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Disciplinary Brief

JUSTICE, JUDGMENT AND VIRTUE IN THE LAW

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In his Theology Brief on *Justice and Rights*, Professor Nicholas Wolterstorff has offered an account of justice that distinguishes between *first order justice*, in which individuals and institutions act justly in their everyday affairs, and *second order justice*, which concerns the laws, sanctions and systems that secure first order justice. In his account, first order justice is best understood as each person or institution rendering to others their right or due. Here a right is a morally legitimate claim which can arise in two ways: firstly, by being conferred as a consequence of a social practice (such as by entering a contract or holding a public office) or, secondly, because it is grounded in the dignity of the rights-bearer (such as a natural or human right).

Three Distinctives

Right Action or Personal Virtue?

Fundamental to Professor Wolterstorff's argument is the proposition that justice, properly and biblically understood, involves an interpersonal, normative state of affairs concerning how individuals and institutions interact with each other, rather than a personal virtue or character trait. Focussing on the Greek terms *dikaios* and *dikaiosunē*, he argues that these terms are rarely used in the New Testament to denote a personal character trait and almost always refer or allude to just or right action. [1] This appears to distinguish his position from a virtue-based approach, which understands just conduct to be secondary to, and ultimately attributed to, an individual's personal virtue or character. [2]

It is not entirely clear, however, how far Professor Wolterstorff wishes to distinguish his position from virtue-ethics approaches because in several places he refers to justice as a virtue and he adopts the definition of justice proposed by the Roman jurist Ulpian, which is nothing other than a definition of the virtue of justice. [3] This is broadly consistent with the stance taken by Thomas Aquinas when he

endorsed Isidore of Seville's definition of justice as the particular virtue that 'makes men capable of doing just actions'. [4] Wolterstorff appears to acknowledge that human beings will not act justly unless they themselves have the character and disposition to do so.

Justice and Judgement

Also fundamental to Professor Wolterstorff's paper is the proposition that first order justice is distinct from and more fundamental than second order justice. In his longer study on the topic, *Justice: Rights and Wrongs*, Wolterstorff critiques the argument advanced by Professor Oliver O'Donovan that the biblical texts place more emphasis on 'judgment' – and especially 'just judgment' – than they do on 'justice' conceived abstractly and generally. [5] According to Wolterstorff, O'Donovan mistakenly considers that the key Hebrew word *mishpat*, which appears hundreds of times in the Old Testament, is properly to be understood as referring to the act of 'judgment', rather than the more abstract state of affairs that we call 'justice'. This a controversy that I will take up further below.

Justice and Rights

A third distinctive of Professor Wolterstorff's argument is that the essence of justice is to accord others their *rights*. He acknowledges that this emphasis on rights might be confused with a 'possessive individualism' which is based, not on the Bible or on the Christian tradition, but on the secular philosophies of the Enlightenment. However, he argues that the idea of natural rights has a much older and more Christian and biblical provenance. In his book, *Justice: Rights and Wrongs*, he again takes issue with O'Donovan on this question of the origin of rights, adopting an important study by Professor Brian Tierney which showed that church lawyers of the twelfth century were already using the Latin term *ius* in a way that designated the particular *subjective* rights to which individuals were legally entitled and not only to refer to an *objectively* just state of affairs. [6] More recently, however, Professor John Milbank has entered this controversy, arguing that this misses the point. The argument that was advanced by specialist scholars such as Michel Villey was not that there was no concept of subjective right (in the sense that an individual could have a particular *ius* in respect of some specific thing) but that the right was not *subjectively grounded* in the will and desire of the isolated individual. [7]

