

# ON SUPERNATURAL LAW: ABOUT THE ORIGINS OF HUMAN RIGHTS AND NATURAL LAW IN ANTIQUITY

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## 1. Introduction<sup>1</sup>

Human rights can be traced back to an earlier and older concept, which viewed the rational nature of man as a limitation on the power of the sovereign. In this sense, modern ideas on human rights are rooted in the concept of natural law<sup>2</sup>, one of the many products of antiquity's notions of the law<sup>3</sup>. The idea of limiting the power of the sovereign, the hubris of the tyrant, was an element of Greek political thought practically from its origins<sup>4</sup>, infusing the whole of Greek political history, eventually being received into Roman thought and finally forming the basis of modern legal theory<sup>5</sup>.

- 1 This article originated from a discussion I held with Professor Laurens Winkel in Santiago de Chile while commenting on his brilliant work on natural law. Eventually, it became a paper that I presented at a conference in Rosario, Argentina, in May 2013, which was completed thanks to my good friend Javier Rodríguez. I dedicate this work to Laurens' friendship.
- 2 The Declaration of the Rights of Man and Citizen of 1789 expressly appeals to natural rights (Arts. II and IV). Although the concept of human rights has evolved (See Casavola, Francesco Paolo, *Fondamento giuridico dei diritti umani in Sententia legum tra mondo antico e moderno* (Napoli, 2004) 3, pp. 77-89), its origin is related to natural law.
- 3 See Polacek, Adalbert, "Human Rights. The Secret Legacy of Antiquity" in Roset Esteve, Jaime (Coord.) *Estudios en homenaje a Juan Iglesias*, Universidad Complutense (Madrid, 1988) v. II pp. 1009-1021; Mitsis, Phillip, "Stoic Origin of Natural Rights in Topics" in *Stoic Philosophy* (Ierodiakonou, Katerina, ed.) (Oxford, 1999) pp. 153-177; Honoré, Tony, "Les droits de l'homme chez Ulpien" in *Le monde antique et les droits de l'homme* (Jones, H., ed.) (Brussels, 1998) pp. 235-243; Crifo, Giuliano, "Per una prospettiva romanistica dei diritti dei uomo" in *Menschenrechte und europäische Identität – Die antiken Grundlagen* (Giradet, Klaus M., Nortmann, Ulrich eds.) (Stuttgart, 2005) pp. 240-269.
- 4 McClelland, J.S., *A History of Western Political Thought* (New York, 2005), Kindle edition, L. 302 ff.
- 5 Senn, Félix, "De l'influence grecque sur le droit romain de la fin de la république" in *Atti del congresso internazionale di diritto romano* (Bologna e Roma XVIII-XXVII Aprile MCMXXXIII) Roma, (Pavia, Fussi, 1934) v. I pp. 99-110; Coing, Helmut "Naturrecht als wissenschaftliches Problem" in *Gesammelte Aufsätze zu Rechtsgeschichte, Rechtsphilosophie und Zivilrecht 1947-1975* b. 2 (Frankfurt-am-Main, 1982) pp. 23-49; Winkel, Laurens C., "Die stoische oikeiosis-Lehre und Ulpians Definition der Gerechtigkeit" in *ZS* (Rom. Abt.) 108 (1988) pp. 669-679 and Winkel, Laurens "Le droit romain et la philosophie grecque, quelques problèmes de méthode" in *TvR* 65 (1997) pp. 373-384.

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Although in antiquity there was no human-rights theory<sup>6</sup>, from the heart of Greek political philosophy a concept of natural law emerged that discarded most of the superstitions of the ancient period, and served as the foundation of the political and legal order. Like fire, this rational conception continued to burn bright in Greece and Rome and even, after two millennia, in the formation of modern states.

This article will briefly trace the pre-history of natural law, analysing its evolution in Greek legal thought, from the concept of supernatural justice through the crisis in Greek political ideas that gave birth to the concept of natural law.

