William Blackstone and the natural law tradition

Andries Raath[1]
Research Fellow in the Department of
Constitutional Law and Philosophy of Law
University of the Free State
RaathA@ufs.ac.za

Elizabeth Oklevitch[2]
Blackstone Legal Fellow

Opsomming

William Blackstone en die natuurregtradisie

Die Engelse regskrywer, William Blackstone, veral bekend om sy werk Commentaries on the laws of England, het 'n groot invloed op die regsdenke (en -praktyk) van die Verenigde State van Amerika, Engeland en Suid-Afrika uitgeoefen. Onderliggend tot sy regsdenke en regsistematiek figureer 'n eksplisiete natuurregsbeskouing wat sy standpunte oor regte, regsnorme en die beginsels van die publiekreg onderlê. Blackstone se regsdenke gryp terug op twee onderskeie tradisies van die natuurreg in die Westerse regsteorie: enersyds die "revolusionêre" natuurregstandpunte van Thomas Hobbes en John Locke; andersyds die metafisiese begronding van natuurregnorme in die natuurregtradisie vanaf Heraclitus tot en met Thomas Aquinas. Alhoewel verskeie punte van immanente kritiek teen Blackstone se benadering tot die natuurstaat, die sosiale kontrak en die rol van die geïsoleerde individu in die regslewe gestel kan word, moet aspekte van sy benadering tot formele regstaatlikheid as belangrike winspunte vir die Engelse common law-tradisie aangemerk word.

1 Research Fellow in the Department of Constitutional Law and Philosophy of Law, University of the Free State.

2 Blackstone Legal Fellow.

1. Introduction

William Blackstone's *Commentaries on the laws of England* is credited with systemizing the English common law[3] and by organizing the mass of common law precepts and practices according to a system of rights derived from natural law.[4] His work enjoyed immediate popularity, and his conception of rights continued to give guidance to courts in Britain, the United States, Europe, and South Africa.[5]

Blackstone's theory of natural law is foundational for his views on rights, justice and the principles of public law. Therefore, an appreciation of Blackstone's theory of rights and justice demands a deeper investigation of his views on and his position in the natural law tradition of Western legal philosophy.[6] Concepts like right, justice and liberty in Blackstone's views on public law can, therefore, only be studied meaningfully from the basis of his natural law theory.

3 Sir William Blackstone's (1723-1780) four volumes *Commentaries on the laws of England* assured him a place in history as one of the greatest scholars of English common law. Cf. http://oll.libertyfund.org/index.php?Itemid=269&id=320&option=com... (accessed 2010/04/08).

4 For the structure of Blackstone's *Commentaries* cf. Kennedy, "The Structure of Blackstone's Commentaries", 28 *Buffalo Law Review*, 205 (1979). Blackstone is credited for the first unprecedented attempt to interpret and codify English common law (Delahunt, "Sir William Blackstone, legal commentator", http://historicalbiographies.suite101.com/article.cfm/thehonourable_william_blackst... (accessed 2010/04/14) at 3. Also cf. Brainard, "18th Century history" http://www.history1700s.com/articles/article1121.shtml at 1 (accessed 2010/04/08).

5 Cf. Nydham & Raath, "Celebrating the common law rights of man – a note on Blackstone's work on natural law and natural rights", 119-133. His clear, lucid style and completeness of his work made his lectures and later writings important sources of the English common law. His *Commentaries* served as a primary instruction toll in England and America well into the nineteenth century and exerted a pronounced influence on the development of the American legal tradition. For Blackstone's influence on the American legal system cf. Schmidt, "Blackstone's View of Natural Law and Its Influence on the Formation of the American Declaration of Independence and the Constitution" at http://www.sullivan-county.com/deism/blackstone.htm (accessed 2010/04/08) and Blackstone Institute, "Bashing Blackstone: The reconstructionists' attack in America's culture war" at http://www.blackstoneinstitute.org/sirwilliamblackstone.html (accessed 2010/04/08). Wortley observes: "The spread of the common law in America was undoubtedly aided by the publication in 1765-9 of Blackstone's *Commentaries*, just as the draftsmen of the Constitution of the U.S.A. found great help from John Locke's philosophical treatises" (*Jurisprudence*, at 39).

6 In opposition to Alschuler, "Rediscovering Blackstone", *University of Pennsylvania Law Review*, 145(1), November 1996:1-55, at 54: "Nothing in William Blackstone's writings ... proposed 'deducing' anything at all from the principles of natural law' and "perhaps Blackstone's description of natural law was merely a pleasing fiction ..."

In spite of the novelties in Blackstone's natural law views, the continuity in his natural law pronouncements can to a large measure be explained from the strands of natural law in the English common law tradition prior to Blackstone – particularly the Judeo-Christian undertones in Blackstone's views dating back to Bracton and Coke. The supremacy of natural law was solidly embedded in English common law by the time Blackstone's *Commentaries* were compiled. Already in 1610 Sir Edward Coke in *Bonham's Case* upheld the general principle that statutes are void if they do not conform to natural law. It is therefore not surprising that Sir William Blackstone in the following century laid down explicitly that "the law of nature being coeval with mankind, and dictated by God himself," is superior in obligation to any other law.; that it is binding "over all the globe, in all countries, and at all times" and that "no human laws are of any validity if contrary to this; and so much of them as are valid derive all their force and all their authority, mediately or immediately, from this original (law)".[7] Blackstone's contribution to natural law philosophy, however, strengthened natural law ideas inimical to arbitrary power, unlimited governmental prerogatives and opposed to the rugged individualism following in the wake of John Locke's views on the isolated individual and the upcoming *Zeitgeist* of sensualism and positivism. Blackstone's contribution to natural law philosophy, is, therefore, of importance not only for understanding his legal theory but also for appreciating the development of formal and material elements of the idea of the state subject to law in the English Common Law.

2. Blackstone's position in natural law theory

2.1 Natural law theory in Western legal philosophy prior to Blackstone

2.1.1 Hobbes' and Locke's conceptions of natural law

The origin and progress of natural law doctrine in Western legal thought point towards a divergence in the idea of a system of law, universal in its application, immutable in its content and rational in its essence and fundamental structure. One stream of natural law thought proceeded along the lines of a revolutionary and individualistic natural law essentially bound up with the basic doctrine of the state of nature as well as with the concept of the state as a social unit based on free contract, constructed arbitrarily and artificially, determined by utility and isolated from metaphysical considerations.

7 1 Comm., 41.

The sharpest deviation from the divine basis of law occurred in Thomas Hobbes' alteration of the words "nature" and "natural", to become the opposite of *civitas*, "reason" and "order". In the philosophy of Hobbes human nature is basically governed by the passions and not by reason. The *status naturalis* is a condition without any obligation or duty – it is a state in which might is right.[8] Hobbes explicitly denies that man has a natural inclination toward help and love – notions which St. Thomas Aquinas frequently mentions. Law does not derive from human nature but is the work of the sovereign maker of the law. The state and its law originate from the absolute will of the sovereign; it affords security and protection by monopolizing all power.[9] It demands strict obedience and subordination through identification of natural law with the positive law of the state. Consequently the state becomes, according to Hobbes, the "Mortal God" which directs all human private and public affairs.[10]

The tension between legal norms and rights in Hobbes' theory has important implications: Firstly, utility alone and in particular the fear of evil (as stated by Hobbes), does not impart force to an agreement; this kind of restriction is insufficient for the powerful who have nothing to fear from the weak. Secondly, Hobbes' views on law, right and duty ultimately undermine (and negate) the intrinsic nature of right: if rights (R) exists prior to violated rights (R1), and if violated right (R1) is what forms fault, and if force (F) can be overcome only by a greater force (F1), R (=F1) can only be violated by a greater right (R2); R2 = F1 = R, which in effect means that R would never be violated.