Practical Consequences

Human Rights and Anti-Discrimination Laws

This is not merely a theoretical argument. [8] These differences of opinion have practical implications. Professor Wolterstorff draws attention to the importance of rights-arguments for the advancement of many of the great social justice movements of the twentieth century. While these arguments were framed in the language of rights, he points out they were directed at various forms of systemic injustice. The American *Civil Rights Act* of 1964, for example, prohibited discrimination on the basis of race, colour, religion, or

national origin in the provision of goods and services in any place of public accommodation, such as hotels, restaurants and theatres. Similarly, the *International Convention on the Elimination of All Forms of Racial Discrimination*, adopted by the General Assembly of the United Nations in 1965, required signatory states to take measures to eliminate all forms of discrimination on the basis of race, colour, descent, or national or ethnic origin if that discrimination has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Since the 1960s, the scope of anti-discrimination laws has expanded tremendously. There are now very long lists of protected attributes in most jurisdictions and the areas in which discrimination is unlawful have multiplied so that even many private associations and religious organisations are subject to anti-discrimination requirements. This raises significant concerns for such organisations because maintenance of their distinctive religious or other identity depends on their ability to adopt particular standards of membership or to employ staff who share their religious convictions. In most anti-discrimination laws, the rights of religious groups to maintain their unique character are protected by special carve-outs that run against the grain of such laws. Over time, however, the exceptions that protect religious freedom have contracted, as the underlying premises of anti-discrimination laws have been pressed to their logical conclusions.

Subjective Grounding of Rights

Why has this happened? As Professor Milbank has argued, rights have come to be understood as essentially individual and subjective in nature, not only in their legal expression, but also in their philosophical and theological foundations. [9] On this view, the individual right not to be discriminated against is considered more basic and fundamental than the right of a religious group or organisation to maintain its distinctive character. Accordingly, when there is a conflict between such rights, the individual right must prevail over the collective right. This is applied even to the right to religious freedom itself, which is increasingly confined to the personal and the private, while its corporate and public dimensions are progressively restricted. There is a lot at stake, therefore, in these debates about the origin and nature of human rights. [10]

Liberal social ontologies tend to understand all social formations and cultural groups—including the state itself—as compositions of individuals. [11] On this view, only individuals are ontologically real and have normative weight. Social groups exist to meet the needs and wants of individuals. They come into being when individuals deliberately create them or when they are recognised by some positive act of the state. This means that families, religious communities and cultural groups tend to be seen as special kinds of voluntary association, like any other voluntary relationship established within the free market. They have weight in moral, political and legal deliberation only to the extent that individuals or the state positively attribute significance to them. As a consequence, in any contest between the rights of an individual and the rights of a social group, the rights of the individual must have normative priority. If a group right is, in some particular circumstance, to prevail, it can only be because the group is a vehicle of the rights of the

individuals that compose the group, and the collective sum of these individual rights outweighs the right of the disaffected individual. This is because the rights of individuals are regarded as more natural, basic and fundamental than group rights. In this way, as Benjamin Berger has put it, the '[l]aw shapes religion in its own ideological image and likeness and conceptually confines it to the individual, choice-centred, and private dimensions of human life'. [12]

Theological Perspectives

Subsidiarity and sphere sovereignty

Within Roman Catholic social thought, the term *subsidiarity* has come to refer to a principle which resists the stark duality of individual and state that is characteristic of liberal political philosophy. [13] According to Pope John Paul II, the principle of subsidiarity recognises that:

> a community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to coordinate its activity with the activities of the rest of society, always with a view to the common good. [14]

Such an approach is often called *personalism*, because it seeks to affirm two important truths about humanity: firstly, the dignity of each individual person and, secondly, the embedding of each individual within a matrix of associations and communities. Human beings have inherent dignity, but this dignity does not isolate the individual from his or her social context and does not fixate, as Immanuel Kant did, on the autonomous will of the individual as the loadstar of ethical reasoning. [15]