## 2. Hesiod and supernatural justice

The ancient Greek world was a universe divided into three layers. The first was the divine order of what was proper for the gods, the second was the human and the last the natural order<sup>7</sup>. The need for justice came from the observation of nature, which was seen negatively. The Greeks conceived the natural world as one hostile to human kind, in which undesirable events happened that ought to be reversed. The world of nature was alien to humankind, lacked justice and was governed by the law of nature, which decreed that the strongest prevailed. Men turned to Justice, a goddess who regulated their social

6 There has been much debate about this during the last ten years, for some scholars believe that in some way the Roman concept of *humanitas* implied the notion of human rights. See Gaudemet, Jean, “Des droits de l’homme ont-ils été reconnus dans l’empire romain?” in *Labeo* 33 (1987) pp. 7-23; Gaudemet, Jean, “Des droits de l’homme dans l’antiquité?” in *Collatio iuris romani, études dédiées à Hans Ankum à la occasion de son 65e anniversaire* (Amsterdam, 1995) v. I pp. 105-115; Gaudemet, Jean, “Le monde antique et les droits de l’homme. Quelques observations” in (Jones, H., ed.) (n. 3) pp. 175-183; Fabre, Paul, “Droits de l’homme et respect de la dignité humaine en Grèce antique” in *Le monde antique et les droits de l’homme, actes de la 50 session de la société internationale Fernand de Visscher pour l’histoire des droits de l’antiquité*, (Bruxelles, 1996) pp. 155-168. Bauman even translates the expression *ius humanum* as human rights. See Bauman, Richard, *Human Rights in Ancient Rome* (London, New York, 2000) p. 29. Obviously this is questionable, for even the most cultivated emperors had little consideration for the humanity of slaves or gladiators, whose death was a form of mass entertainment. See Robinson, Olivia, “Crime and Punishment and Human Rights in Ancient Rome” in (Jones, H., ed.) (n. 3) pp. 325-334. Although the notion of *humanitas* implies a certain universality and holiness in human life (see Riccobono, Salvatore “L’idea di *humanitas* come fonte di progresso del diritto” in *Studi in onore di Biondo Biondi* (Milano, 1965) v. II, pp. 585-614), and did inspire some legal decisions, it was not a legal concept and did not occupy a central place in the concept of the political order, as human rights do, so that it cannot be considered as the equivalent of modern human rights. It lacks “une référence à l’universel humaine à laquelle rattacher les droits de la personne en tant que personne” (Haarscher, Guy, “Le monde antique et les droits de l’homme” in (Jones, H., ed.) (n. 3) pp. 197-208). And although some jurists of the third century even recognised in *humanitas* an element that was able to “tempérer la rigueur du droit” (Gaudemet, Jean, “Des droits de l’homme dans l’antiquité?” in *Collatio iuris romani, études dédiées à Hans Ankum à la occasion de son 65e anniversaire* (Amsterdam, 1995) v. I p. 110), the basic inequality of men, divided into free and slave, *sui iuris* and *alieni iuris*, citizens and foreigners, still determined the treatment of *personae* in Rome, to the point that Gaius used those divisions as the basis for his Institutes.

7 McClelland, J.S., *A History* (n. 4) L. 192-195.

relations and liberated them from this harsh natural law that was nothing more than brute force. Therefore, *l'attuazione della diké è il segno che distingue l'uomo della bestia*<sup>8</sup>.

Even in the earliest Greek literature we see this image. In particular, the didactic poem “Works and Days” of Hesiod, was of particular significance in antiquity. This is one of the first literary works written in Greek (c. eighth century BC)<sup>9</sup>, and is almost as old as the Iliad. It is a popular work, having nothing to do with the Homeric heroes and kings, written by a peasant who cultivated a small piece of land with his hands. It expresses distrust of both war<sup>10</sup> and the whole ruling class<sup>11</sup>. In a way, this is a piece of resistance literature confronting power, especially power exercised in an arbitrary fashion contrary to the interests of the common people.

The poem takes the form of a letter addressed to the author’s brother, Perses, who deprived him of his inheritance by bribing the judges who were to decide their dispute. The main subject of the poem is therefore justice itself, which, according to the poet, transcends the judgments of the ruling class and comes directly from Zeus:

Oh kings! Consider for yourselves this punishment, for the gods, mingling with humankind, see those who persecute others with unfair judgments without even caring about the gods. On the land, which sustains many, there are thirty thousand of Zeus’ immortals watching over mortal men, who run here and there over the land watching their fair judgments and bad deeds<sup>12</sup>.

