, and is wholly incomprehensible to human reason, it is proper and indeed necessary that His righteousness should be incomprehensible, as Paul also says: "How incomprehensible are His judgements and how unsearchable his ways!" But they would not be incomprehensible if men were able in every instance to grasp how they are righteous. Luther asks: "What is man compared with God? How much is there within our power compared with his power? What is our strength in comparison with his resources? What is our knowledge compared with his wisdom? What is our substance over against his substance? In a word, what is our all compared with his?"¹⁹ Because God is totally different from sinful man, man's reason can neither grasp nor endure that God should act according to human justice, and do what seems right to man, or else He would cease to be God.²⁰ God is by nature immutably just and merciful as his nature never changes; so neither does His justice and mercy.²¹

15 *LW*, 12: 238.

16 *LW*, 12: 238.

17 *LW*, 12: 238.

18 *LW*, 12: 238.

19 *LW*, 33: 289. Luther comments that Job's friends have a worldly and human idea of God and His righteousness, as though He were just like men and His justice like the justice of the world (*LW*, 35: 251).

20 *LW*, 33: 206. Man's reason is not able to comprehend God's justice therefore man needs faith and the Holy Spirit to know God's justice (*LW*, 33: 173). The effect of man's reason (Epicureanism) is that men unduly deprive God of His power, His justice, and His wisdom.

21 *LW*, 33: 37.

Before the absolute justice of God no one is righteous, and therefore, no injustice can be done to a person by any other creature, even though he may have justice on his side: “Therefore, to whomsoever an injury is done or an evil comes in return for his good actions, let him turn away his eyes from this evil and remember how great his own evil is in other respects, and then he will see how good the will of God is even in this evil which has come upon him; for this is what it means to be renewed in one’s mind and to be changed into another state of mind and to be wise in the things of God”.²² Because God’s justice is accompanied by His other virtues, our damnation rests with God’s justice and our salvation depends on God’s mercy.²³

God reveals His justice to those who confess their unrighteousness. The statement in 1 John 1: 9 concerning God’s faithfulness and justice means, to Luther, that God is faithful because He keeps His promises. He is just when He gives righteousness to him who confesses that He is just. It is as if God were saying: “Because you say that I am just, which I am, for this reason I shall show you My justice and justify you”.²⁴ God is always right; when God sends the devil or evil people to punish you, He uses them to administer His justice. Hence rascals and wrong are good things too.²⁵ In essence divine justice is expressive of love – love should be sought through all things, above all things, and in all things. Nor do we need to fear that divine justice will be offended by love, for it is toward that end that righteousness actually impels us.²⁶

God’s perfect justice should move us to songs in praise of God’s justice: since God is a just judge, we must love and laud His justice and rejoice in God even when He miserably destroys the wicked in body and soul, for all this, lofty and unspeakable justice shines forth. Thus even hell is no less full of good, the supreme good, than is heaven. The justice of God is God Himself and God is the highest good. Therefore, even as His mercy, so must His justice or judgement be loved, praised and glorified above all things.²⁷

22 *LW*, 25: 441.

23 *LW*, 34: 121.

24 *LW*, 30: 231.

25 *LW*, 30: 104.

26 *LW*, 31: 166.

27 *LW*, 42: 156.

2.2 God's just and benevolent intervention in the sinful existence of man

Not only God's works of creation, and the stations and offices which He instituted in creation are just, but also the works of redemption and punishment He performs in man, by renewing man from his fall into sin. God's works in "truth" and "justice" alluded to in Psalm 112: 1, are understood by Luther in the following terms: "truth" means that which is true, certain, and righteous, in which there are neither lies nor deceit; "justice" is what we call "fair or not unjust".²⁸ The first manifestation of God's gracious intervention in the life of sinful men was the giving of His moral law to Moses on the two tablets of stone. In Psalm 111: 7 these precepts are called the "reliable precepts" of God. Their content is absolutely just because everything God commands is absolutely just; there is no falsehood or deceit in it, but it is right and good in its very essence. This the Psalmist says in the face of all the gods and teachings of the Gentiles, as well as against all the doctrines of men; "for they are a sham, hollow and false".²⁹ When the Law of God is in the heart, and is loved and man lives according to it, through faith, man speaks justice and utters wisdom, because the Law of God is not in a book, not in his ears or on his tongue, but in his heart.³⁰ In his commentaries on the minor prophets Luther explains the demand to do justice to mean to harm no one, to render to each person what is his own, to bother no one; on the other hand to help others, to promote their welfare, to prevent damage and violence, so that the wealthy may not surround and oppress the needy, and so that the guilty may be punished and the innocent protected. This, to Luther, is what is said in Jeremiah 7: 5: If you execute judgement between a man and his neighbour, that is, if you restrain the wicked and protect the good. This applies to all people in such a way that they be concerned about the public peace so that the state may be in good condition and each person may in peace enjoy what is his own. The demand "to do justice" implies that these things must not only be presented with words but with the matter itself. With this one expression the good part of Christian behaviour or of Christian morals is embraced. In effect the demands of the whole Second Table of the Decalogue is contained in this one demand: "(V)iolence against one's neighbour is forbidden, then covetousness, that I should not covet my neighbour's goods, or wish him ill, but protect him, ward off

28 *LW*, 13: 378 & 379.

29 *LW*, 13: 360.

30 *LW*, 14: 223.

danger from, etc. Whoever does this will incur the hatred of many people against himself, for tyrants and others who strike out against the poor will be annoyed by resistance against themselves”.³¹ The Ten Commandments, reflecting the will of God, and His divine standards of justice, are to be assiduously taught, for all good works are therein comprehended. They are called good works not only because they are done for the welfare of our neighbours, but because God has commanded them, and so they too are well pleasing to God. God has a delight in those who obey the commandments, as stated in Micah 6: 8: “O man, I will show you what is good and what God requires of you, namely, to do justice. Yea, do justice, delight to do good to your neighbour, and walk humbly before God”.³² The words of God’s law are to keep justice. To Luther justice and righteousness are two words with the same meaning namely, righteousness. The admonition in Isaiah 56: 1, to keep justice, is a brief statement of God (the Lawgiver) who condemns the guilty and the innocent.³³ God’s divine justice is contained in His gracious will and His demand for humility as a public virtue. Over against God’s just will, according to Luther, is the abuse of the term “justice” by human rules to the extent, he says, that “the word ‘justice’ nauseates me to the point that if someone robbed me, he would not bring me such grief. And yet the word is always sounding in the mouths of lawyers. There is no race of men upon the earth who are more ignorant about this than good-intentioners and the intellectuals. For I in myself and with many others have had the experience that when we were righteous, God laughed at us in our righteousness”.³⁴ The only complete righteousness is humility, which subjects everyone to everyone else and thus gives everything to everyone, as Christ says to John: “Thus it is fitting for us to fulfil all righteousness”.³⁵

Secondly, God actively intervenes with his justice in man’s sinful existence in the world. Because earthly government is too weak and the masses become so wanton that no one can keep peace or administer justice, and the people will not listen to preaching, God keeps the rod (of justice) in His hand – therefore the Psalmist calls God’s works “faithful and just”; “for even though they appear harsh and severe, they are just and good, and God deals justly and righteously in them”; they “preserve

31 *LW*, 18: 260.

32 *LW*, 40: 277.

33 *LW*, 17: 260.

34 *LW*, 25: 440.