Within Reformed Christian thought, a similar perspective is advanced under the name of *sphere sovereignty*. As Professor Wolterstorff has elsewhere pointed out, sphere sovereignty is the view that human life is 'differentiated into distinct spheres', each with its own authority structure which is not delegated to it by some external authority but is original to it. [16] According to its best known advocate, Dutch theologian and politician Abraham Kuyper, the principle has a theological basis, namely 'the Sovereignty of the Triune God over the whole Cosmos, in all its spheres and kingdoms, visible and invisible'. This 'primordial Sovereignty', he argued, 'eradiates in mankind in a threefold deduced supremacy': in the state, in society and in the church. [17] Moreover, according to Kuyper, within society there are several particular 'social spheres'—including especially the family, business, science and art—which 'do not derive the law of their life from the superiority of the state', but are rather subject directly to the highest authority of God himself. [18] It follows, in the words of Kuyper's fellow reformed theologian, Herman Bavinck, that the state ought to 'recognize and maintain the various life spheres of family, church and culture' and should respect their independence. [19]

Simple Space or Complex Space?

Subsidiarity and sphere sovereignty are not merely abstract principles. They have deep roots in Christian reflection on human nature and human sociality. In the thirteenth century, Thomas Aquinas modified the

position taken by the Greek philosopher Aristotle, by maintaining that human beings are not only *political* animals, but also *social* animals. [20] Aquinas recognised the existence of what German historian Otto von Gierke described as a 'manifold and graduated system' of 'intermediating units' lying between the individual on the one hand and the empire and church on the other. [21] John Milbank has called this sort of social arrangement *complex space*, which means that society consists of a whole array of intermediate groups and institutions, such as guilds, trade unions, religious associations and universities, that are 'not simply subordinate to the greater whole', but rather are formed into a complex network of 'free associations and complex varying jurisdictions'. [22] This contrasts with what Milbank calls the *simple space* of liberal modernity, in which the only basic terms are the rights of individuals and the power of the state. [23] In his ground-breaking work, *Law and Revolution*, Harold Berman has similarly argued that the most distinctive characteristic of the Western legal tradition has been 'the coexistence and competition within the same community of diverse jurisdictions and diverse legal systems', in which no particular community or institution is necessarily regarded as 'sovereign' in any absolute sense. [24]

What is it about Christian faith and practice which historically gave rise to this complex space in which communities and groups have enjoyed an inherent freedom to associate and govern themselves in order to achieve their particular purposes? The duality of church and state is an important part of the answer. Its roots lie in the teaching of Christ that his disciples ought to 'render to Caesar the things that are Caesar's and to God the things that are God's' (*Luke* 20:25). As resident aliens, whose citizenship is heavenly (*I Peter* 1:1, 2:11; *Philippians* 3:20; *Ephesians* 2:12, 19), [25] Christians are counselled to submit to the authorities, acknowledging that they are instituted by God to punish evil and praise the good (*Romans* 13:1-7; *I Peter* 2:13-14). However, in case of conflicting obligations, they are also required to obey God rather than men (*Acts* 4:19, 5:29), for Christians are ambassadors of the kingdom of heaven (*II Corinthians* 5:20; *Ephesians* 6:20) and owe their highest allegiance to Jesus Christ, who alone is King of kings and Lord of lords (*I Timothy* 6:15; *Revelation* 17:14; 19:16).

Two Loves, Two Cities

Reflecting on these teachings, St Augustine of Hippo (354–430) proposed that there are two cities: the earthly city characterised by love of self and the heavenly city characterised by love of God. [26] Pope Gelasius I (492–496) taught that whereas the role of kings and the role of priests had once been combined (such as when the Roman emperors bore the title *pontifex maximus*), after Christ the two roles were separated on account of 'human weakness', each operating in 'its sphere of operation'. [27] Consequently there were 'two swords' by which the world is ruled: the consecrated authority of the priests and the royal power. [28] Especially after the investiture contest of the eleventh and twelfth centuries, the Roman concept of jurisdiction was used by civil lawyers and canon lawyers to identify the particular matters that fell within the authority of church and state. [29] In the striking words of Étienne de Tournai (1128–1203):

> In the same city under the same king there are two people. With two people there are two types of life. With two types of life there are two forms of government. From the two forms of government arise two jurisdictions, the city and the church. The king of the city is Christ.