Therefore the main thing that separates animals and humankind is Justice, a goddess and daughter of Zeus<sup>13</sup>. To illustrate his point, the poet speaks of the parable of the hawk and the nightingale, where the hawk tries to justify his behaviour to the nightingale it has caught in its claws:

Oh you unfortunate creature, why complain? You are prey to someone stronger than yourself. You will go wherever I take you, even if you are a bard. I shall eat you, or free

8 Gigante, Marcello, *Nomos Basileus* (Napoli, 1959) p. 47.

9 See Lesky, Albin, *Historia de la literatura Griega*, (Madrid, 1989) pp. 115-130.

10 War, in the eyes of the author of *Works and the Days*, does not seem to be the glorious work depicted in the Homeric poems, but a damnation caused by injustice. When justice is accomplished, peace is the reward:

Hesiodus, *Opera et dies*, 228:

εἰρήνη δ' ἀνὰ γῆν κουροτρόφος, οὐδέ ποτ' αὐτοῖς ργαλέον πόλεμον τεκμαίρεται εὐρύοπα Ζεύς  
(Peace is on earth and Zeus, who sees beyond earth, never causes war).

11 The leaders are directly accused of corruption and called *doroфagos*, that is present eaters. (Hesiodus, *Opera et dies*, 38).

12 Hesiodus, *Opera et dies*, 248:

ὦ βασιλῆς, ὑμεῖς δὲ καταφράζεσθε καὶ αὐτοὶ<sup>14</sup>  
τῆνδε δίκην: ἐγγὺς γάρ ἐν ἀνθρώποισιν ἔοντες  
ἀθάνατοι φράζονται, ὅσοι σκολιῆσι δίκησιν  
ἀλλήλους τρίβουσι θεῶν δῖπν οὐκ ἀλέγοντες.  
τρὶς γάρ μύριοι εἰσιν ἐπὶ χθονὶ πουλυβοτείρῃ  
ἀθάνατοι Ζηνὸς φύλακες θνητῶν ἀνθρώπων:  
οἵ δια φυλάσσουσιν τε δίκας καὶ σχέτλια ἔργα

13 Gigante, Marcello, *Nomos Basileus* (n. 8) pp. 19-20.

you as I choose. Damnation to those who wish to fight those stronger than themselves. They will not be victorious and they will be ashamed and sore<sup>14</sup>.

To deal with this animal and natural world, the poet envisages a different role for humankind, not subject to mere brute force:

Oh Perses! Bear this in mind: heed justice and reject violence, for the son of Chronos has imposed this law upon humankind. He has permitted fish, wild animals and birds of prey to devour each other, for they do not know justice, but to men he has given justice, which is the best of things. If in the agora someone wants to speak with justice, far-seeing Zeus gives him wealth, but if he lies and perjures himself, he is bound to be punished. His descendants diminish and die out, while the descendants of the righteous are well known and abundant<sup>15</sup>.

Hesiod, *non accetta il diritto del piú forte perché bestiale e ingiusto*<sup>16</sup>. Men are outside the natural world and its law, from which they are protected by the gods, who have given us Justice to regulate our social relations<sup>17</sup>. Even kings should follow it, lest they be judged and the whole community condemned:

Oh kings, beware this punishment, for gods are present among men who see how many are persecuted in unfair trials in which no attention is paid to the gods<sup>18</sup>.

14 Hesiodus, *Opera et dies*, 207-212:  
 δαιμονή, τί λέληκας; ἔχει νύ σε πολλὸν ἀρείων:  
 τῇ δ' εἰς, η σ' ἀν ἐγώ περ ἄγω καὶ ἀοιδὸν ἔονταν:  
 δεῖπνον δ', αἱ κ' ἔθέλω, ποιήσομαι ήὲ μεθήσω.  
 ἄφρων δ', οὓς κ' ἔθέλῃ πρὸς κρείσσονας ἀντιφερίζειν:  
 νίκης τε στέρεται πρός τ' αἰσχεσιν ὅλγεα πάσχει.