35 *LW*, 25: 440.

justice and serve to maintain truth, that is, a righteous life among the people, lest there be nothing but wicked scoundrels and everything be turned upside down”.³⁶

The rule of God in the lives of men is described by Luther in different terms: in essence the rule of God is justice, peace and security, the opposite of sin, fear, and horror of hell.³⁷ Not only is God justice, but He also loves justice; and whoever loves justice receives it from Him.³⁸ Receiving God’s justice demands submission to His divine will – this “attitude and resignation” is the highest righteousness we can possess.³⁹ Not only is God the author and lover of justice, He is also the eternal, constant, essential and never-changing Justice itself and the supreme Judge of all things. In His words and works God is constantly resisted, opposed, judged, and condemned by unjust self-righteous and self-satisfied men – “(t)here is a constant legal war between Him and them over His words and works (LW, 14: 168).⁴⁰ In His supreme justice, justice itself exalts the Lord. When He smashes and avenges ungodliness, then people will say: “He is the mighty Lord, but meanwhile He also looks after the godly who have been made to suffer by the ungodly ...”.⁴¹ The Lord is a God of justice and of mercy, because he chastises by measure.⁴² Whereas men judge “according to the mask and according to persons,” God will give you honour and glory, because He judges according to justice since He loves justice.⁴³ Alluding to the often-quoted text of Romans 9: 21: “has the potter no right over the clay?”, Luther accepts and strongly supports St. Augustine’s observations in his *Enchiridion* to the effect that the entire human race in its apostate root was condemned with a divine justice which was so just that even if not a single person were delivered from it, no man could rightly curse the righteousness of God.⁴⁴

In his gracious intervention in the lives of men, God instituted the various estates and He wants us to honour and respect these “positions” as His masks or instruments through which He preserves and governs the world. God wants no partiality in judgement, for judgement is something divine.

36 LW, 13: 360.
 37 LW, 14: 323.
 38 LW, 14: 316.
 39 LW, 14: 175.
 40 LW, 14: 168.
 41 LW, 16: 63.
 42 LW, 16: 260.
 43 LW, 17: 339.
 44 LW, 25: 393.

Man must constantly remember that he is not to fear the judge or love the judge; but his fear and his trust are to be in someone else beyond the judge, namely in God, who is the real Judge. We are to respect and honour the civil judge, who is the mask of God, for the sake of God. “But my conscience dare not repose its truth in his justice, nor dare it be intimidated by his tyranny. For if this happened, I could sin against God and offend Him by lying, false witness, or a denial of the truth. Otherwise, where God is not involved, I should, of course, honour the judge”.⁴⁵

2.3 God’s will and the standards of justice

In his pre-lapsarian state of innocence man yielded completely to the will of God. The tree of the knowledge of good and evil was Adam’s “church, altar, and pulpit”.⁴⁶ Here he was to yield to God the obedience he owed, give recognition to the Word and will of God, give thanks to God, and call upon God for aid against temptation. Luther followed the voluntaristic line of St. Paul – God’s sovereign will is supreme over the whole of creation. Although he did not make much of the scholastic view concerning the twofold will of God: “the will of His sign” and “the will of His good pleasure” (Thomas Aquinas: “will of good pleasure” (*voluntas beneplaciti*), and will metaphorically taken as the “will of sign” (*voluntas signi*)), Luther used this distinction against Erasmus in *The bondage of the will*.⁴⁷ The effect of this distinction is that “the will of His good pleasure” is uniform and unchangeable, but that “the will of His sign” is changeable; for God changes signs when He wishes.⁴⁸

Man was created on the sixth day according to the image and similitude of God, so that His will was good and sound; moreover, his reason or intellect was sound, so that whatever God wanted or said, man also wanted, believed, and understood the same thing. The knowledge of all the other creatures necessarily followed this knowledge; for where the knowledge of God is perfect, there also the knowledge of the other things that are under God is necessarily perfect.⁴⁹ The horribleness of the fall of Adam and Eve is reflected in the fact that mankind has lost a most beautifully enlightened reason and a will in agreement with the Word and will of God. The most serious loss consists in the fact that man’s will

45 *LW*, 26: 96.

46 *LW*, 1: 94.

47 *WA*, 18: 715.

48 *LW*, 2: 44.

49 *LW*, 1: 141.

turned away from God. As a result, man wants and does none of the things God wants and commands. Likewise, man has no knowledge about who God is, what grace is, what righteousness is, and what sin itself is.⁵⁰ We do not fully appreciate the enormity of these losses unless we look back at that image of the state of innocence – whatever its nature may have been – in which the will was upright, and the reason was sound.⁵¹ Those who maintain that the natural endowments have remained unimpaired do not see how much mankind has lost: “For the will that is good and righteous, that pleases God, obeys God, trusts in the Creator, and makes use of the creature with an expression of thanks has been lost to such an extent that our will makes a devil out of God and shudders at the mention of His name, especially when it is troubled by God’s judgement”.⁵² Man has a will and a reason, but is depraved in many ways. Just as reason is overwhelmed by many kinds of ignorance, so the will has not only been confused but has been turned away from God and is an enemy of God (LW, 1: 142).⁵³ “From the image of God, from the knowledge of God, from the knowledge of all other creatures, and from a very honourable nakedness man has fallen into blasphemies, into hatred, into contempt of God, yes, what is even more, into enmity against God.”⁵⁴

Luther sketches the horrible effects of sin on man’s will in different ways: man’s will became depraved to the extent that he extended a “rebellious hand” against the will of God⁵⁵; if it had not been for the sin of Adam, man could have lived in conformity with God’s will⁵⁶; Aristotle and Cicero teach many things about the virtues; however, concerning God they teach nothing, “(t)hey do not teach that His will and commandment are to be considered in preference” because men who do not have the Word lack the knowledge of the will of God.⁵⁷

Paul testifies when he says in Romans 12: 2: “That you may prove what is the will of God, what is good and acceptable and perfect” – for this is God’s will, over mortification and sanctification (1 Thessalonians 4: 3). God therefore judges, chastises, and scourges until we learn what the good and acceptable and perfect will of God is.⁵⁸ God’s will sets the divine standards of justice. God reveals His will to man in His Word and in the course of history. Luther cites

50 *LW*, 1: 141.

51 *LW*, 1: 141.

52 *LW*, 1: 142.

53 *LW*, 1: 142.

54 *LW*, 1: 142.

55 *LW*, 1: 147.

56 *LW*, 1: 210.

57 *LW*, 2: 124.

58 *LW*, 6: 152.

Abraham as an example of such a person to whom God revealed His will to punish the cities, including Sodom and Gomorrah. Commenting upon the words of Genesis 18: 19, to the effect that God chose Abraham, “that he may charge his household after him to keep the way of the Lord by doing righteousness and justice,” Luther observes that God did want to bring this awful judgement upon the cities without first revealing the entire matter to Abraham.⁵⁹

In Christ, through faith and the working of the Spirit, to Luther, man is regenerated. Paul says in Romans 12: 2: “Be transformed by the renewal of your mind. But, says Luther, this transformation hurts! Why? Paul goes on to say: “That you may prove what is the will of God, good and acceptable and perfect.” To Luther, here we will learn by enduring, grieving and groaning what God has decided concerning man.⁶⁰ The new man is renewed from day to day and is taught what the good and perfect will of God is (Romans 12: 2).⁶¹

It is a right and sure Spirit who makes us sure concerning the will of God, who does not allow us to doubt, but carries out what Paul admonishes: “Let everyone be fully convinced in his own mind” (Romans 14: 5) (LW, 7: 154).⁶²

To Luther the true knowledge of God is to know His nature and will, which He reveals in the Word, where He promises that He will be man’s Lord and God and orders man to take hold of His will in faith. For here a sure and firm foundation in which hearts find rest has been laid. When Joseph is disciplined by exile, imprisonment, dangers, and false charges, he determines as follows: “I see that this is the will of God, who is undoubtedly contemplating something greater and more sublime than I could now understand.”⁶³

God approves of nothing, unless He has first sent out His Word, from which we are completely informed concerning His will. But He does not approve of what we decide to do by our own reason or strength, from however pious a mind this may appear so; but what we do at His command in every way pleases Him.⁶⁴

The will of God stands firm, however, and what the Lord wills is finally carried out even though the Satan and all the gates of hell resist it.⁶⁵ The Lord forms the spirit of man so that man can think nothing without the Lord allowing it. The word “spirit,” says Luther, means the mind, the movement

59 *LW*, 3: No. 1.