John Locke's individualist social philosophy followed Hobbes, though he rejected Hobbes' divination of the state as the "Mortal God"; he denied that the Leviathan is the exclusive source of law and he sought means to overcome Hobbes' views on force and right (R2 = F1 = R) by binding the state to more basic structure of law and rights.[11]

8 Cf. Mariàs, *History of philosophy*, 252.

9 In *De cive*, VI, 18, Hobbes describes absolute power as the power of "one man, or council, or court, who by right hath as great a power over each single citizen, as each man hath over himself considered out of that civil state; that is, supreme and absolute ... For if this power were limited, that limitation must necessarily proceed from some greater power than he who is confined by them."

10 Cf. *Leviathan*, Ii, 17: "This is the Generation of that great LEVIATHAN, or rather (to speake more reverently) of that *Mortal God*, to which wee owe under the *Immortal God*, our peace and defence. For by this Authoritie, give 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 ..."

11 To Locke, absolute monarchy is "no form of civil government at all: (*Second treatise of civil government*, par 90).

Although Locke, different to Hobbes, depicts the state of nature as idyllic, as a condition of peace, good will and mutual assistance, he also contends that state government is indispensible. For Locke the function of the state of nature and of the idea of natural law is to establish the inalienable rights of the individual. These innate rights of individuals afford an ultimate criterion for judging all acts of government and all laws of the state – the rights to life, liberty and property make the law; the law does not create them.[12] However, Locke's conception of the legislative power hews to Hobbes' approach to legal norms: the supreme and original law-forming power within the state is supposedly bound only to natural law; every specific legal power – also in the private spheres of law – is derived from it. Hence Locke observes: "Nor can any edict of anybody else, in what form so ever conceived, nor by what power so ever be backed, have the force and obligation of law which has not its sanction from the legislative which the public has chosen and appointed."[13] He does, however, introduce the limitation that there still remains in the people a supreme power to remove or alter the legislative power, when the people find the legislative act contrary "to the trust reposed in them".[14]

Because of Locke's profound individualism the legal order arises from contracts between individuals, who are induced by their rather selfish interests to enter into these contractual relationships, cloaked in the solemn and venerable language of the traditional philosophy of natural law.[15] The characteristic tone of individualism and its related preponderance of commutative justice and of self-interest over distributive justice and the common good was the logical outcome of the revolutionary individualist trend in natural law philosophy in the seventeenth and eighteenth centuries.

12 The sequence of Locke's reasoning seems to be: The law of nature is the decree of the divine will discernibly by the light of nature and indicating what is and what is not in conformity with man's rational nature, and for this very reason commanding or prohibiting; the natural rights of man take their origin from the law of nature; the natural rights are the origins of all manmade laws. In his *Essays on the law of nature*, Locke observes that it is clear that all the requisites of a law are found in natural law. For, in the first place, it is the decree of a superior will, wherein the formal cause of law appears to consist; secondly, it lays down what is and what is not to be done, which is the proper function of a law (113).

13 *Second Treatise*, VI, 134.

14 *Second Treatise*, XIII, 149.

15 Cf. Rommen, *The natural law. A study in legal and social history and philosophy*, 89.

2.1.2 Metaphysically grounded theories of natural law

2.1.2.1 Ancient Greek and Roman conceptions of natural law

The second stream of natural law thought is represented by the more conservative idea of natural law grounded in metaphysical reality, it rejects the idea of a mythical state of nature and takes its origin from God as the supreme Lawgiver and the grounding of the jural duties of the human person in a divine metaphysical order. This line of thinking was already manifest in Heraclitus of Ephesus' (cir. 536-470 B.C.) views on a fundamental and eternal law of harmony, which exists unchanged amid the continual variation of phenomena: not chance, lawlessness, or irrational change, but a fundamental law, a divine *logos*,[16] a universal reason holds sway and guides the processes of nature.[17] The primordial norm of moral being and conduct emanates from a divine mind and all human laws are fed by one divine law.[18] At the basis of Heraclitus' philosophy there is the idea of an eternal law of nature that corresponds to man's reason as sharing in the eternal *logos*.[19] There is a natural, unchangeable law, rationally perceivable, from which all human laws draw their force – not the whims and fancies and fickleness of the uncertain masses, but the eternal law of nature has binding force and validity.[20]

In Plato's and Aristotle's philosophy of law the idea of a universal, immutable and rationally perceivable system of natural law precepts manifests even stronger. In Plato's *Laws* the constitutive force of natural law norms is explained by the Athenian: "When there has been a contest for power, those who gain the upper hand so entirely monopolize the government as to refuse all share to the defeated party and their descendents ... Now, according to our view, such governments are not polities at all, nor are laws rights which are passed for the good of particular classes and not for the good of the whole

16 Cf. Vollenhoven, *Geschiedenis der wijsbegeerte*, 76.

17 A double harmony: "harmoniè aphanès" and "harmoniè phanarè".

18 Heraclitus states: "Wisdom is the foremost virtue, and wisdom consists in speaking the truth, and in lending an ear to nature and acting according to her. Wisdom is common to all ... They who would speak with intelligence must hold fast to the [wisdom] that is common to all, a city holds fast to its laws, and even more strongly. For all human laws are fed by one divine law (Fragments 112-114, in Bakewell, *Source book in ancient philosophy*, 34.

19 To Heraclitus "all human laws are sustained by one divine law, which is infinitely strong, and suffices, and more than suffices, for them all" (in Baker, *The political thought of Plato and Aristotle*, 23).

20 Rommen, *The natural law*, 6.

state. States which have such laws are not polities but parties and their notions of justice are simply unmeaning."[21]

All human positive law should reflect the true natural law: law that serves the common weal. There is a marked difference between the true and proper natural law and human positive law; natural law sets the standards of justice for positive law. Whereas natural law is the true law, true right and remains the same, positive law change and may claim legal force only in so far as it partake of natural law.[22]

In Aristotle's legal theory the differences between natural law and positive law are even more distinct: natural law has its source in the essence of the just in nature; positive law originates in the will of the lawmaker or in an act of an assembly. That which is naturally rights is unalterable; it has everywhere the same force, quite apart from any positive law that may embody it.[23] Statutory law varies with every people and changes with the times. The application of the universal idea of justice to the variable circumstances of life demands that natural law has to be concretized *in* the changing and mutable positive law. Natural law maintains its binding force for positive law and its ethically grounded norm. Because positive law is variable and imperfect equity has to be applied to ensure justice is particular circumstances.[24]

Cicero grounded jural duties and rights on natural law and thus prepared the way for the Christian approaches to these concepts. Cicero appealed to the Stoic emphasis on right reason and the universal law of nature, which holds sway throughout the universe.[25] To Cicero the *lex nata* (the law within us) is the foundation of law in general; natural law is identical with right reason, it is universally valid, un-

21 Plato, *Laws*, IV, 715.

22 The conflict between man's duties to human laws and the duties owing to the law of God surfaced in Greek literature e.g. the *Antigone* of Sophocles (cf. Sabine & Thorston, *A history of political theory* (1973)).

23 Aristotle in his *Ethics*, V, 7, distinguishes between natural and conventional justice: "It is natural when it has the same validity everywhere and is unaffected by any view we may take about the justice of it. It is conventional when there is no original reason why it should take one form rather than another and the rule it imposes is reached by agreement, after which it holds good."