15 Hesiodus, *Opera et dies*, 274-285:  
 τόνδε γάρ ἀνθρώποισι νόμον διέταξε Κρονίων  
 ιχθύσι μὲν καὶ θηρίσι καὶ οἰωνοῖς πετενοῖς  
 ἐσθέμεν ἀλλήλουν, ἐπεὶ οὐ δίκη ἐστὶ μετ' αὐτοῖς:  
 ἀνθρώποισι δ' ἔδωκε δίκην, ή πολλὸν ἀρίστη  
 γίγνεται: εἰ γάρ τις κ' ἔθέλῃ τὰ δίκαια ἀγορεῦσαι  
 γιγνώσκων, τῷ μέν τ' ὅλβον διδοῖ εὐρύόπα Ζεύς:  
 οὓς δέ κε μαρτυρήσται ἐκῶν ἐπιόρκον ὄμόσσας  
 ψεύσεται, ἐν δὲ δίκην βλάγας νήκεστον ἀσθῆ,  
 τοῦ δέ τ' ἀμαρτοτέρη γενεὶ μετόπισθε λέλειπται:  
 ἀνδρὸς δ' εὐόρκου γενεὶ μετόπισθεν ἀμείνων.

16 Gigante, Marcello, *Nomos Basileus* (n. 8) p. 25.

17 On the matter, Heinimann comments: "Man hat mit Recht betont dass diké und nomos hier scharf zu trennen sind. Denn nicht nur die Menschen haben ja ihren nomos, sondern auch die Tiere die keine diké kennen ...": Heinimann, Felix, *Nomos und Physis. Herkunft und Bedeutung einer Antithese im griechischen Denken des 5. Jahrhunderts* (Basel, 1945) p. 61.

18 Hesiodus, *Opera et dies*, 248-251:  
 ὁ βασιλῆς, ὑμεῖς δὲ καταφράζεσθε καὶ αὐτοὶ<sup>19</sup>  
 τήνδε δίκην: ἐγγὺς γάρ ἐν ἀνθρώποισιν ἔοντες  
 ἀθάνατοι φράζονται, ὅσοι σκόλιῆσι δίκησιν  
 ἀλλήλουν τρίβουσι θεῶν ὅπιν οὐκ ἀλέγοντες.

Humankind is ruled by norms, apart from those of the State, which neither the central authority nor common person should contravene. This law is not natural, because it is exactly what differentiates men from the world of nature, but rather supernatural, for it comes directly from the gods, who also enforce it<sup>19</sup>.

It seems it is not only in Hesiod that one finds the idea of government bound by divine justice and rules that cannot be ousted by the laws of the community. It emerges in so many other works on justice that it appears to form part of the common heritage of the Greek people<sup>20</sup>. The link between divinity and the *nomos* is a common topic in philosophy and literature. For instance, for Heraclitus<sup>21</sup> the *nomos* of the polis, which encompasses the State's laws, could come from the gods or from men:

Those who speak intelligently should be strengthened by the intelligence common to all, as a city by its laws, and even more strongly. All human laws are nurtured by a divine being that, being superior, controls everything it wishes to; it extends to everyone and everything<sup>22</sup>.

In this regard, it is also important to mention the orphic<sup>23</sup> ideas on justice and law, which are succinctly expressed in three hymns: one to Justice (62), another to equity (*dikaiosune*) (63) and a final one to *nomos* (64).

Justice is a goddess who watches everything from above and avenges men's evil deeds, along the same lines as in Hesiod's works<sup>24</sup>. All order in the world is organised through *nomos*, but it is only the *nomoi* of humankind that, thanks to the supernatural influence of Zeus, must follow justice, and this is the difference between men and nature.

The same idea is present in Sophocles' Antigone. In the play, the protagonist decides to bury her brother Polinices, something that has been prohibited by the king, Creon. Antigone is captured and has to confront the king in a dialogue that is usually quoted to demonstrate the presence of a natural-law concept in classical Greek thought:

CREON: And so, you dared to contravene the law?