60 *LW*, 6: 352.

61 *LW*, 6: 362.

62 *LW*, 7: 154.

63 *LW*, 8: 17.

64 *LW*, 20: 3.

65 *LW*, 20: 48.

or emotions of minds. This, he says, is instead of clay for the Lord. He Himself is the Potter who changes, applies, and directs our plans according to His will where He wishes, as does any potter. God Almighty directs hearts and thoughts already created and guides them as and where He wishes so that we are incapable of thinking anything if God does not will it, much less accomplish anything we have thought of.⁶⁶ Even tyrants advise nothing other than what the Lord wills, for He forms their spirits. Thus we are absolutely certain that we are not in the power of our enemies, that they do not move a hair of our head without the Lord's permission, "however much they rage against us, however many deaths they plot for us".⁶⁷

To do the will of God means to remain with the doctrine of Christ and genuine good works, but not to do God's will means to fall back on their own works, which are done without faith or love; they do not do any works to serve or help their neighbour but only to seek their own advantage. Therefore they completely lack faith, love, and patience.

Luther remarks that we pray that the will of God may be done, that is, that His Word and His work of every kind, whether favourable or adverse, may be accepted by us graciously and willingly. Therefore, the fulfilment of God's will is actually the fulfilment of our will for which we have prayed, namely that we might will what God wills. For God wills things that are difficult and hard and exceed our will.⁶⁸

3. Melancthon on justice and the Spirit

3.1 Natural law and the dictates of Scripture

Already in the first version of Melancthon's *Loci communes* of 1521⁶⁹, he emphasised the close link between divine law, composed of the moral, legal and ceremonial laws⁷⁰, and the precepts of natural law.⁷¹ Whilst the

66 *LW*, 20: 131.

67 *LW*, 20: 131.

68 *LW*, 2: 198.

69 *Loci Communes Theologici. Vol. I. Summa cura ac diligentia postremum recogniti et aucti* ...Erlangen: Joan. Andrea Detzer. See also Melancthon, *Werke, II. Band 1. Theil: Loci Communes von 1521* ... Gütersloh: C. Bertelsmann Verlag. All citations of the *Loci Communes Theologici* are abbreviated to *LCT*, followed by the year of its first appearance (e.g. 1521).

70 See *LCT* (1521), par. 116 *et seq.*: "Legum aliae naturales sunt, aliae divinae, aliae humanae. De naturalibus legibus nondum vidi neque a theologis neque a iurisconsultis aliquid digne scriptum." Also note *LCT* (1521), par. 129 *et seq.*: "Supersunt iudicialis et ceremonialis leges, de quibus non attinet in compendio plura dicere. Iudicialis de iudiciis, poenis adeoque de forensibus causis in literis divinis populo Iudaico proditae sunt."

71 The first distinction drawn by Melancthon is the threefold manifestation of law: "Primum recensentur hae species: lex divina, lex naturae, leges humanae. Leges divinae sunt,

commandments of the First Table concern man's love and fear of God, the Second Table's commands deal with man's love of his neighbour. The commandments of both the First and the Second Tables are not limited to external affects on man's deeds, but also have internal affect. Therefore, natural law proper, to Melanchthon, is the law which demands love of God and one's neighbour. Therefore, it refers to the affect of love which is the demand of the divine law. Because, to Melanchthon, the existence of natural law is based on the Apostle Paul's Letter to the Romans (2: 15)⁷², all people have a conscience which either defends or accuses them, because they also have the law. The conscience is nothing but a common understanding (*sententia communis*) which all people consent to.⁷³ This understanding is engraved on the minds of all human beings, and is appropriate for forming man's moral habits. At this point it is clear that Melanchthon represents the view that natural law means common law in the moral sense. The common moral axioms of ethics contain principles which are the rules affecting man's actions in the public sphere.⁷⁴

The first natural law is the obligation to honour God⁷⁵; God has revealed His majesty by creating and maintaining the world.⁷⁶ The second natural

quae a Deo traditae sunt, quocumque tempore, et exstant scriptae passim in Mose et libris evangelii; lex naturae, ut infra dicam, est notitia naturalis de Deo, et de morum gubernatione, seu discrimine honestorum et turpium, divinitus insita humano generi, sicut notitia numerorum divinitus humanis mentibus insita est: ideo congruit cum ea parte legis Dei, quae discernendae sunt species legis divinae" (For a treatment of Melanchthon's natural law theory, see A.W.G. Raath & N.P. Swartz, 2006, The implications of the Pauline Ethics of benevolence and Natural Law applied in the Early Lutheran Reformation, *Journal for Christian scholarship*, 42(4): 57-93.

- 72 *LCT* (1521), par. 116: "Porro esse in nobis legem naturae Paulus mire eleganti et arguto enthymemate in secundo capite ad Romanos docet, cum sic colligit: Est in gentibus conscientia factum defendens vel accusans; est igitur lex. Quid enim aliud est conscientia quam facti nostri iudicium, quod a lege aliqua aut communi formula petitur?"
- 73 *LCT* (1521), par. 116(34-37): "Est itaque lex naturae sententia communis, cui omnes homines paritur adsentimur atque adeo quam deus insculpit cuiusque animo, ad formandos mores accommodata."
- 74 Cf. *LCT* (1521), par. 117(2-5): "Nam ut sunt in disciplinis theoreticis, ut mathematici, quaedam communia principia sive ... quale illud est totum esse maius partibus, ita sunt quaedam in moralibus tum principia communia tum conclusiones primae – utendum est enim docendi gratia istorum vocabulis – regulae omnium humanarum functionem. Has recte vocaveris leges naturae".
- 75 Knowledge of the natural laws is an innate habit given by God, an ability to make moral judgments: "Quod vero dico leges naturae a deo impresas mentibus humanis, volo earum cognitionem esse quosdam, ut isti loquuntur, habitus concreatos, non inventam a nostris ingenis, sed insitam nobis a deo regulam iudicandi de moribus" (*LCT* (1521), par. 117(17-21).
- 76 Cf. *LCT* (1521), par. 117(35-39): "Primam legem de colendo deo accepimus ex primo cap. ad Romanos, ubi non dubium est, quin inter naturales leges eam recenseat

law states that because human beings are born to social life, nobody should harm anybody else.⁷⁷ The third natural law implies that the society of human beings should use all things jointly, which means, to Melanchthon, that in a well-organised society all human beings belong to one family and they should treat each other as brothers, and as parents treat their children and children treat their parents. In effect, the third natural law is derived from the second natural law, which demands that human beings love each other.⁷⁸

3.2 Melanchthon's views on natural law, reason and will

In his *Enneratio libri V. ethicorum Aristoteles*, Melanchthon defines natural law as follows: "Natural law is knowledge of the practical principles and of the conclusions which necessarily follow from the principles, both of which God has placed in human minds. It is not only knowledge of social habits but, firstly, of confessing God and of the obedience we owe to Him and after that of the evil habits, which should refer to the end of the celebrating God. The law of nature is best expressed in the Decalogue."⁷⁹ An important implication of Melanchthon's definition is that the law of nature is written by God in the hearts of all human beings and that it is an expression of the divine will and an image of the divine wisdom in the human mind.⁸⁰ Therefore, human beings possess some

apostolus, cum inquit deum declarasse omnibus hominibus maiestatem suam conditione et administratione universitatis mundi."