> There are two peoples and two orders in the church, clerics and laypeople. There are two types of life, the spiritual life and the life of the flesh. There are two types of government, priestly authority and princely power. There are two jurisdictions, divine and human justice, rights, and equity. If each is rendered its due, all things will be harmonious. [30]

According to Brian Tierney, it was this insistence on jurisdictional boundaries between popes and emperors, bishops and kings, priests and princes, that largely explains the emergence of what we today know as constitutional government. [31] It meant, in practice, that 'none of the coexisting ecclesiastical and secular legal systems that constituted the western legal tradition could claim to be entirely all-inclusive or omnicompetent' and therefore 'each had to develop constitutional standards for locating and limiting sovereignty, for allocating governmental powers within such sovereignty, and for determining the basic rights and duties of members'. [32] In *Law and Revolution*, Harold Berman has shown how the Western legal tradition came to be characterised by a plurality of jurisdictions and legal systems—not only ecclesiastical and imperial—but also royal, urban, feudal, manorial and mercantile. Berman argues that 'this plurality of jurisdictions and legal systems' made 'the supremacy of law both necessary and possible'. [33] The result was the complex space to which John Milbank has referred, in which a diversity of 'intermediate' corporations and associations—religious, scholarly, commercial and professional—operated within an overarching framework of law, qualifying the power claims of secular rulers and helping to keep them within constitutional bounds. [34]

Justice, Judgment and Virtue

The Apostle Paul's teaching was that rulers were servants of God, responsible to administer just judgment against wrongdoers (*Romans* 13:4). [35] This was consistent with the teaching of the Old Testament, which required kings and judges to enact just judgment (*Deuteronomy* 1:16; 16:18). To fulfil this task, it was necessary that the judges were capable, God-fearing, trustworthy and averse to dishonest gain (*Exodus* 18:13-23). In the striking language of *Amos* 5:24, righteous judgment is compared to a life-giving stream of water. Contrary to the argument of Professor Wolterstorff, [36] the text does not separate judgment from justice. The passage literally reads: 'but let run down like water judgment and righteousness like a stream enduring'. The two key Hebrew terms, *mishpat usedaqah*, are at the centre of the grammatical construction. The same occurs earlier in the passage, where the opposite ethical evaluation is expressed using the same grammatical construction: 'you who turn to wormwood judgment and righteousness in the earth cast down' (*Amos* 5:7). This intimate association between the masculine *mishpat* (judgment) and the feminine *tsedaqah* (justice) appears many times in the Old Testament and is especially predicated of David (*II Samuel* 8:15; *II Chronicles* 18:14), Solomon (*I Kings* 10:9; *II Chronicles* 9:8), the ideal king Messiah (*Psalm* 99:4; *Jeremiah* 23:5, 33:15) and fundamentally of God himself (*Isaiah* 33:5; *Jeremiah* 9:24). [37]

In New Testament times, the Caesars had increasingly asserted the prerogatives of deity, proclaiming themselves to be gods. [38] Under the influence of Christian teaching, however, later Roman emperors 'abandoned their claim to be true divinity on earth and recognized instead in God the origin of their power'. [39] From as early as the eighth century, kings and emperors were expected at their coronations

to swear oaths that they would, among other things, execute justice and mercy in their judgments, and later, that they would govern in accordance with the established customs and laws of the realm. [40]

In his recent book, *The Ways of Judgment*, Professor O'Donovan distinguishes between three conceptions of justice: justice-as-right, justice-as-virtue and justice-as-judgment. [41] Justice-as-right is a state of affairs in which persons and things are in an altogether just set of relationships. Justice-as-virtue is an ordered disposition of the powers of the soul which disposes a person to act justly. Justice-as-judgment refers to the act of moral discrimination pursuant to which a wrong act or a wrong state of affairs is effectively set right. Justice-as-right is a presupposition of justice-as-judgment, which can only be fully enacted by those that possess justice-as-virtue. [42] While the original creation was entirely good and therefore exemplified a just state of affairs (*Genesis* 1:31), the fall from this primordial goodness necessitates judgment (*Genesis* 3:14-19) and our need to recover the virtue of justice in and through the Gospel (*Romans* 1:16-16-17). This is, I think, a helpful way to think about it, consistently with the tenor of Scripture as a whole.