ANTIGONE: It was not Zeus who enacted it, nor did Dike (Justice), comrade of the underworld gods, ever conceive of such laws among men. Nor did I think your statutes had such power as to allow one man to ignore the unwritten and unchangeable laws of the

19 On the matter Gigante says: "L'ammistrazione della retta giustizia è possesso di dio ... La concezione di Zeus supremo vindice di giustizia è svolta tanto nella Teogonia che negli Erga": Gigante, Marcello, *Nomos Basileus* (n. 8) p. 19.

20 See Coing, Helmut *Naturrecht* (n. 5) p. 23; Boucher, David, *The Priority of Law and Morality: the Greeks and the Stoics in Political Theories of International Relations*, (New York, Oxford, 1998) pp. 171-190 and Martens, John W., *One God, One Law: Philo of Alexandria on the Mosaic and Greco-Roman Law* (Leiden, 2003) p. 22.

21 (B114). For an analysis see Heinimann, Felix, *Nomos und Physis* (n. 17) pp. 65 ff. and Gigante, Marcello, *Nomos Basileus* (n. 8) pp. 50 ff.

22 ζὺν νῷ λέγοντας ισχυρίζεσθαι χρὴ τῷ ξυνῷ πάντων, ὄκωσπερ νόμῳ πόλις, καὶ πολὺ ισχυροτέρως. τρέφονται γὰρ πάντες οἱ ἀνθρώπειοι νόμοι ὑπὸ ἐνὸς τοῦ θείου· κρατεῖ γὰρ τοσοῦτον ὄκοσον ἐθέλει καὶ ἔχαρκει πᾶσι καὶ περιγίνεται.

23 On the orphics and their relation with Heraclitus and Pindarus see Heinimann, Felix, *Nomos und Physis* (n. 17) pp. 67 ff. and Gigante, Marcello, *Nomos Basileus* (n. 8) pp. 54 ff.

24 Heinimann, Felix, *Nomos und Physis* (n. 17) p. 70.

gods. They have applied not just today or since yesterday, but always; and nobody knows when they originated.<sup>25</sup>

Antigone defends her conduct in light of the existence of a law of divine origin, emanating from Zeus himself, which has materialised in the goddess Justice and rules human interactions<sup>26</sup>. This is the law that Antigone obeys. Creon, who tries to abolish it through statutes is a mere tyrant. However, this law is somewhat more complex than that depicted in the works of Hesiod. It comprises a body of unwritten laws whose power is superior to that of the laws of any government<sup>27</sup>. Coming directly from the gods, they are eternal and immutable<sup>28</sup>. Many of these characteristics will later become associated with natural law, although Antigone is referring not to a natural body of rules, but rather to a supernatural order imposed on humankind by the gods. The validity of this order therefore depends on the existence and power of the gods. Hesiod's simple ideas on justice have now acquired a different texture, becoming a whole body of laws that supersedes the legislative power of the polis.

The bond between the divine order and the positive law of specific cities, which reinforced their validity, is a constant theme among Greek legislators. For instance, Lycurgus, the Spartan legislator, obtained divine sanction for his laws in Delfos<sup>29</sup>, something that became commonplace among the great reformers of the sixth and fifth centuries BC<sup>30</sup>.

### 3. Crisis in traditional thought

During the whole archaic period of Greek culture, the legal order was founded on a supernatural order. Judges in Crete were called *kosmoi*, for they received from the divine

25 Sophocles, Antigonae, 449-457:

Κρέων  
καὶ δῆτ' ἐτόλμας τούσδ' ὑπερβαίνειν νόμους;  
Ἀντιγόνη  
οὐ γάρ τι μοι Ζεὺς ἦν ὁ κηρύξας τάδε,  
οὐδὲ ἡ ξύνοικος τῶν κάτω θεῶν Δίκη  
τοιούσδ' ἐν ἀνθρώποισιν ὥρισεν νόμους.  
οὐδὲ σθένειν τοσοῦτον φόμην τὰ σὰ  
κηρύγμαθ', ὥστ' ἄγραπτα κάσφαλή θεῶν  
νόμιμα δύνασθαι θνητὸν ὅνθ' ὑπερδραμεῖν.  
οὐ γάρ τι νῦν γε κάκθες, ἀλλ' ἀεί ποτε  
ζῆ ταῦτα, κούδεις οἶδεν ἐξ ὅτου 'φάνη.