- 77 *LCT* (1521), par. 118(5-15): "Secundam legem, qua cavetur, ne quis laedatur, non dubium est colligi ex necessitudine communi, qua omnes omnibus devincti copulatque nascimur, ut scripta indicat, cum inquit non convenire, ut homo solitarius degat, sed addendum ei esse auxilium vitae."
- 78 *LCT* (1521), par. 119: "Tertia lex de rerum communione plane ex ratione societatis humani generis oritur. Nam si inter pauculos amicos valere debet, quod vulgo dicitur ... id est, ut sint inter amicos omnia communia: cur non idem valeat inter omnes homines, siquidem cohaere debebant ita inter se omnes, ut cohaerent fratres cum fratribus, liberi cum parentibus, parentes cum liberis?"
- 79 *CR XVI*, 384: "Est igitur lex naturae illa ipsa notitia principiorum practicum et conclusionum, quae ex illis necessaria consequentia ducuntur, divinitus insita mentibus humanis, non solum de moribus civilibus, qui referendi sunt ad hunc finem, ut Deus celebretur. Ac summa proposita est in decalogo." All references to *CR*, are to Phillip Melanchthon's works in *Corpus Reformatorum*, ed. G. Bretschneider *et al.*, serien 1, vols. 1-28, halis Saxonum, Schwetschke 1834-1860.
- 80 *CR XVI*, 381: "Sunt autem natae et leges illae, et Philosophia ipsa ex quibusdam sententiis, quae divinitus scriptae sunt in animis humanis, quae saepe vocamus leges naturae ..." Also see *CR XVI*, 384, 392, 398-399. In *CR XVI*, 230, Melanchthon remarks: "At ius naturae, seu lex naturae, valet immediate propter autoritatem divinam, quia est radius sapientiae et iustitiae divinae, congruens ad normam mentis divinae immotam ..."

natural knowledge of the divine will. Natural law means that part of divine law which is understandable to human reason. Strictly speaking, ethics is that part of divine law which concerns social life.⁸¹

The virtues produced by man's powers of will are influenced by evil effects.⁸² Despite its knowledge of good and evil, philosophy has no power against evil effects. The only remedy for man's soul is the Christian virtues: fear of God and trust in Him, love of one's neighbour, renouncing lust and the love of glory.⁸³ Antti Raunio observes that here Melanchthon connects theology and the gospel with the inner affects of the human being and philosophy and natural law with the external actions. He adds: "He (Melanchthon) seems to think that even though the natural moral laws are part of the divine will, the human reason does not understand this."⁸⁴

To Melanchthon the close link between divine law and natural law finds expression in the fact that rational natural moral law is one aspect of divine law. However, the divine law contains something that goes beyond rational morality, namely perfect internal obedience, which is demanded by the commandment to love God with one's whole heart.⁸⁵

The relationship between the intellect (*intellectus*) and the will (*voluntas*) in Melanchthon's thought could be summarised as follows: The rationality of man refers to its rational creator, that is, to God. God has made the other rational creatures to which he gives his wisdom and goodness. In essence it means that God has sown the Word and the Holy Spirit in the human mind. The task of the Word is to show the Father and to illuminate men's minds with wisdom. The Spirit in turn unites wills and hearts with the eternal Father. This union realises itself by mutual love and joy and by the affects which conform to the divine nature.⁸⁶ Although man lost natural wisdom as a result of the Fall, the light of the Gospel shows that the object of the will is the eternal good.

Man's sinful weakness is contained in the fact that man's will is moved by finite things in creation – everything that is good for man and for human society, for example learning, knowledge, civil honour, virtue, life and the

81 *CR XVI*, 277-278.

82 Melanchthon follows Luther on this point.

83 Cf. *CR XVI*, 281-282.

84 "Divine and natural law in Luther and Melanchthon", 21-61, at 52.

85 *LCT* (1521), par. 121(16-19): "non dubium est, quin Christus exposuerit per hanc legem: "Diliges dominum deum tuum ex toto corde tuo et in tota anima tua et in tota mente tua.""

86 Antti Raunio, 55-56.

needs and enjoyments of life⁸⁷; these fine things are made by God and are therefore good, but they have to be reached for in the right order, and they should never be put before the will of God. Hearing and receiving the Gospel, the Son of God Himself, the divine Word, enlightens man's mind and lights the heart by His Holy Spirit. The mind then calms down and delights in God, loves Him and begins to obey Him. This love is directed to God above all and then to good things in the order which the divine wisdom shows. One who loves according to the right order reaches for virtues and the needs of life for God's sake and understands that by using these things in the correct way he serves and honours God.⁸⁸

4. Thomas Hobbes's enlightened absolutism and statement of justice

4.1 Natural law and society

According to Hobbes, man's sense of rational self-preservation brings a man into society. Human nature has two principles, desire and reason. What reason adds is not a new motive, but a regulative power, or foresight, by which the pursuit of security becomes more effective without ceasing to follow the general rule of self-preservation. The transition from the savage and solitary to the civilised condition depends upon the regulative power of reason. Reason tells man that it is only through the organisation of society and establishment of the commonwealth that peace and civilisation can be attained. It is clearly in man's interest to emerge from the natural state of war, and the possibility of doing so is provided by nature itself: some of man's passions (for example fear of death, hope of obtaining things by industry) incline him to peace, and reason shows him that the fundamental desire of self-preservation can be made effective: "And thus much for the ill condition, in which man by mere Nature is actually placed; though with a possibility to come out of it, consisting partly in the Passions, partly in Reason".⁸⁹ The passions that incline men to peace, are fear of death, desire of such things as are necessary to "commodious living" and a hope to obtain them.⁹⁰ Reason suggests

87 Cf. *De Anima*, par. 155(35)-156(6).

88 *De Anima*, par. 154(19)-155(6): "Ut obiectum intellectus est ens quam patet, Deus et rerum universitas, si hominis natura integra esset: ita voluntatis idem esset obiectum, et inter appetenda et amanda summum esset Deus, ut testatur lex divina: Diligas Deum ex toto corde ..."

89 *Leviathan*, 1, 13 (188).