End Notes

[1] This is despite their conventional translation as ‘righteous’ and ‘righteousness’, terms which in contemporary idiomatic English denote a personal character trait.

[2] G E M Anscombe, ’Modern Moral-Philosophy’ (1958) 33(124) *Philosophy* 1; Alasdair C MacIntyre, *After Virtue: A Study in Moral Theory* (University of Notre Dame Press, 3rd ed, 2007).

[3] Alan Watson (ed), *The Digest of Justinian* (University of Pennsylvania Press, 1998) I.i.10: ‘Justice is a steady enduring will to render to everyone his right’. The Latin text is: ‘*Iustitia est constans et perpetua voluntas ius suum cuique tribuendi*.’

[4] *Summa Theologiae*, II.II Q 57, Art 1.

[5] Nicholas Wolterstorff, *Justice: Rights and Wrongs* (Princeton University Press, 2008) 68-75, discussing Oliver O’Donovan, *The Desire of the Nations: Rediscovering the roots of political theology* (Cambridge University Press, 1996).

[6] Wolterstorff, above n 5, ch 2, discussing Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625* (Scholars Press, 1997).

[7] John Milbank, ’Against Human Rights: Liberty in the Western Tradition’ (2012) 1 *Oxford Journal of Law and Religion* 1, discussing Michel Villey, *Le droit et les droits de l’homme* (Presses universitaires de France, 1983) and Michel Villey, *La Formation de la pensée juridique moderne* (PUF, 2006).

[8] For a highly illuminating discussion of the controversy, see Francis Oakley, *Natural Law, Laws of Nature, Natural Rights: Continuity and Discontinuity in the History of Ideas* (Continuum, 2005).

[9] Milbank, above n 7.

[10] I discuss this in Nicholas Aroney, ’Freedom of Religion as an Associational Right’ (2014) 33 *University of Queensland Law Journal* 153.

[11] Charles Taylor, ’Atomism’ in *Philosophy and the human sciences* (Cambridge University Press, 1985) 187. See also Nicholas Aroney and Patrick Parkinson, ’Associational Freedom, Anti-Discrimination Law and the New Multiculturalism’ (2019) 44 *Australasian Journal of Legal Philosophy* 1.

[12] Benjamin L Berger, *Law’s Religion* (University of Toronto Press, 2015) 100.

[13] The best explanation of origin and nature of the idea in Roman Catholic social teaching is Russell Hittinger, ’Social Pluralism and Subsidiarity in Catholic Social Doctrine’ (2002) 16 *Annales Theologici* 385.

[14] John Paul II, *Centesimus Annus: Encyclical Letter on the Hundredth Anniversary of Rerum Novarum* (May 1, 1991) [48].

[15] I discuss the Christian theological roots of human dignity in Nicholas Aroney, ’The Rise and Fall of Human Dignity’ (2021) 46 *BYU Law Review* 1211.

[16] Nicholas Wolterstorff, ’Abraham Kuyper on the limited authority of church and state’ (2008) 7(1) *Georgetown Journal of Law & Public Policy* 105, 109-110.

[17] Abraham Kuyper, *Lectures on Calvinism* (Eerdmanns, 1931) 79.

[18] Ibid 90-91.

[19] Herman Bavinck, ’The Kingdom of God, The Highest Good’ (2011) 2 *The Bavinck Review* 133, 160.