24 Cf. Barker, *The political thought of Plato and Aristotle*, 327f.

25 No person shall be allowed for the sake of his own advantage to injure his neighbour; this principle follows directly from Reason which is in Nature, "which is the laws of gods and men" (*De officiis*, III, 291).

changeable and incapable of being abrogated; it is the eternal law.[26] Cicero motivates the immutable and universally validity of natural law as follows: "If the principle of Justice were founded on the decrees of peoples, the edicts of princes, or the decisions of judges, then Justice would sanction robbery and adultery and forgery of wills, in case these acts were approved by the votes or decrees of the populace. But is so great a power belongs to the decisions and decrees of fools that the laws of nature can be changed by their votes, then why do they not ordain that which is bad and baneful shall be considered good or salutary? Or, if a law can make Justice out of Injustice, can it also make good out of bad? But in fact we can perceive the difference between good laws and bad by referring them to no other standard than Nature: indeed, it is not merely Justice and Injustice which are distinguishable by Nature, but also and without exception things which are honourable and dishonourable." Cicero adds: "For since an intelligence common to us all makes things known to us and formulates them in our minds, honourable actions are ascribed by us to virtue, and dishonourable actions to vice; and only a madman would conclude that these judgments are matters of opinion, and not fixed by Nature."[27] The pattern in Cicero's thought is the contrast of the law of nature, as the measure and inner source of validity with positive law, which, to him, is merely a shadow and image of the true law.[28]

The idea of a fundamental divine orderliness underlying all manifestations of law, received its first comprehensive treatment in the legal philosophy of St. Thomas Aquinas. St. Thomas' treatment of law in general proceeds from the perspective that God's providential government of the world reflects a deeper structure of and a fundamental basis for all other manifestations of law.[29] The idea of law takes its roots from the principles by which God made and governs the universe.[30] The whole universe reflects a divine order and provi-

26 Justice binds all human society and is based on one law, namely right reason (*De legibus*, I, 345).

27 *Laws*, I, xvi & I, x, xvii ff.

28 In *The republic*, III, xxii, Cicero stresses the fact that true law is right reason in agreement with nature.

29 Cf. *ST*., I-II, Question 91, Article 1.

30 The eternal law is identical with the reason of God; it is the eternal plan of divine wisdom by which the whole creation is ordered. Although this law is beyond human comprehension, it is not contrary to human reason.

dence as it is in the mind of God Himself.[31] Although the human mind with its limited capacities cannot know the eternal law as it is in the mind of God Himself, God has offered us two reflections from which the orderly and providential government of God's works can be made known: natural law and divine law.[32]

In St. Thomas' synthesis of biblical truths with ancient natural law theory, he also grounds his natural law views and its accompanying duties in the "architecture" of universal law – the order of which all of the various categories and dimensions of law fit together, beginning with their origin in God, reaching all the way down to man.

In St. Thomas' biblically grounded natural law theory, eternal law as it is in the mind of God Himself is the apex of all law. The natural law and the divine law are the respective manifestations of the eternal law. Natural law is the reflection of eternal law in the created rational mind, whilst divine law is the reflection of eternal law in special revelation. Both natural law and divine law flow down to human law, which includes both written law and the "unwritten law" of sound custom.[33]

Natural law needs and must be supplemented by human law – the human laws are themselves derived from the natural law either by way of specific determinations of a general rule or of conclusions from indemonstrable principles (e.g. from the general principle that one should refrain from harming others, reason infers that one should not murder, steal, or commit adultery).[34]

To St. Thomas the natural law is a reflection of a deeper orderliness permeating the whole of creation. This orderliness is an imprint of the divine light on the human being and forms the basis of man's rational nature participating in the eternal law.[35] The natural law is a general revelation in the deeper structures of the created human intellect, that which can also be called the "deep conscience" of the human

31 St. Thomas relies on Proverbs 8:23.

32 Natural law is a reflection of divine reason in created things; divine law is revelation. To St. Thomas reason and faith is consolidated into one harmonious structure. Cf. *ST*., I-II, Question 93, Article 2.

33 St. Thomas' four kinds of law are four norms of reason, manifesting themselves at four levels of cosmic reality, but remaining one reason throughout.

34 *ST*., I-II, Question 95 a. 1-2; Question 91 a. 2.

35 *ST*., I-II, Question 91, Article 2.

person. The imprint of divine law on the deeper conscience of man St. Paul calls "the law written on our hearts".[36] This imprint on the innermost selves of human persons is the foundation of everything the human person knows about right and wrong. To the measure that the human person is a rational creature, it has a share of the eternal Reason and this participation is called the natural law.[37]

St. Thomas furthermore distinguishes between various levels, or grades, of natural law precepts. First level precepts are completely transparent; second level precepts are slightly less transparent, and third level precepts are rather difficult. For the reason, St. Thomas Explains, second and third level precepts are also promulgated in the Law of Moses.[38]

Besides the natural and the human law in St. Thomas' theory of law, it was necessary for the directing of human conduct to have a divine law. St. Thomas mentions four reasons for this: firstly, besides the natural and the human law, man should be directed towards his end by a law given by God; secondly, it is necessary for man to be directed in his proper acts by a law given by God, for it is certain that such a law cannot err; thirdly, human law cannot sufficiently curb and direct interior acts, and, therefore, it is necessary for this purpose that a divine law should supervene, and fourthly, in order that no evil might remain unforbidden and unpunished, it is necessary for the divine law to supervene, whereby all sins are forbidden.

2.2 Blackstone's views on natural law and the deeper structure of law in the universe

2.2.1 Blackstone's treatment of the divine source of law

Most post-medieval legal theories are indebted to St. Thomas' structural treatment of natural law and its relatedness to other normative expressions

36 Romans 2:14-15.

37 *ST*., I-II, Question 91, Article 2.

38 *ST*., I-II, Question 100, Article 11. Compare Article 1: "For there are certain things which the natural reason of every man, of its own accord and at once, judges to be done or not to be done: e.g. 'honor thy father and thy mother', and 'Thou shalt not kill, Thou shalt not steal': and these belong to the law of nature absolutely. And there are certain things which, after a more careful consideration, wise men deem obligatory. Such belong to the law of nature, yet so that they need to be inculcated, the wiser teaching the less wise: e.g. 'Rise up before the hoary head, and honor the person of aged men', and the like. And there are some things, to judge of which human reason needs Divine instruction, whereby we are taught about the things of God: e.g. 'Thou shalt not make to thyself a graven thing, nor the likeness of anything; Thou shalt not take the name of the Lord thy God in vain.'"

of law. Blackstone's theory of law is no exception. He also incorporates the main distinctions of divine, natural and positive (or municipal) law into his theory of law. He substitutes Thomas' idea of the Eternal Law for a broad perspective of the divine providence guiding the universe towards its ultimate end.

Although Blackstone nowhere specifically mentions the Eternal Law as God's providential government of the world, his treatment of the natural law and divine law both reflect a deeper and more basic divine source from which all law and jural obligations spring. Such a deeper law has parallels with St. Thomas' treatment of the Eternal Law underlying all other normative expressions of law in the universe. To Blackstone God's providential government of the universe is an encompassing whole. The human faculties and powers are all "spectators" in the works of God's divine providence – also the human ability to know and interpret God's physical and moral universe.[39] Through God's providential government of the world he established the law of nature; in His infinite wisdom He laid down only such laws as were founded in those relations of justice that existed in the nature of things antecedent to any positive precept of law.[40] God also provided human beings with rational abilities to know the precepts of divine law; God also gave human beings the ability to apply the precepts of natural law to the practical circumstances of daily life.[41]

2.2.2 Blackstone's theory of natural law

2.2.2.1 The law of nature

To understand Blackstone's use of natural law ideas to structure and justify his rights system, it is useful to know the substance of his theory.[42] Although Blackstone's work is far from a theological or philosophical treatise, he does premise his interaction with the laws of England with a thorough theoretical introduction. In this introduction, which he designates *Of the nature of laws in general*, he lays out his conception of the various types of law, their source, their proper aims, the ways they are known, and how they relate to each other.[43]

39 1 Comm., 10.