90 *Leviathan*, 1, 13 (188)

“convenient Articles of Peace, upon which men may be drawn to agreement”.⁹¹ These articles are called the laws of nature.⁹² These laws state what an ideally reasonable being would do if he impartially considered his relations with other men in all their bearings on his own security. In his *De Cive*⁹³ Hobbes defines the law of nature as “the dictate of right reason, conversant about those things which are either to be done or omitted for the constant preservation of life and members, as much as in us lies”.⁹⁴ In a note Hobbes adds that right reason refers to the natural state of men; not as many do, an infallible faculty, “but the act of reasoning, that is, the peculiar and true ratiocination of every man concerning those actions of his, which may either redound to the damage or benefit of his neighbours”.⁹⁵ In his *Leviathan* Hobbes describes the law of nature (*lex naturalis*) as a “Precept, or generall Rule, found out by Reason, by which a man is forbidden to do, that, which is destructive of his life, or taketh away the means of preserving the same; and to omit, that, by which he thinketh it may be best preserved.”⁹⁶

In Hobbes’s definitions of natural law, there is no theological or metaphysical significance attached – a law of nature is merely a dictate of egoistic prudence; the laws of nature merely state the conditions of rational self-preservation: “THE RIGHT OF NATURE, which Writers commonly call Jus Naturale, is the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing, which in his own Judgement, and Reason, hee shall conceive to be the aptest means thereunto”.⁹⁷ And, Hobbes argues, the rational pursuit of self-preservation leads men to form commonwealths or states, whilst the laws of nature give the conditions for the establishment of society and stable government.⁹⁸

91 *Leviathan*, I, 13 (188).

92 *Leviathan*, I, 13 (188).

93 II, 1 (123).

94 *De cive*, II, 1 (123).

95 II, 2 (123). He adds: “I call it peculiar, because although in a civil government the reason of the supreme, that is, the civil law, is to be received by each single subject for the right; yet being without this civil government, in which state no man can know right reason from false, but by comparing it with his own, every man’s own reason is to be accounted, not only the rule of his own actions, which are done at his own peril, but also for the measure of another man’s reason, in such things as do concern him.”

96 I, 14 (189-190).

97 *Leviathan*, I, 14 (189).

98 *Leviathan*, I, 14 (189).

4.2 *The laws of nature and peace in society*

The first and fundamental law of nature is the general rule of reason that “every man, ought to endeavour Peace, as farre as he has hope of obtaining it; and when he cannot obtain it, that he may seek, and use, all helps, and advantages of Warre”.⁹⁹ The first part of this rule contains the most fundamental law of nature, namely to seek peace and follow it, while the second part contains the sum of natural right, namely, to defend ourselves by all means we can.¹⁰⁰

From this the second law of nature is derived, namely, that for the sake of peace a man should be willing, when others are also willing, to give up his right to all things and content himself with so much liberty against other men, as he would allow other men against himself.¹⁰¹ In an unexpected way of argumentation Hobbes states that this is the same as the “Law of the Gospel”: “Whatsoever you require that others should do to you, that do ye to them”.¹⁰² The main point of difference between Hobbes’s formulation of the second basic law and the command to love one’s neighbour, is situated in the fact that if a man lays down his right under obligation of the law of nature he does so primarily for his own advantage. This is explicitly conceded by Hobbes: “Whensoever a man Transferreth his Right, or Renounceth it; is is either in consideration of some Right reciprocally transferraed to himselfe; or for some other good he hopeth for thereby. For it is a voluntary act: and of the voluntary acts of every man, the object is some Good to himselfe”.¹⁰³ It follows from this that there are “some Rights, which no man can be understood by any words, or other signes, to have abandoned, or transferred”.¹⁰⁴ For example, a man cannot lay down the right to defend his own life, “because he cannot be understood to ayme thereby, at any Good to himselfe”.¹⁰⁵

The third law of nature is that “men perform their covenants”.¹⁰⁶ Hobbes states that from the third law of nature, by which man is obliged to transfer

99 *Leviathan*, I, 14 (190).

100 *Leviathan*, I, 14 (190).

101 *Leviathan*, I, 14 (190). Hobbes adds: “For as long as every man holdeth this Right, of doing any thing he liketh; so long are all men in the condition of Warre. But if other men will not lay down their Right as well as he; then there is no Reason for any one, to devest himselfe of this: For what were to expose himselfe to expose himselfe to Prey, (which no man is bound to) rather than to dispose himselfe to Peace” (I, 14 (190)).

102 *Leviathan*, I, 14 (190).

103 *Leviathan*, I, 14 (192).

104 *Leviathan*, I, 14 (192).

105 *Leviathan*, I, 1 (192).

106 *Leviathan*, I, 15 (201).

to another, “such Rights, as being retained, hinder the peace of Mankind”, he adds a third without which covenants are in vain, “and but Empty words”.¹⁰⁷ To Hobbes a contract is “the mutual transferring of Right”.¹⁰⁸ Drawing a distinction between transferring of right to a thing, and transferring the thing itself, Hobbes observes that, in terms of the contract, “one of the Contractors, may deliver the Thing contracted for on his part, and leave the other to perform his part at some determinate time after, and in the mean time be trusted; and then the Contract on his part, is called PACT, or COVENANT: Or both parts may contract now, to performe hereafter: in which cases, he that is to performe in time to come, being trusted, his performance is called Keeping of Promise, or Faith; and the fayling of performance (if it be voluntary) Violation of Faith.”¹⁰⁹ Without this third law of nature, “Covenants are in vain, and but empty words; and the Rights of all men to all things remaining, wee are still in the condition of Warre”.¹¹⁰ In this law of nature is contained the “Fountain and Originall of JUSTICE”.¹¹¹ When there has been no covenant, no action can be unjust.¹¹² But when a covenant has been made, it is unjust to break it. Injustice is defined in terms of breaking the covenant: “And the definition of INJUSTICE, is no other than the not performance of Covenant. And whatsoever is not Unjust, is Just”.¹¹³

4.3 Sovereignty and positive law

There are no valid covenants, and hence no justice and injustice, until a coercive power has been established that will compel men to perform their covenants, that is, until the commonwealth is established: “Therefore where there is no Common-wealth, there nothing is Unjust” and “the nature of Justice, consisteth in keeping of valid Covenants; but the Validity of Covenants begins not but with the Constitution of a Civill Power, sufficient to compell men to keep them: And then it is also that Property begins”.¹¹⁴ To Hobbes words alone, “if they be of the time to come, and contains a bare promise, are an insufficient signe of a Free-gift and therefore not obligatory”¹¹⁵, and “(t)he force of Words, being ... too weak

107 *Leviathan*, I, 15 (201).

108 *Leviathan*, I, 4 (192).

109 *Leviathan*, I, 1 (193).

110 *Leviathan*, I, 15 (202).

111 *Leviathan* I, 15 (202).

112 *Leviathan*, I, 15 (202).

113 *Leviathan*, I, 15 (202).

114 *Leviathan*, I, 15 (203)

to hold men to performance of their Covenants; there are in mans nature, but two imaginable helps to strengthen it".¹¹⁶ Elsewhere, Hobbes observes that "Covenants, without the Sword, are but Words, and of no strength to secure a man at all".¹¹⁷

Security depends upon the existence of government and in its having the power to keep the peace and to apply the sanctions needed to curb man's innate unsocial inclinations. The effective motive by which men are socialised is the fear of punishment, and the authority of law extends only as far as its enforcement is able to reach. Hobbes, therefore, identifies government and law with force. The implications are that the multitude is united by a common power called the Leviathan: "This is the Generation of that great LEVIATHAN, or rather (to speak more reverently) of that Mortall God, to which wee owe under the Immortall God, our peace and defence. For by this Authoritie, given him by every particular man in the Common-Wealth, he hath the use of so much Power and Strength conferred on him, that by terror thereof, he is inabled to forme the wills of them all..."¹¹⁸

It follows, therefore, that a plurality of individuals should confer all their power and strength upon one man or upon an assembly of men, that may reduce all their wills, by plurality of voices, unto one will.¹¹⁹ How does this transfer of rights take place? Hobbes answers that it takes place "by Covenant of every man with every man, in such manner, as if every man should say to every man, I Authorise and give up my Right of Governening my selfe, to this Man, or to this Assembly of men, on this condition, that thou give up thy Right to him, and Authorise all his Actions in like manner. This done, the Multitude so united in one Person, is called a COMMON-WEALTH ...".¹²⁰

Thomas Hobbes, following the traditional views on the character and goals of political life, reverted to nature to determine the standards for law and politics. Hobbes's first step was to state the laws governing human behaviour and to identify the conditions determining stable legal and political orders. According to Hobbes, human behaviour is primarily to be understood in terms of a mechanistic view of the psychological forces

115 I, 14 (194).

116 *Leviathan*, I, 15 (200).