26 Pohlenz, Max, *Nomos und Physis in Kleine Schriften* (De Vries, Jan, ed.) (Hildesheim. 1965) v. II pp. 351-352.

27 Apparently, this is the oldest attestation of unwritten laws. See Martens, John W., *One God, One Law* (n. 20) p. 28.

28 In this sense, Fabre says that in Ancient Greece law was founded on man's dignity, but "*Le fondement de cette dignité est religieux*": Fabre, Paul, *Droits de l'homme* (n. 6) p. 155.

29 So says Plutarch, who adds that the Pythia would have named him a god among men: Plutarchus, Lycurgus, 5.3.1-5.3.7.

30 See MacDowell, Douglas M., *The Law in Classical Athens*, (Cornell, New York, 1978), pp. 41 ff.

world the inspiration to give their sentences<sup>31</sup>. Humankind was distinguished from the world of nature and the law of the strongest, and placed in a superior order, governed by Justice. Man had the sacred fire of the gods. This made him unique and superior to animals.

Nevertheless, towards the end of the archaic period the traditional worldview entered a crisis phase, when Greek rationalism refuted the traditional division of the world into natural, human and supernatural orders, and suggested an alternative view. When Thales of Miletus investigated nature, he tried to explain it in causal terms, that is to say, to reduce it to phenomena that might be explained by intrinsic reasons, from which the constant intervention of the gods and their supernatural acts were absent. He therefore regarded equinoxes and solstices not as events related to divinity, but as phenomena that might be explained in causal terms from a strictly natural perspective<sup>32</sup>. His alleged disciple Anaximander took a further step in this direction by calling the whole natural world a “*kosmos*”<sup>33</sup>, an order. In terms of this order, the natural world was not subject to the will of the gods, but governed by the rules of causality, which implied that it was possible to predict events in the world. Thus Anaximandre indicated that the natural world might be “scientifically” studied, which meant, at least to physics scholars, that it was independent of the divine<sup>34</sup>.

If the Greek traditional worldview is based on the dependence of the natural and human orders on the divine, once the natural world has declared its independence how long will it be before the human world does the same? Will justice as a model of behaviour still be based on a divine law imposed on humans from above? Are we so different from the natural world?<sup>35</sup>

During the Greco-Persian Wars, the contact of Greek culture with the Eastern Mediterranean increased. Consequently, there was a tendency to compare the mores of the Greeks with those of the rest of the Eastern world. Ionic scholars studied the mores of the Egyptians, the Persians and the Scythians and even exotic people like the Hyperboreans, and made an ethnographical comparison between them. In Herodotus' works we find not only a history of the Greco-Persian wars, but also a detailed account of the physical and human geography of the people of the Eastern Mediterranean. The dependence of mores on climate is discussed<sup>36</sup>. Montesquieu did the same some centuries later. The variety of mores is studied with impartiality, something that reveals a certain cultural relativism in classical Greece<sup>37</sup>.

31 The inscription from Dreros GHI 2 (c. 650 BC) is very expressive in this sense. See Von Reden, Sitta, Money in Classical Antiquity (Cambridge, Kindle edition, 2010) L. 689 ff.

32 He seems to have written two works on the problem (D. Laertius 1,23).

33 Plutarcus, Stromata 145.179.9-13.

34 See Heinimann, Felix, Nomos und Physis (n. 17) pp. 43 ff.

35 See Schiavone, Aldo, The Invention of Law in the West, (Harvard, Cambridge, 2012) pp. 292-293.

36 Heinimann, Felix, Nomos und Physis (n. 17) pp. 23 ff.

37 Heinimann, Felix, Nomos und Physis (n. 17) pp. 78-80.

In this context, during the fifth century BC, the contrast between *nomos* (law) and *physis* (nature) appears in medical science<sup>38</sup>. In the *Corpus Hipocraticum* two works dating from the second half of the fifth century BC – *De aere aquis et locis* and *De morbo sacro* – distinguished *physis*, that is nature, from *nomos*, human convention<sup>39</sup>. Nature was seen as a given to which the mores – the *nomoi* – of the people should adapt. Climate (*physis*) and mores (*nomos*) would determine the ethnical appearance of people *Wie die beiden Faktoren physis und nomos für die Unterschiede der Körperform verantwortlich sind*<sup>40</sup>. This idea is clearly stated in *De aere aquis et locis* at the beginning of chapter 14<sup>41</sup>:

I'll leave aside minor differences between nations and I'll consider only the large ones that come from nature or law, and I'll begin with the Macrocephalos.