[20] Nicholas Aroney, 'Subsidiarity, Federalism and the Best Constitution: Thomas Aquinas on City, Province and Empire' (2007) 26 *Law and Philosophy* 161, 177-179.

[21] Otto von Gierke, *Political Theories of the Middle Age* (Frederic William Maitland trans, Cambridge University Press, 1900 [1922]) 20-21.

[22] John Milbank, 'On Complex Space' in *The Word Made Strange: Theology, Language, Culture* (Blackwell, 1997) 268, 276, 284.

[23] Ibid 272. See also John Milbank, 'Shari'a and the True Basis of Group Rights: Islam, the West and Liberalism' in Rex Ahdar and Nicholas Aroney (eds), *Shari'a in the West* (Oxford University Press, 2010) 135, 140.

[24] Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983) 10. I discuss differing theological and legal conceptions of sovereignty in Nicholas Aroney, 'Christianity, Sovereignty, and Global Law' in Rafael Domingo and John Witte (eds), *Christianity and Global law* (Routledge, 2020) 267.

[25] See also *Hebrews* 11:13, observing that the Old Testament saints—and especially Abraham, Isaac and Jacob—had also lived as foreigners and aliens—see *Genesis* 12:10, 17:8, 19:9, 20:1, 21:23, 34, 23:4, 28:4, 32:4, 47:4, 9; *Exodus* 2:22. The *Torah* accordingly reminded the Israelites that they once had been sojourners in Egypt and that they should not oppress the stranger in their midst (eg, *Exodus* 22:21; 23:9); and it also included rules that specifically benefitted and protected foreigners (eg *Exodus* 23:12; *Leviticus* 16:29; 19:10; 23:22).

[26] Augustine, *The City of God* (413-426) XIV.28.

[27] Gelasius, *The Bond of Anathema*, reproduced in Oliver O'Donovan and Joan Lockwood O'Donovan, *From Irenaeus to Grotius: A sourcebook in Christian political thought, 100-1625* (Eerdmans, 1999) 178.

[28] Gelasius, *Letter to Emperor Anastasius*, in ibid 179. On the unfolding distinction between 'two cities' and 'two swords', see O'Donovan, above n 5, 193-211.

[29] Berman, above n 24, 221-4.

[30] Stephen of Tournai, *Summa* on Gratian's *Decretum*, cited in Kenneth Pennington, 'Stephen of Tournai (Étienne de Tournai) (1128–1203)' in Olivier Descamps and Rafael Domingo (eds), *Great Christian Jurists in French History* (Cambridge University Press, 2019) 35, 45.

[31] Brian Tierney, *Religion, Law and the Growth of Constitutional Thought* (Cambridge University Press, 1982) 8-13.

[32] Berman, above n 24, 225.

[33] Ibid 25, 10.

[34] See also John Milbank, *Beyond Secular Order: The Representation of Being and the Representation of the People* (Wiley Blackwell, 2013) 159.

[35] See also *I Peter* 2:14.

[36] Wolterstorff, above n 5, 73-74.

[37] See also *Jeremiah* 22:3, 22:15; *Ezekiel* 18:5, 19, 21, 27, 33:14, 16, 19, 45:9.

[38] *I Thessalonians* 2:4. See Bruce Winter, *Divine Honours for the Caesars: The First Christians' Responses* (Grand Rapids: Eerdmans, 2015).

[39] Walter Ullmann, *Principles of government and politics in the Middle Ages* (Routledge, 2nd ed, 1966) 27.

[40] W J Loftie, *The Coronation Book of Edward VII* (Cassell, 1902) 108-9. I discuss the role of oaths of office in Nicholas Aroney, 'The Rule of Law, Religious Authority, and Oaths of Office' (2018) 6 *Journal of Law, Religion and State* 195.

[41] Oliver O'Donovan, *The Ways of Judgment* (Eerdmans, 2005) 6-7.

[42] Ibid 7, 31.

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