117 *Leviathan*, I, 17 (223).

118 *Leviathan*, II, 17 (227).

119 *Leviathan*, II, 17 (227).

120 *Leviathan*, II, 17 (227).

determining human behaviour in the public sphere. Employing a relativistic morality, Hobbes maintained that the objects of man's passions vary with the individual's constitution and education, and with the individual's aversions and desires: "But whatsoever is the object of any mans Appetite or Desire; that is it, which he for his part calleth Good; And the object of his Hate, and Aversion, Evill; And of his Contempt, Vile, an Inconsiderable. For these words of Good, Evill, and contemptible, are ever used with relation to the person that useth them: There being nothing simply and absolutely so; nor any common Rule of Good and Evill, to be taken from the nature of the objects themselves; but from the Person of the man ..."¹²¹ What men really mean when they say something is good is that it pleases them. Man's thoughts do not control the passions: quite the contrary.¹²² On this basis Hobbes deduced the state of nature from the passions of man and denied that man is naturally social and political. From this pre-political condition of mankind, in which men live without civil government or without a common power to keep them in fear, Hobbes developed his theory of political absolutism.¹²³

4.4 Natural law and the state of nature in Hobbes's theory of public law

Hobbes's construction of the state of nature is deduced from the passions of man. In his answer to the issue of whether man is by nature social and political, Hobbes answers negatively. The basis for his denial is the presupposition that men lived in a pre-political condition without civil government or without a common power over them to keep them in fear. Man's natural condition, to Hobbes, is one in which all men are equal in the faculties of body and mind; "as that though there bee found one man sometimes manifestly stronger in body, or of quicker mind then another; yet when all is reckoned together, the difference between man, and man, is not so considerable, as that one man can thereupon claim to himselfe any benefit, to which another may not pretend, as well as he."¹²⁴

Because man, by nature, is neither social nor political, it means that all civil societies have grown out of the state of nature. Although Hobbes did

121 *Leviathan*, Part 1, Chapter 6: Page 120 (1, 6: (120)).

122 A.W.G. Raath, *Jurisprudence*, 138.

123 During the time men live without a common Power to keep them all in fear, they are in a condition which is called war; "and such a warre, as is of every man, against every man" (*Leviathan*, I, 13 (185)).

124 *Leviathan*, I, 13 (183-184)

not believe that there ever was such a state all over the world, he said that, in his day, in many places in America, during civil wars and between independent sovereigns, such a state actually existed: “For the savage people in many places of America, except the government of the small Families, the concord whereof dependeth on naturall lust, have no government at all; and live at this day in that brutish manner ...”¹²⁵ However, the historical question is not very important for Hobbes, because the state of nature is deduced from the passions of man; it is meant to reveal and clarify what it is about man’s natural inclinations that we must know in order to form the right kind of political order. It serves primarily to determine the reasons, the purposes, or the ends for the sake of which men form political societies.¹²⁶

What would have been the position of mankind if there were no civil society? Firstly, Hobbes argues that men are more equal in faculties of body and mind than has hitherto been recognised: “Nature hath made men so equall in the faculties of body, and mind; as that though there bee found one man sometimes manifestly stronger in body, or of quicker mind then another; yet when all is reckoned together, the difference between man, and man, is not so considerable, as that one man can thereupon claim to himselfe any benefit, to which another may not pretend, as well as he. For as to the strength of the body, the weakest has strength enough to kill the strongest, either by secret machination, or by confederacy with others, that are in the same danger with himselfe”.¹²⁷ Not that all possess the same degree of physical and mental strength, but rather that by and large an individual’s deficiencies in one respect can be compensated by other qualities.¹²⁸ Every individual seeks only his own good, and man’s natural equality produces in men equal hope of attaining their ends. This leads to competition and mistrust¹²⁹, for the first general inclination of all mankind is a perpetual desire for power, a desire that ceases only in death. And this competition and mistrust are made worse by the pleasures of the mind, namely, love and glory, pride and vanity.¹³⁰

125 *Leviathan*, 1, 13 (187).

126 A.W.G. Raath, *Jurisprudence*, 139.

127 *Leviathan*, 1, 13 (183).

128 *Leviathan*, 1, 13 (183).

129 I, 13 (184): From this equality of ability, ariseth equality of hope in the attaining of our Ends. And therefore if any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies; and in the way to their End, ... endeavour to destroy, or subdue one another.”

130 *Leviathan*, 1, 13 (185).

Hobbes draws the conclusion that in a state of nature (prior to organised government) men live in a perpetual state of war (*bellum omnium contra omnes*). In such a state “men live without other security, than what their own strength, and their own invention shall furnish them withall. In such a 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 improved by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short”.¹³¹

Furthermore, in the state of nature there is no appeal to justice; nothing there can be unjust, for justice and injustice are such only in terms of some preceding law and there is no law outside civil society: “The notions of Right and Wrong, Justice and Injustice have there no place. Where there is no common Power, there is no Law: where no Law, no Injustice. Force, and Fraud, are in warre the two Cardinall vertues. Justice, and Injustice are none of the Faculties neither of the Body, nor Mind. If they were, they might be in a man that were alone in the world, as well as his Senses, and Passions. They are Qualities, that realte to men in Society, not in Solitude”.¹³² In short, man is not by nature social; on the contrary, nature dissociates man. The state of civil society, then, is radically conventional. This does not mean that there are not present in men certain natural impulses or forces that drive them toward civil life. It means that the antisocial forces are as natural as, and when unmitigated by convention even more powerful than, the force promoting civil life. Instead of serving as a direct guide to goodness, nature indicates what man has to run away from: “It is consequent also to the same condition, that there be no Propriety, no Dominion, no Mine and Thine distinct; but onely that to be every mans that he can get; and for so long, as he can keep it. And thus much for the ill condition, which man by mere Nature is actually placed in; though with a possibility to come out of it, consisting partly in the Passions, partly in his Reason”.¹³³

131 *Leviathan*, 1, 13 (186).

132 *Leviathan*, 1, 13 (188).

133 *Leviathan*, 1, 13 (188).