This is followed by a strange description of how a people, through their mores and climate, are able to change the shape of their heads in order to enlarge them. In the following chapters the different nations of Europe and Asia are described. The relationship between climate and laws, which to Herodotus was a mere curiosity, became in the *Corpus Hipocraticum* a fundamental element in the diagnosis and prevention of disease<sup>42</sup>.

The first sophists discussed conclusively the ethical and legal consequences of the separation of humankind and divinity. Here the role played by Protagoras (490-421 BC) cannot be overestimated<sup>43</sup>. Protagoras was born in Abdera c. 490 BC. He was a contemporary – and maybe a disciple – of Democritus<sup>44</sup>, and led a wandering life, teaching philosophy in different cities in the Greek world. He was a close friend of Pericles<sup>45</sup> and spent some time in Athens, from which he was eventually expelled either by a decision of the Assembly or after a trial for impiety. Among his main teachings, he stated that all causes of natural phenomena are to be found in matter<sup>46</sup>, something that places him among the first materialist philosophers. Regarding the gods, he declared himself an agnostic, for he said that it is impossible to know whether they exist or not<sup>47</sup>.

38 Heinimann, Felix, *Nomos und Physis* (n. 17) pp. 11 ff.; Pohlenz, Max, *Nomos und Physis* (n. 26) pp. 341-346.

39 Gigante, Marcello, *Nomos Basileus* (n. 8) p. 14; Pohlenz, Max, *Nomos und Physis* (n. 26) pp. 346-347.

40 Heinimann, Felix, *Nomos und Physis* (n. 17) p. 16.

41 καὶ ὄκόσα μὲν ὀλίγον διαφέρει τῶν ἔθνεών παραλείψω, ὄκόσα δὲ μεγάλα ἡ φύσει ἡ νόμῳ, ἐρέω περὶ αὐτῶν ὡς ἔχει. καὶ πρῶτον περὶ τῶν Μακροκεφάλων.

42 Heinimann says: "Während Völkerbeschreibung für Herodot weitgehend Selbzweck ist, dient sie dem Hippokratiker nur als Beweismaterial für seine These vom Einfluss des Klimas auf die Menschen in ihrer körperlichen und geistigen Konstitution": Heinimann, Felix, *Nomos und Physis* (n. 17) p. 24.

43 Nevertheless, the sophistic theory of *nomos* and *physis* may have appeared before Protagoras, in the works of Archelaos and Hippias. See Heinimann, Felix, *Nomos und Physis* (n. 17) pp. 100-114 and Pohlenz, Max, *Nomos und Physis* (n. 26) v. II p. 356.

44 On the relation between Archelaos, Democritus and Protagoras see Heinimann, Felix, *Nomos und Physis* (n. 17) p. 148.

45 Plutarch even described them debating liability for an accidental event. See Plutarcus, Pericles, 36.

46 Sextus Empiricus, *Pyrrhoniae hypotyposes*, 1.216 ff.

47 Philostratus, *Vitae sophistarum*, 1.10.

As far as the theory of knowledge is concerned, he was a relativist, considering that man was the measure of all things<sup>48</sup>, so there could not be universally valid knowledge. Each man could only build his own truth<sup>49</sup>. The moral consequence of this statement is quite apparent, for it indicates that there cannot be good or evil, but that each action may be subject to a different moral judgment according to the judge's whim. In this sense, two equally valid discourses will always have to be considered in judging any action. In legal matters, a good lawgiver should consider what is useful for the community and convince it that what is useful is also just<sup>50</sup>. The legal perspective of Protagoras was surprisingly similar to nineteenth-century utilitarianism<sup>51</sup> and, because of his close relations with Athenian elite, had important practical consequences in the Peloponnesian War.