40 1 Comm., 40.

41 Cf. 1 Comm., 10.

42 Some scholars argue that his appeals to natural law are superficial custom, but are still helpful to know what he says he believes before denying that he actually holds to those beliefs. For the purposes of this discussion, Blackstone will be taken at his word with regard to his philosophical framework.

43 Blackstone's *Commentaries* proposed to lay down a general and comprehensive plan of the laws of England; to deduce their history; to enforce and illustrate their leading rules and fundamental principles; and to compare them with the laws of nature and other nations (cf.

In each of these categories, Blackstone demonstrates continuity with the traditional natural law theory of his time.[44]

Blackstone opens his discussion of law in the same manner he approaches the whole of the common law later in his work, moving from the general to the specific. He begins with a definition of law in its broadest sense, defining it as a "rule of action which is prescribed by some superior and which the inferior is bound to obey".[45] Still speaking of law generally, he writes that "when the Supreme Being formed the universe ... he impressed certain principles upon that matter, from which it can never depart".[46] Blackstone then addresses the law specifically applicable to human action, calling this the law of nature.[47] Because man is dependent on God, he is obliged to submit to his will, the law of nature.[48]

According to Blackstone, God, in His "infinite *goodness*", gave man an effective motivator to pursue knowledge of the natural law he obliged to follow.[49] That "prompter to enquire after and pursue the rule of right" is "our own self-love".[50] For God has "so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former; and, if the former be punctually obeyed, it cannot but induce the latter".[51] Because of this relationship, knowledge of the law of nature can be approached from different angles. A.W. Alschuler

Orth, "Sir William Blackstone: Hero of the Common Law", 156).

44 Blackstone sought to provide the English common law with the same systematic, rational treatment that Newton and others had given to the natural sciences. He felt the common law should be complete and independent, as if it were a uniform system of logic.

45 All references to Sir William Blackstone's Commentaries are to his Commentaries on the Laws of England. Oxford: The Clarendon Press (1765), (a reprint of the first edition with supplement (1966)), cited as 1 Comm., 38.

46 I Comm., 38. Blackstone's views on the law "impressed' on the universe, is reminiscent of Aquinas' theory of the Eternal Law.

47 I Comm., 38.

48 For Blackstone's natural law theory cf. Nydham & Raath, "Blackstone, natural law and the future", 77-94 and "Celebrating the common law rights of man – a note on Blackstone's work on natural law and natural rights", 119-133. According to Blackstone the law of nature is co-eval with mankind and dictated by God himself, it is superior in obligation to any other law; it is binding all over the world, in all countries, and at all times: no human laws are of any validity, if contrary to natural law (I Comm., 41).

49 I Comm., 40.

50 I Comm., 40.

51 I Comm., 40.

characterizes Blackstone's perspective as an assertion that, "(t)he study of God and of human nature led to the same understanding".[52] Indeed, rather than viewing the natural law as an amalgam of complicated, much less arbitrary, principles, Blackstone insisted that God "has graciously reduced the rule of obedience to this one paternal precept, 'that man should pursue his own happiness'".[53] Once man has thus been propelled to seek the precepts of the natural law, he faces the task of discovering them. Here, too, Blackstone expresses the view that God has shown grace to man after man's fall into sin.

Blackstone reverts to the idea of the social contract as a mechanism to integrate the interests (and happiness) of the individual and the social body in the quest to serve the common good. The "original contract of society" demands that the whole should protect all its parts, and that every part should pay obedience to the will of the whole; or, in other words, that the community should guard the rights of each individual member, and that (in return for this protection) each individual member should submit to the laws of the community; "without which submission of all it was impossible that protection could be certainly extended to any".[54]

The state of nature is not a historical state of affairs, but the condition of man considered as an individual, in abstraction from all social relations.[55] Reflection on this state of nature is the source of most of the rules of natural law identified by Blackstone. The state of nature is one of equality, liberty and community of property, where every person has the right to punish infringements of these natural rights.[56] Blackstone's treatment of the original contract begs the question: what is the relation between the state of nature and the single foundation of natural law – man's "true and substantial happiness"? Blackstone leans in favour of the individual good and happiness. The only natural good is individual and pre-social, and the ends of the law are the protection of pre-existing individual rights.[57] Therefore, natural law looks back to the individual in his state of nature as a standard

52 Alschuler, "Rediscovering Blackstone", 22.

53 I Comm., 41.

54 I Comm., 47-48.

55 I Comm., 123.

56 IV Comm., 7.

57 I Comm., 48, 124 & II Comm., 15.

and the end of the law is the protection of individual rights.[58]

The original contract, to Blackstone, is composed of two stages: firstly, the implied contract of society (*pactum unionis*) and the implied contract of government (*pactum subjectionis*). This distinction permeates the whole of Book Four of Blackstone's *Commentaries*. Blackstone's exposition of crimes proceeds from the individual to society to government; all crimes are arranged after those against divine law and the law of nations: crimes against the king and government (Book IV, cc. Vi-ix), against the commonwealth (Book IV, cc. X-xiii), and against the individual (Book IV, cc. Xiv-xvii). In the process Blackstone admits natural law as a source of law while the autonomy of municipal law is strictly insisted upon.

2.2.2.2 Blackstone on the relatedness of the law of nature and divine law

One way that mankind can come to know the law of nature is through the application of reason. Blackstone emphasizes that as a creature of rationality and free will, man was given not only the moral obligation but also the rational ability to "discover the purport of those laws" of nature.[59] However, Blackstone explains, with logic consistent with the Christian doctrine of the fall of mankind, that reason alone is inadequate to discover Gods commands. For, "every man now finds ...; that his reason is corrupt, and his understanding full of ignorance and error".[60] In light of this, God graciously gave Scripture, divine law, to mankind. The precepts contained therein are "really a part of the original law of nature" and therefore the two laws, divine (which Blackstone here terms "direct revelation") and "natural", are theoretically equally authoritative, though due to man's fallen reason, divine law must be regarded as superior.[61]

Blackstone's treatment of divine law is brief, but it is nonetheless significant. First, he acknowledges it as the ultimate authority on discerning natural law. This carries great weight, for as will be demonstrated in the discussion on the relationship between natural law

58 I Comm., 48, 125 & II Comm., 15.

59 I Comm., 40.

60 I Comm., 41.

61 I Comm., 42. According to Blackstone the law of nature is binding upon all human beings because it is dictated by God Himself. Cf. Schmidt, "Blackstone's View of Natural Law and Its Influence on the Formation of the American Declaration of Independence and the Constitution", at 1.

and municipal law, municipal laws that violate the law of nature are not truly law.[62] Blackstone's view of this principle is quite nuanced; for instance he refrained from drawing the common conclusion from these premises that judicial review is therefore necessary. However, his assertion of municipal law's subjection to natural law, and thus to divine law as an express articulation of natural law realties, is still significant; Scripture "is the basis of Christianity, and 'Christianity is part of the laws of England'".[63]

2.2.2.3 Natural law and the human law

In St. Thomas' treatment of natural law, human reason has a distinct role and function. From the precepts of the natural law, the human reason needs to proceed to the more particular determinations of certain matters. These particular determinations devised by human reason, are called human laws, provided that the other essential conditions of law be observed. By the human law is meant the application of the natural law, by public authority, to the circumstances of particular human societies; natural law is the product of correct reasoning from the general considerations of what is good and right.