5. Ulrich Huber on justice and natural law

Whereas St. Thomas Aquinas postulated a fourfold distinction of justice, beginning with the origins of law in God, reaching all the way down to man, and distinguishing between Eternal law, natural law, divine law and human law¹³⁴, Huber states that the laws of every nation emanate from three sources: nature, the nations and the divinity.¹³⁵ Huber adds that these laws may be either public or private.¹³⁶ To Huber these laws are not fixed for time and eternity, but some were taken away, added to, changed according to the nature of the people, the status of the countries, and the conditions of the times which are always changing.¹³⁷ Regarding the law of nature, it is firmly established, says Huber, that there is nothing more useful or wise for the interpretation of the law of nature and of the nations than the Roman law the jurists left for us.¹³⁸ In passing, Huber criticises Thomas Hobbes's contempt for Roman scholarship, because "this is clearly a matter of ignorance."¹³⁹ Huber steers closely to Aristotle's definition of justice: "Justice is equal to all law and all virtues are called universal."¹⁴⁰ As a consequence Huber interprets this to mean that this is nothing other than a kind of virtue, merely because justice means the relation to other people and the customs of civil society. Aristotle calls this the custom of universal virtue.¹⁴¹ Huber draws the inference that, therefore, this is not a separate kind of virtue but this is the sum total of all the virtues, just like the much quoted statement by Aristotle that justice contains all the other virtues.¹⁴² Huber aligns his definition of justice very closely to that of Aristotle: "Properly stated justice is that which teaches man not to look or desire more while the contrary vice is the frequently mentioned desire to have more than that which belongs to him."¹⁴³ The implications flowing from the fact that justice is the sum total of all virtues, are quite varied: That which is not limited by another virtue can only be a particular virtue which is separate from all others; that which belongs to a person is the phrase by which Justinian limits all inordinate

134 Cf. *Summa Theologica*, I-II, Questions 90-108.

135 *DJC*, I, 1, VII(1): "Ex hoc triplici fonte juris *Naturalis, Gentium & Divini*, leges cujusque populi tam privatae quam publicae sunt derivandae."

136 *DJC*, I, 1, VII(1).

137 *DJC*, I, 1, VII(2).

138 *DJC*, I, 1, VII(4).

139 Huber, *DJC*, Book 1, Section 1, Chapter VII (Paragraph 7), (I,1,VI(7)), adds that in this regard Hobbes is not far from certain interpreters of Grotius, whom he seeks to imitate. According to Huber they are ignorant of that legal system: "They seek and confirm by the example which they provide that a knowledge of Roman law is not required for the interpretation of public law."

140 *Nicomachean Ethics*, Chapter 1.

141 *DJC*, I, 1, VII(11): "Neque aliud est, quam virtus in genere; tantum quod Justitia relationem ad alios usumque in societate civili continet."

desires¹⁴⁴; by the first meaning of the term justice, the excessive craving for money is limited, as stated by Aristotle¹⁴⁵; by the second meaning of the term all evil desires by which somebody may cause harm in any way to somebody else are curbed¹⁴⁶; in the Aristotelian sense specific justice stands in opposition to universal justice, however another possible meaning is that we may be satisfied with one type of justice viz. that nobody may suffer in his property, his body and honour or in those of his dependants.^m

Huber also refers to Cicero's definition of justice as the virtue whereby everybody is given his rights and dignity.¹⁴⁸ In Huber's view, Cicero does not dispute the definition of the jurists, viz. the constant and perpetual wish of giving to everyone that which is due to him.¹⁴⁹ In this sense justice is divisible into commutative and distributive according to the pristine terminology, or as Grotius would have it: into complete and attributive.¹⁵⁰ Commutative or expletive provides for the giving to another that which fully and perfectly is due to him. These, says Huber, are matters in regard to which that person is the owner or the creator.¹⁵¹

Distributive or attributive provides for the observance of equality in all those matters which are probably due to somebody else, prizes, offices, honorary appointments, mercy and similar matters as stated by Grotius.¹⁵² However, this is not a completely new doctrine – what did Cicero wish for when he said that justice is that which gives to everybody his dignity?¹⁵³ Whereas a right indicates that which belongs to us fully and perfectly,

142 *DJC*, 1, 1, VII(12): “Unde liquet, eam non esse distinctam virtutis speciem, sed omnium complexionem, juxta veterem versiculum Aristoteli laudatum ...”

143 *DJC*, 1, 1, VII(13): “Proprie autem dicta Justitia est ea, quae docet *plus suo non capere aut cupere, cujus oppositum vitium illud frequens est ...*”

144 It is understood as those things by which we are enriched and which form part of our estate; it also means that which belongs to us fully and perfectly (*DJC*, 1, 1, VII(15)).

145 *DJC*, 1, 1, VII(16).

146 *DJC*, 1, 1, VII(16).

147 *DJC*, 1, 1, VII(17). Huber prefers to understand justice in this sense: “Sensu Aristotelio *Justitia particularis universali opponitur; Altera significatione, contentis esse licet nobis uno genere Justitiae, quae doceat, neminem laedere in bonis, corpore, honore suo suorumque. Placet in hoc sensu accipere Justitiam.*”

148 *DJC*, 1, 1, VII(18).

149 *DJC*, 1, 1, VII(19): “Nec ablutitbdefinitio Jurisconsultorum; Constans & perpetua voluntas sus suum cuique tribuendi ...”

150 *DJC*, 1, 1, VII(20).

151 *DJC*, 1, 1, VII(21).

152 *DJC*, 1, 1, VII(22). *De Jure Belli ac Pacis*, Chapter 1, Paragraph 8 (1: 8).

153 *DJC*, 1, 1, VII(23): “Non est haec nova plane doctrina; Quid enim aliud Cicero voluit, cum justitiam esse dixit, *quae cuique jus suum & dignitatem tribuit? ut modo intelleximus.*”

dignity is that which is probably due to us, but not necessarily.¹⁵⁴ It cannot be claimed as a deserved prize or aid to the needy.¹⁵⁵ Anybody who claims and demands dignity as being perfectly owing to him, acts unlawfully.¹⁵⁶ Catalina acted in this way when he wrote a letter to Quintus Catullus saying that he was waging a war against the fatherland because he had failed in his candidature for the consulship and had realised that unworthy people were honoured with public offices.¹⁵⁷ Originally this gave rise to many skirmishes between the plebeians and the ruling class because they saw themselves as worthy of occupying public office.¹⁵⁸ They thought that the plebs should receive equal opportunities to occupy public offices just like patrimonial property.¹⁵⁹ The ruling class had a more sober and workable approach. It was inevitable that a random distribution of public offices would lead to confusion in the country. If the claims of members of the ruling class to public offices were ignored they might correctly argue that they had been overlooked in the same way as Catalina thought that he had been treated unjustly.¹⁶⁰

In his criticism of Hobbes's theory of justice and politics, Huber refutes Hobbes's theory of wanting justice to be nothing more than the protection of pacts. The definition depends on the hypothesis that prior to the conclusion of agreements there is no justice and that the origin of the state arises from consent and violence. Apart from the desire for society and the hatred of confusion, the state arose from the wickedness of mankind. The good people could not defend themselves against this other than by making a pact. In this way the wishes of all became the wishes of many people that were coerced into a state by violence and they were forced to live under authority.¹⁶¹

Huber is of the view that when a resumé is made there are a few salient matters which should be done or avoided. (1) A man by nature is eager for self preservation; (2) he is weak and lacks everything; (3) he cannot acquire that which he needs unless he joins a society of people like himself; (4) he has to behave himself towards those people in such a way

154 *DJC*, 1, 1, VII(24).

155 *DJC*, 1, 1, VII(24).

156 *DJC*, 1, 1, VII(25).

157 *DJC*, 1, 1, VII(25)).

158 *DJC*, 1, 1, VII(26).

159 *DJC*, 1, 1, VII(26)).

160 *DJC*, 1, 1, VII(27)).