The human law depends on the natural law for its authority. If human legislators refuse to enact what is good and right, they are not true laws, but frauds and acts of violence. The relationship between natural law and the human law involves enforcement. However, the enforcement of positive law demanded by the natural law can take two forms. The first is the enforcement universally demanded by the natural law, called conclusion, for example the punishment for murder. The second is the prohibition by way of determination because it requires choice among possible responses and because it *makes* something wrong which was not previously wrong.

The enforcement in the case of "conclusions" are the same in all cultures – they are ingrained in the legal cultures of all peoples in all times and places. Determinations are not cultural universals but do vary widely among legal cultures and from place to place.

62 The authority of divine law also impacts Blackstone's theory, as he recognizes that not only laws, but theories about law must comply with revealed truth, as evidenced by his dismissal of the idea of an actual, historical social contract in part on the grounds of an incompatible biblical account of social history (I Comm., 41, 70).

63 Finnis, "Blackstone's theoretical intentions", 176, quoting I Comm., 59.

Aquinas' distinction between *conclusion* and *determination* in the relationship between natural law and positive law is, therefore, accepted and applied in Blackstone's Commentaries. Blackstone also holds that conclusion and determination are ways of grounding human law in natural law. To Blackstone there are a great number of different points in which both the divine law and natural law leave a man at his own liberty, but which are found necessary for the benefit of society to be restrained within certain limits. Murder is expressly forbidden by the divine law, and demonstrably by the natural law; and from these prohibitions arise the true unlawfulness of this crime. Those human laws that add a punishment to it, do not at all increase its moral guilt, or add any obligation *in foro conscientiae* to abstain from its perpetration. If any human law should allow or enjoin us to commit it, we are bound to transgress that human law or else we must offend both the natural and the divine law. However, with regard to matters that are themselves indifferent, and are not commanded or forbidden by those superior laws; such for example as exporting wool into foreign countries, the inferior legislature has scope and opportunity to interpose, and to make that action unlawful which before was not so.[64]

2.2.2.3.1 Natural law as the source of legitimacy

Blackstone's attention, both in his introduction and throughout the entire *Commentaries*, is focused upon municipal law. However, natural law, God's will for human action, plays an integral part in Blackstone's conception of municipal law in at least two ways. First, natural law provides the legitimacy and proper aims of civil government's legislative authority, by way of social contract theory. Second, natural law, being superior to municipal law, has implications for the content of law, for it sets important boundaries for lawmakers while giving them broad discretion to make laws as they see fit.

2.2.2.3.2 Natural law and the social contract

Blackstone defines municipal law as "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong".[65] For Blackstone, the right of the state to prescribe rules of civil con-

64 I Comm., 43.

65 I Comm., 43.

duct arises from a theoretical social contract. He writes of man, that "municipal or civil law regards him also as a citizen, and bound to other duties ... which he has engaged in by enjoying the benefits of the common union".[66] In Blackstone's theoretical framework, man existed in an independent state of nature, possessing the natural rights of personal security, personal liberty, and private property.[67] In exchange for the community's protection of those rights, he agreed to obey the laws of the community.[68] Such a contract, a promise to protect in exchange for a promise to obey, "*in nature and reason* must always be understood and implied, in the very act of associating".[69] Blackstone infers that this contract, or exchange, "should be regarded as one of the most important elements of natural law in the *Commentaries*".[70] He argues that this reciprocal contract "provides the link ... between the formal juridical 'rights and wrongs' referred to in the definition of municipal law ... and the natural and rational rights which English law successfully upheld"[71] As a consequence of this reciprocal, natural law-based contract, there arises "the natural, inherent right that belongs to the sovereignty of a state ... of making and enforcing laws".[72]

From this contract, civil authorities derive not only their law-making power, but their limited law-making objective: the good of society. For, "(e)very man, when he enters into society, gives up a part of his natural liberty" but possesses political liberty, which "is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public".[73] Consequently, according to Alschuler, while government could justly abridge natural rights, "(w)hen human law lim-

66 I Comm., 45.

67 I Comm., 129.

68 I Comm., 48.

69 I Comm., 47, 48 (emphasis added).

70 Finnis, "Blackstone's theoretical intentions", 178.

71 Finnis, "Blackstone's theoretical intentions", 179.

72 I Comm., 47.

73 I Comm., 125.

ited natural rights for corrupt, arbitrary or otherwise inadequate reasons, this law was not binding".[74] This position follows logically from the notion of a contract, since man could not have given away more than he originally possessed, and even in nature he had no right to arbitrarily deprive another of life, liberty, and property; consequently he had no right to delegate government.[75] Blackstone acknowledged the need to evaluate the success of the English common law in actually securing the rights existing in man from his natural state (in fact, he noted that as one of his objectives for the *Commentaries*).[76] Regardless of the answer to that query, it is clear from Blackstone's opening pages that due to his social contract theory, which he grounded in natural law, the protection of natural rights was the proper objective of municipal law.

2.2.2.3.3 The extent to which natural law determines the content of municipal law

In Blackstone's legal theory, natural law not only legitimizes the state's making of municipal law and establishing that law's proper aim, but it affects the content of law. Because natural law, as the will of God for man, is comprised of universally applicable, God-ordained principles, it is superior to man-made law, and therefore makers of municipal law are charged with establishing laws consistent with these principles. However, while the natural law provides guidance on some of the matters municipal law may legitimately address, it is indifferent on others. Some readers of Blackstone emphasize only one of these relationships between natural law and municipal law, guidance or indifference, and neglect the other. Such a reading of Blackstone results in a skewed view of his natural law theory. The first extreme assessment of Blackstone's view of the relationship between natural law and municipal law, which is in fact a misrepresentation, is that natural law ought to specifically direct the entirety of municipal law.

74 Alschuler, "Rediscovering Blackstone", 30.

75 Alschuler, "Rediscovering Blackstone", 30 n. 174.

76 "Let us, therefore, proceed to examine how far all laws ought, and how far the laws of England actually do take notice of these absolute rights, and provide for their lasting security" (I Comm., 125).

One author characterized classical natural law theory as a belief that "all positive law ... was but a more or less feeble reflection of an ideal body of perfect rules, demonstrably by reason, and valid for all times, all places and all men".[77] He wrote specifically of late eighteenth century Europe, Blackstone's place and time, that, "(s)tarting with the proposition that natural law was a body of eternal principles universally applicable, it was believed that the whole body of these principles might be discovered at one stroke by an effort of reason"[78] However, as Alschuler accurately perceives, "(c)ontrary to the perceptions of modern critics ... Blackstone did not believe that judges or legislators could use the principles of natural law to derive appropriate answers to all or even most legal questions".[79] This position is supported by examining the context of language facially indicating that natural law dictates all aspects of municipal law, and also by noting Blackstone's explicit language on the relationship between natural law and municipal law and his illustrations of that relationship.