161 *DJC*, 1, 1, VII(28)).

that they cause no injury to themselves; (5) consequently he seeks everything which promotes life in the society and avoids everything which is harmful thereto.¹⁶² Grotius also decides that law is that which is just. Just as the opposite of unjust is that which is repugnant to the needs of man's living in a society.¹⁶³ Huber remarks that Grotius treats the deprivation of justice only to the extent in which it applies in his work on war and peace. He pays no attention to those virtues and vices which stop with a single individual and which contribute to the destruction of human society.¹⁶⁴ In the following chapter Huber concludes that he adheres to the old and proven philosophy that the law of nature is that which states immediately that something is either bad or honourable.¹⁶⁵ The law of nations then, is that law which is apart from the law of nature, and postulates a law common to mankind which can comfortably be said to derive from the law of nature.¹⁶⁶ Whereas the law of nature is inborn and engraved, the law of nations is invented and thought out.¹⁶⁷

6. Conclusion

In Huber's philosophy of public law, nature (created by God), the will of the nations in agreement therewith and the will of God posit the formal sources of constitutional law. As a consequence natural law theory, legal comparison and theology play a most important role in the field of constitutional law in general. Natural law, to Huber, is that which, according to the direct instructions of reason, is shameful or good. *Ius gentium* is that law which receives its binding authority from the will of all, or rather the more civilised nations, more or less similar to Grotius's views in his *De Jure Belli ac Pacis*.¹⁶⁸ However, to Huber, divine law and the principles of Holy Scriptures play a very important role in perfecting the natural law and the *ius gentium*. Although Huber acknowledges the importance of man's rational faculties for scientific and philosophic enquiries, he knows that man is a sinful creature and not able to come to true knowledge without the contribution of the Scriptures. To Huber, the rational precepts of natural law and *ius gentium* provide philosophical principles, which could very easily degenerate into fruitless sophistry.

162 *DJC*, 1, 1, IV(22)).

163 *DJC*, 1, 1, IV(23)).

164 *DJC*, 1, 1, IV(24)).

165 *DJC*, 1, 1, V(1)).

166 *DJC*, 1, 1, V(1)).

167 *DJC*, 1, 1, V(6)).

168 Book 1, cap. 1, n. 14.

Because of man's fall into sin, man needs God's revelation in the Holy Scriptures. If the constitutional law practitioner arrives at conclusions in conflict with the Holy Scriptures he must acknowledge that natural law and the *ius gentium* and all applications of reason are subject to the precepts of divine law.

By accepting divine law as a substantive component of constitutional law in general, Huber endeavours to prevent the philosophy of the state and political philosophy in general, from eroding the Biblical foundations of the state and political action. In Chapter 26 of his *De Jure Civitatis*, Huber provides an exposition of the authority of the political sovereign in religious affairs. To Huber the divine precepts binding man's conscience are either natural or revealed. Contra Hobbes, Huber asserts that the sovereign has no authority to intervene in the domain of the naturally valid rules divinely engraved on the human heart, or in the precepts divinely revealed by God.

Citing Biblical authority, Huber argues that God Himself provides the believer with the light necessary for illuminating the mind and the proof of His Spirit: he who believes is absolutely certain of the divinity and the truth of the Scriptural requirements for salvation. The relevance of divine law and the Holy Scriptures for the sphere of constitutional law in general, is contained in the certainty regarding the Scriptures, and the highest truth of man's belief as a result of God's immediate work is generated in and engraved on the hearts of believers, to the effect that the confessions of the Scriptures and its main truths are in no single instance subject to human authority or wisdom, which would not be the case in the event of purely rational statements.

Huber's main aim was to unseat the notion that the divinity of the Scriptures is solely dependent upon human reason. In Chapter 28 of his *De Jure Civitatis*, Huber cites, inter alia, Calvin's *Institutio* and the *Confessio Belgica*. The strongest appeal to Protestant Biblicism, however, comes from the Melanchthonian emphasis on the Spirit and its work in the public sphere.

Ulrich Huber's basic message regarding the sources of justice and accomplishing the aims thereof, is the same as that of the founders of Protestantism, viz. Luther and Melanchthon: for piety and virtue in the public sphere, not man's will, but God's will has to be done. Because God's reason is inaccessible to man, the only true norms of justice are contained in God's will as revealed in man's heart and in the Holy Scriptures. Doing God's will means following the precepts of justice as

contained in the commandments of the Holy Scriptures. Although natural law is known by all men on account of God's revelation of the natural moral law in their hearts, divine law is indispensable on account of man's fall into sin. Man's fall had so darkened the human abilities to know justice and to do God's will, that the standards of divine law are the only true measurements for accomplishing justice and piety in the public sphere. The tenets of justice can be summarised in the two basic commandments of love: love towards God and love towards one's neighbour.

How is it possible to do and accomplish justice in the public sphere? Through God's Spirit – the divine Spirit is a spirit of love – it unites the wills of people towards virtue. Therefore, the divine message in the Holy Scriptures, to the effect that men must love one another, has very important consequences for furthering justice in society.

Is it possible for non-Christians to assist in furthering the aims of justice and benevolence in society? Yes, because God's commandments come to both Christians and non-Christians, and because non-Christians also carry God's commandments of love in their hearts, nobody is exempted from the commands and duties of benevolence, and practising the conditions of justice in society.

Reading Huber's criticism of Hobbes from this perspective produces clarity, firstly, as to his true motives for spending much time in refuting Hobbes' secular views on justice and the implications of his enlightened absolutism in the public sphere, and secondly, for striving to protect the interests of subjects in the private spheres of their existence from the intrusion of an all-powerful Leviathan.

Although Huber's reflections on political covenants pre-empted certain enlightened views on politics¹⁶⁹, his Protestant perspectives on natural and divine law carried forward important principles emanating from the Lutheran Reformation. Foremost it has to be mentioned that a principle of foundational importance emanating from Huber's Protestant thought, is contained in the fact that, different from some of the later reformers, for

169 Raath, A.W.G. & De Freitas, S.A., 2006, The covenant in Ulrich Huber's enlightened theology, jurisprudence and political philosophy, *Acta theologica*, 26(2): 199-226, at 224. Also note that Huber tends to "shift" from rationalism to voluntarism, and vice versa; so e.g. he is sometimes inclined to overlay the role of the human intellect in legal theory (cf. Raath, A.W.G., 2005, Divine law, natural law and reason in Dutch jurisprudence: The rise of moral relativism in the jurisprudence of the Dutch golden age, *Journal for Christian scholarship*, 41(3&4): 1-31.

example Calvin, Luther did not bind the ideal Christian patterns of behaviour to a more static system of precepts in the form of the Old Testamentary Decalogue – in the legal sphere Christians are expected to consider God’s will for them and the whole of mankind in the ever-changing circumstances of history. The fluid demands of justice require believers to make concrete the redeeming will of God in the legal domain not only by consulting the Bible, but by using their God-given power of observation and reason; by practising benevolence in all social relations. The duty of neighbourly love at the heart of natural law postulates demands of benevolence of an anti-positivistic and anti-legalistic nature in all social relations. Therefore, there is no room for the unbridled personal power or will of particular rulers, or for the humanistic effort to make law without reference to values at a deeper level of human existence, or for secular efforts to idealise man’s natural reason or powers of will.¹⁷⁰

From Huber’s reformational views on natural law and the working of the Holy Spirit in the public sphere, it is a small step to a reformational philosophy of fundamental rights based on the Scriptural demands of love – fundamental natural rights given by God, of which humankind’s heart in the kingdom of creation gives testimony, and which serve God and our neighbours through love. Therefore, human rights are fundamentally rights of love, to be maintained for the glory of God. In the social sphere both private and public social rights are of fundamental importance for steering mankind towards attaining peace and justice in society.¹⁷¹

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Sluutel terme/ Key words:

Geregtigheid/ Justice

Hobbes

Huber

Luther

Melanchthon