A superficial reading of Blackstone's *Commentaries* could render such an understanding, for he did write in his introduction that "in order to apply (the law of nature) ..., it is still necessary to have recourse to reason: whose office it is to discover, as was before observed, *what the law of nature directs in every circumstance of life*".[80] The context of Blackstone's statement is very helpful in understanding his meaning. This sentence comes from a transitional paragraph in which Blackstone moves from discussing the attributes of the law of nature, to giving his view on the purpose of divine law. Having described the law of nature as, first, in accordance with "immutable laws of good and evil",[81] second, reducible to the precept of man pursuing his own happiness, and third, superior to all human laws,[82]

77 Pound, "The theory of judicial decision II. Nineteenth-century theories of judicial finding of law", 802.

78 Pound, "The theory of judicial decision", 804.

79 Alschuler, "Rediscovering Blackstone", 24-25.

80 I Comm., 41 (emphasis added).

81 I Comm., 40.

82 I Comm., 41.

he takes the opportunity to express that this great law, awesome as it is, does not expressly dictate all things and human reason "still" plays a role in its application. In essence, Blackstone is saying that reason is the usual medium by which this great law is "brought down to earth" to apply to the circumstances of individual men. That his emphasis here is on the function of reason, not on the scope of natural law's dictates, is evidenced by his next paragraph. Blackstone uses his discussion of reason to transition into the role of divine law. In the next section he says that on account of man's corrupted reason and consequent inability to correctly deduce the fullness of natural law, God graciously provided Scripture to expressly reveal elements of the natural law.[83]

Lest there be any doubt that Blackstone did not believe that natural law dictated every aspect of municipal law and that man, by reason and comprehension of Scripture, merely had to discover both the law and its proper applications, Blackstone elsewhere explicitly refutes the idea. On the very next page, in a discussion devoted to the relationship between natural law and municipal law, Blackstone writes: "There is, it is true, a *great number of indifferent points, in which both the divine law and the natural leave a man at his own liberty*; but which are found necessary for the benefit of society to be restrained within certain limits. And herein it is that human laws have their greatest force and efficacy ..."[84]

Thus, Blackstone clearly acknowledges points of "indifference", in which the natural law is silent and man may properly not discover, but make law (including the natural law principle, expressed through the social contract theory explained above, that laws must be directed toward the good of society), but they are made, not discovered by man, nonetheless.

The understanding of Blackstone's theory of natural law as it relates to the content of municipal law is reinforced

83 I Comm., 41, 42.

84 I Comm., 42 (emphasis added).

by Blackstone's illustrations throughout his work. For instance, in his introduction to the *Commentaries*, Blackstone explains that municipal laws may either have no natural law basis or may be a discretionary application of a general natural principle and still be proper law. To illustrate the first relationship, Blackstone says that the laws outlawing monopolies and declaring that a woman's property becomes her husband's once they marry 'have no foundation in nature; but merely created by the law, for the purposes of civil society."[85] To illustrate that sometimes the particular applications of a natural law principle are rightly left to the discretion of the municipal lawmakers and that those applications are binding once enacted as positive law, Blackstone also uses two examples. First, he says that although the duty to obey superiors is a natural law principle, "who those superiors shall be, and in what circumstances, or to what degrees they shall be obeyed, is the province of human laws to determine".[86] Likewise, natural law establishes that robbery is wrong, but human law must decide in which cases taking another's property may be justified, such as when a landlord seizes personal property from a tenant who has not paid rent.[87]

The illustrations provided by Blackstone, in conjunction with his explicit language on the topic and a proper contextual understanding of the text seemingly to the contrary, indicate that for Blackstone, natural law does not and should not direct every determination of municipal lawmakers. In fact, Blackstone gives such extensive leeway to lawmakers to use their discretion that some have accused him of reducing natural law to a negligible role in guiding municipal law. This position is likewise an unjustified over-emphasis on one aspect of Blackstone's theory. Responding to Blackstone's position that the content of municipal laws is discretionary so long as it does not contradict natural law, scholars claimed this an "empty test",[88]

85 I Comm., 55.

86 I Comm., 55.

87 I Comm., 55.

88 Lucas, Ex parte Sir William Blackstone, 'Plagiarist': A note on Blackstone' and the natural

and that it would "(i)n no way ... allow the legislative power to be bound by principles accepted prior to the exercise of its will".[89] Consequently, this logic continues, Blackstone's theory "is in danger of collapsing into a positivism that will regard explanation as extraneous to the exposition of law".[90] However, this perspective on Blackstone's theory underestimates the importance of Blackstone's qualifier of positive law. While these scholars all recognize that Blackstone deems positive law invalid if it contradicts natural law, they seem to miss the significance of this limitation. For Blackstone, natural law has a powerful restraining effect.

Many aspects of municipal law are not dictated by natural law, but they are still subject to eternal, universally applicable limitations. Reflecting on the broad discretion given to lawmakers in deciding legal questions, Alschuler comments that natural law "simply indicated the essential needs of human beings and demanded that people respect the essential needs of others".[91]

In Blackstone's system of rights, respecting the essential needs of others is no small duty and carries many implications. Thus, to say natural law "simply" indicates these matters provides a useful contrast to the view that it dictates every minute detail but understates natural law's true role. Natural law establishes principles of order that provide boundaries, expansive as they may be, in which municipal law must function.[92]

Many scholars view Blackstone's assertion that municipal law is subject to natural law principles as a "toothless" threat because Blackstone does not allow judicial review to invalidate municipal law that violates natural law. Yet

law", 153.

89 Lucas, "Ex parte Sir William Blackstone", 154-155.

90 Finnis, "Blackstone's theoretical intentions", 182.

91 Alschuler, "Rediscovering Blackstone", 2.

92 "To instance in the case of murder: this is expressly forbidden by the divine, and demonstrably by the natural law; and from these prohibitions arise the true unlawfulness of this crime. Those human laws, that annex a punishment to it, do not at all increase its [sic] moral guilt ..." (I Comm., 42).

Blackstone does articulate other ways to deal with rogues municipal laws that have strayed beyond their proper natural law bounds. First, Blackstone emphasizes the legislature as the seat of sovereign lawmaking power, as the source of legal reforms. In England, the members of Parliament are "the makers, *repealers*, and interpreters of the English laws; delegated to ... *adopt, and cherish any solid and well weighed improvement* ..."[93] When the common law was defective, the legislature was specifically tasked with enacting "remedial statutes" to rectify the problem.[94]

Since the burden of creating right law rests on the legislature, Blackstone saw judges as properly taking a more conservative role to ensure the municipal law's compliance with natural law. Blackstone wrote that when applying a remedial statute, "it is the business of the judges so to construe the act, as to suppress the mischief and advance the remedy".[95] This is consistent with the mainstream thought of his time, for Michael Milgate explains the dominant legal thought of the Middle Ages and early modern period,[96] specifically its rejection of judicial review, by arguing, "(i)f one assumes that the sovereign wishes to have statutes read in light of natural law, that the legislator could not have inteneded to deviate from its paths, then there is rarely a need (for judges) to invalidate the statutes themselves".[97] So, for Blackstone, the typical way for a judge to ensure the law complies with natural law is to interpret and apply it so as not to effect manifest injustice.[98] In instances where the common law has drastically deviated from reason, and thus natural law, Blackstone permits more direct action. For, if judicial precedent is "more evidently contrary to reason; much more if it be contrary to the divine law". Blackstone adds that the actual law of the

93 I Comm., 9 (emphasis added).

94 I Comm., 87.

95 I Comm., 87.

96 Milgate, "Human rights and natural law: From Bracton to Blackstone", 54.

97 Milgate, "Human rights and natural law", 66.

98 Given the broad range of discretion permitted to lawmakers, interpreting a statute so that it was not against a specific natural law precept would only require keeping the application of laws within wide bounds, not twisting them to conform to a rigid standard.

land must be in conformity with natural law and that judges are not bound to follow that precedent, for a decision that "is manifestly absurd or unjust" is not law.[99]

To properly understand Blackstone's view of judges in ensuring municipal law's compliance with divine law, it is important to understand Blackstone's perspectives on the common law of England. In short, Blackstone believed that the laws, at their heart, were in accord with natural law. Thus, judges could interpret laws to support natural law principles in their application with confidence that they were advancing the law's objective. Likewise, a common law decision contradictory to reason, and thus natural law, was not law because the law of the land did not violate natural law. Therefore, the judge who formed the decision had simply erred in identifying the law of the land. Blackstone's prescription for judicial behaviour does not display a confidence that the body of law before any judge in England does comply with that law. For this reason, while Blackstone clearly describes the appropriate actions of a judge faced with ambiguous legislation or a stray unreasonable precedent, his thoughts are not developed fully enough in the *Commentaries* to indicate his view on a judge's proper response to municipal laws that truly violate natural law. That is, he does not give direction to judges confronted with a statute with no feasible interpretation compatible with natural law or with a precedent violating natural law that is not an outlier but an accurate representation of common law, the established custom of the land. He does, however, indicate appropriate responses to such laws on the part of the people.

Blackstone recognizes the capacity, indeed the duty, of individuals and society as a whole to refuse to submit to municipal laws that violate natural law. Although he recognizes no laws in England that would justify such resistance, he does make his theoretical point clear. Speaking of murder, he writes "if any human law should allow or enjoin us to commit it, we are bound to transgress that human law, or else we must offend both

99 I Comm., 70.

the natural and the divine".[100] Similarly, municipal law could be so noxiously offensive to natural law that the people as a whole would be justified to disobey the law because the contract that empowered the government to make the laws would have effectively been cancelled.[101] Blackstone wrote: "(I)n cases of national oppression the nation has very justifiably risen as one man, to vindicate the original contract subsisting between the king and his people."[102] Alschuler aptly summarized Blackstone's view of appropriate responses to municipal laws that do not comply with natural law when he commented: "If Parliament were to defy the law of nature (a prospect that Blackstone thought almost inconceivable), the only remedy would lie in the streets rather than in the courts."[103] In addition to opposing laws that violated the natural law, awareness of the possibility of justifiable rebellion surely served a deterrent function, as well, prompting lawmakers, whom the public perceived as deriving their authority from natural law, to think carefully before enacting laws grievously contrary to its principles.

Thus, Blackstone's assertion that the content of natural law must be in line with the precepts of natural law was defended through several mechanisms of ensuring compliance. Lawmakers had a duty to enact laws within the generous bounds set by the natural law and judges were entrusted with preserving the law as laid down for them, but also of interpreting and applying the law consistent with natural law precepts. Further, the people had a primary duty of conscience to God, and a right to insist that civil government did not compel them to break His law.

100 I Comm., 43.

101 Finnis, "Blackstone's theoretical intentions", 175.

102 I Comm., 82.

103 Alschuler, "Rediscovering Blackstone", 19 n 106.

3. Conclusion

To the debit of Blackstone's legal philosophy it should be stated that his theoretical position reflect "theoretical inadequacies" and reflects "the confusion and terminological inexactitudes which have so muddled the interpretation" of his legal theory.[104] His natural law position represents a synthesis of the two major streams of thought in the natural law tradition: on the one side Blackstone grounds law in a divine orderliness permeating the whole of the universe; on the other hand he utilizes insights regarding the law of nature, the state of nature, the social contract and man's original isolation from social life.[105] This pre-social state of nature is not a historical state of affairs, but a hypothetical state of equality, liberty and community of property, where every person has the right to punish infringements of these natural rights.[106] Because of Blackstone's synthesis of various strands of natural law thinking, it is difficult to determine his views on a number of aspects (e.g. how judges should respond to unjust statutes from English common law).

According to Blackstone's legal theory the original state of nature is "an ambiguous and impoverished explanatory category, because natural and positive law lack intelligible modes of interconnection, and because superior will rather than reasonable connection between end and means is made the basis of obligation".[107] Furthermore the original state of nature is not an ideal stage in man's social development. Due to the evils in the state of nature, the more positive law aspires to the state of nature the more primitive and undesirable is it.[108] Blackstone is also unclear about explaining why the family qualifies as a "natural society"[109] although the human person in the state of nature is isolated from social life. Blackstone's treatment of the individual's right to reputation and good name seems inconceivable in isolation from man's social life and the recognition of man's reputation and good name by fellow human beings.[110] Blackstone's theory also fails to explain the relationship between positive and natural law: the primary good is individual and pre-social and the end of the law is the protection of

104 Cf. Finnis, "Blackstone's theoretical intentions", 181.

105 I Comm., 123.

106 IV Comm., 7.

107 Finnis, "Blackstone's theoretical intentions", 182.

108 Cf. III Comm., 327. Also compare III Comm., 4, 168 & I Comm., 193, 213.

109 I Comm., 47, 422.

110 Finnis, "Blackstone's theoretical intentions", 180.

the individual's rights.[111] To the foregoing could also be added Blackstone's silence on the reconciliation of natural individual rights and civil social rights and the lack of clarity in his use of the terms "principles of society" which are neither natural nor merely positive.[112] The most profound inadequacies in Blackstone's legal theory concern his grounding of jural right in the state of nature, and not in the duties emanating from the deeper moral strata of human existence and the intercourse between human beings. Blackstone formally follows the "architecture" of St. Thomas' fourfold classification of law, however, the jural duties of both rulers and subjects in terms of a basic normative moral law, do not have any material binding authority.

Although Blackstone also utilizes Locke's views on the social contract and the natural rights emanating from the state of nature, he explicitly leans in favour of Hobbes' views in a number of respects. For example, he disagrees from Locke that the individual has a right to remove the legislature or that the subjects in the state have a right to resist the sovereign.[113]

Blackstone's work at interpreting and systemizing English common law formally followed the scheme of foundational principles consistent with the Judeo-Christian system of law – the status of law as a rule of human action in an orderly universe – revealed by God as a systematic but complex structure of norms applicable to both the nations of the world and to municipal systems of law, but his *Commentaries* reflect tensions with material jural consequences emanating from his views on the original state of nature, the social contract and the normative structure of law.

To Blackstone's credit it must be stated that one of the most important aspects surfacing from his contribution to the common law system was his emphasis on the idea of the rule of law – paramount laws in the form of the natural law – binding both the ruler and the ruled and serving as the critical norm for the existing positive legal order and for reforms to bring it into accord with the demands of justice. Blackstone's rule of law theory flows from his earnest emphasis in favour of supra positive measures for evaluating the laws of the lawmaker – the principle that positive law should aspire to meet the standards set by natural law. Similar to Aquinas Blackstone argues that the tenets of natural law have real enforceable validity to the measure that positive law which conflicts with natural law are not truly law; positive law must be fully based on natural law. Hence Thomas Aquinas says that every

111 I Comm., 48, 124: II Comm., 15.

112 Cf. I Comm., 131; III Comm., 168.

113 Cf. I Comm., 51-52; 161-162, 173, 213.

rule of law positivized by man is really rule of law only to the extent that it is deduced from natural law.[114] Blackstone's efforts at postulating universal and immutable norms of a super positive nature for evaluating human conduct in all spheres of law, at least in a formal sense, endeavoured to secure the principle postulated by Bracton, who, under Henry III, stated that "(t)he king ought not to be subject to man, but to God, and to the law; for the law maketh the king."[115]

Following Locke's attack on feudal theories of political power as a private patrimonium (*regalia*) owned by the sovereign, Blackstone became the first common law thinker to subscribe to the idea of the rule of law in its first stage of development. Similar to Locke, Blackstone views the state as a public community of law, within which political power is to be exercised in the public interest, subject to general legislation – there is no absolute and unlimited sovereignty, but power limited by the very purpose of the political body, viz. the protection of fundamental rights. Since the state finds its natural legal justification in the protection of these natural rights, Blackstone's conception of the state subject to law may be considered an instance of the emerging idea of the state subject to law gradually unfolding in the common law tradition.

Blackstone was the theorist in the English common law tradition to start out from an abstractly construed state of nature establishing the necessary juridical relations between separate individuals in subjection to universally valid and immutable laws of nature founded in human reason.[116] However, Blackstone's conception of the legislative power of the state – similar to that of Locke – slants towards the line of Bodin: it is the supreme and original law-forming power within the state and is bound only to natural law; every specific legal power is derived from it – similar to Hobbes' statements concerning the state of nature and the commonwealth being the ground of his conception of sovereignty. In effect it implies that the identity of the state of nature and violence justifies the absolute power of the sovereign; the blurring of the distinction of law and violence constitutes the presupposition that legitimates the principle of sovereignty; the state of nature survives in

114 ST., I-II, Question 95 a. 2.

115 Mekkes, *Proeve eener critische beschouwing van de ontwikkeling der humanistische rechtsstaatstheorieën*, 262: "Ipse autem rex non debet esse sub homine, sed sub Deo et sub lege, quia lex facit regem."

116 In this regard Blackstone follows Locke's view that "(t)he state of Nature has a law of nature to govern it, which obliges every one, and reason, which is that law, (and) teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty and possessions."

the person of the sovereign, who is the only one to preserve its natural *jus contra omne*s. Sovereignty thus presents itself as an incorporation of the state of nature in society, or, if one prefers, as a state of indistinction between nature and culture, between violence and law, and this very indistinction carries the potential of sovereign violence. Sovereign violence because the state of nature did not necessarily have to be conceived as a real epoch, but rather could be understood as a principle internal tot the state revealed in the moment in which the state is considered "as if it were dissolved" (*tanquam dissoluta* according to Hobbes).[117] Therefore Blackstone's insufficient regard for the enforcement of the principles of the material law state reflects the same enigmatic deficiencies as the democratic theories of the law state based on the social contractarianism of Hobbes and Locke. Or, as Habermas would put it: state institutions are not precluded from substituting public moral communicative action for instrumentally rational behaviour, thus lacking the insight (and ability) to fulfil the ideals of normative social integration through law. Blackstone does not really have a legitimate answer to the threats emanating from the Hobbesian toning down of humanitarian ideals in favour of the growth of instrumental and strategic rationality and the teleological ideals of technological, scientific and economic development.

Although Blackstone's theory of public law does not reflect Locke's revolutionary bent to the point of renouncing the original compact and the power reverting back to the people, it is an unanswered question to what extent Blackstone leaves room for effective resistance to highly unjust laws. Fact remains that although Blackstone did not argue through the philosophical underpinnings of the principles and ideas of philosophers like Hobbes and Locke, he earnestly sought to bind the making and enforcement of law to supra temporal norms of universal validity, immutable in their effect, accessible by human reason and setting standards beyond the whims and fancies of the lawmakers – pioneering efforts at introducing the principle of the state subject to law as a formal ideal to the English system of common law. Blackstone set the English common law, albeit in a rudimentary and formal form, on the path towards the rule of law, that which the distinguished constitutional theorist, Julius Stahl, described as the "state subject-to-law-approach". The state must precisely determine course and limits of its own activity as well as the citizens' spheres of liberty in the mode of justice ("in der Weise des Rechts") and make them unbreakably secure; the concept of the law-state not simply maintains the legal order without administrative purposes, nor merely protects the rights of individuals; the typical structure

117 Cf. Agamben, *Homo sacer. Sovereign power and bare life*, 105-106

of the rule of law (the state subject to law) does not at all indicate goal and content of the state, but only the mode and manner in which to realize the latter."[118]

Bibliography

AGAMBEN, G. 1998. *Homo Sacer. Sovereign power and bare life*. Stanford: Stanford University Press.

ALSCHULER, A.W. 1996. Rediscovering Blackstone. *University of Pennsylvania Law Review*, 145(1), November, 1-55.

BAKEWELL, C.M. 1907. *Source Book in ancient philosophy*. New York: Charles Scribner's Sons.

BARKER, E. 1959. *The political thought of Plato and Aristotle*. New York: Dover Publications.

BLACKSTONE, W. 1765. *Commentaries on the laws of England*. Four Volumes. Oxford: The Clarendon Press.

BLACKSTONE INSTITUTE, Bashing Blackstone: The deconstructionists' attack in America's culture war, http://www.blackstoneinstitute.org/sirwilliamblackstone.html (accessed 2010/04/08).

BRAINARD, R. 18th century history, http:www.history1700s.com/articles1121.shtm/ (accessed 2010/04/08).

CICERO, M. 1948. *De re publica and De legibus*. (Transl. by C.W. Keyes). London: Heinemann.

DELAHUNT, J. Sir William Blackstone, legal commentator, http://historicalbiographies.suite101.com/article.cfm/thehonourablewilliamblackstone (accessed 2010/04/14).

FINNIS, J.M. 1976. Blackstone's theoretical intentions. *Natural Law Forum*, 163-183.

HOBBES, T. 1904. *Leviathan*. (Ed. by Macpherson, C.B.). Harmandsworth, Middlesex: Pellican Books.

KENNEDY, D. 1979. The structure of Blackstone's Commentaries. *Buffalo Law Review*, 205.

LOCKE, J. 1954. *Essays on the law of nature*. (Ed. by W. Van Leyden). Oxford: The Clarendon Press.

118 Stahl, *Die Philosophie des Rechts*, II, 137, 138.

LUCAS, P. 1963. Ex parte Sir William Blackstone, 'Plagiarist': A note on Blackstone and the natural law. *The American Journal; of Legal History*, Vol. 7(2), April, 142-158.

MARIAS, J. 1967. *History of philosophy*. (Transl. by S. Appelbaum, & C.C. Strowbridge). New York: Dover.

MEKKES, J.P.A. 1940. *Proeve eener critische beschouwing van de ontwikkeling der humanistische rechtsstaatstheorieën*. Utrecht-Rotterdam: Libertas-Drukkerijen.

MILGATE, M. 2006. Human rights and natural law: From Bracton to Blackstone, 10, *Legal History*, 54.

NYDHAM, L. & RAATH, A.W.G. 2009. Celebrating the common law rights of man - a note on Blackstone's work on natural law and natural rights. *Journal for Juridical Science*, 34(2), 119-133.

NYDHAM, L. & RAATH, A.W.G. 2009. Blackstone, natural law and the future. *Journal for Christian Scholarship*, 45(4), 77-79.

PLATO. 1978. *The laws*. Harmondsworth, Middlesex: Penguin Books.

POUND, R. 1923. The theory of judicial decision II. Nineteenth century theories of judicial finding of law, 36(7), *Harvard Law Review*, 7(2), May, 802.

ORTH, J.V. 1980. Sir William Blackstone: hero of the common law. *American bar Association Journal*, 66, February, 155-159.

ROMMEN, H. 1964. *The natural law. A study in legal and social history and philosophy*. (Transl. by T.R. Hanley). North Jefferson, St. Louis: Herder Books.

SABINE, G.H. & THORSTON, T.L. 1973. *A history of political theory* (4th edn.). Hisdale, Illenois: Dryden Press.

SMIDT, K. Blackstone's view of natural law and its influence on the American Declaration of Independence and the Constitution, http://www.sullivan-county.com/deism/blackstone.htm (accessed 2010/04/08).

VOLLENHOVEN, D.H. Th. 1950. *Geschiedenis der wijsbegeerte*. Vol. I. Franeker: T. Wever.

WORTLEY, B.A. 1967. *Jurisprudence*. Manchester: University Press.