The Melian dialogue, reported by Thucydides, may be a quite literal transcription of the arguments raised during the Athenian invasion of Melos, when Protagoras' ideas and the traditional concept of justice were debated. During the Peloponnesian War (431-404 BC), Athenian forces invaded the island of Melos (or Milos) in order to force it to abandon the Spartan alliance and submit to the power of Athens. Before the siege, there was a parley between the leaders of the Athenian forces and the Melians, in which the right of Athens to demand submission – not mere neutrality – was debated. In the dialogue, the Athenians demanded that the debate should focus on what was in the interests of Melos – that is to say, whether they should submit to Athens or be utterly destroyed – for between the weak and the strong there could not be considerations of justice<sup>52</sup>. Justice was removed from the dialogue and its place taken by utility. The Athenians argued that natural law supported their aggression: the law of the strongest<sup>53</sup>, which they had not created nor could change. In short, once the gods and their supernatural law were removed from the human order, there was no longer a difference between man and other animals and he was again subject to natural law, like the nightingale in the claws of the hawk.

Plato attributes the most brutal exposition of this natural law to Thrasymachus, a sophist and rhetorician of whom we know practically nothing, apart from his rather unpleasant statement mentioned in the Republic. In this work, Thrasymachus interrupts a dialogue between the main characters and suggests they ask him what he believes justice to be. Once he convinces them to put the question, he gives them this answer:

48 Plato, Cratylus, 385e and Aristoteles, Metaphysica, 9.6, 1062b.10-13.

49 Sextus Empiricus, Pyrrhoniae hypotyposes, 1.216.

In this sense, the ethical ideas of Protagoras are related with ionic relativism. In Heinemann's words, *nomos* means *Menschenmeinung*: Heinemann, Felix, *Nomos und Physis* (n. 17) p. 119. On the concept of *nomos* as a convention see, also, Martens, John W., *One God, One Law* (n. 20) pp. 22-23.

50 Plato, Theaetetus, 167c.2.

51 On utilitarianism in antiquity see Waldstein, Wolfgang, *Natural Law and the Defence of Life in Evangelium Vitae in Evangelium Vitae. Five Years of Confrontation with Society Libreria Editrice Vaticana*, (Vaticano, 2000) pp. 225-230.

52 Thucydides, Historiae, 5.89.1.6-9.

53 Thucydides, Historiae, 5.105.2.

Well, listen. I say that justice is nothing more than what is useful to the strongest. Why don't you applaud? I knew you wouldn't!<sup>54</sup>

In the face of Socrates' perplexity, he explains his ideas:

Do not all people make laws for their own benefit, the democrats, democratic laws, the tyrant, tyrannical ones and so on? Once these laws are passed, do they not declare that justice for the governed is to follow them? Are trespassers who are guilty of an unjust action not punished? Here is my opinion. In every state, Justice is no more than the utility of the one who holds power and is therefore the strongest. It follows that to any man who has reason, Justice and what is useful to the strongest are always and everywhere the same<sup>55</sup>.

#### 4. Aristotle

The Thrasymachus thesis, that justice was the law of the strongest, completed the fusion of the human and natural orders after the final breakdown of divinity. Men were not different from animals, law derived from brute force and what was called justice was only a mask used by the powerful to cover up their deeds. As it was among hawks, so it was between men. Socrates' refutation was only a nicety, and the Thrasymachus thesis continued to be a bitter sediment in the Republic. In a world suffering from political decomposition, where the fundamental political unit, the polis – today the National State – is always incapable of guaranteeing the independence of its citizens in the face of powerful external threats, as exemplified by Philip of Macedonia, the diadochi kings and later Rome, politics, through the Thrasymachus thesis, show its hobbesian face by transforming brute force into law.

In this context, Aristotle was able to invert the terms, giving a new meaning to natural justice as a rational entity that was independent of the cultural or religious values of any particular community. Aristotle, at the beginning of his *Politics*, defines men as social and rational animals, which fundamentally changes their relationship with nature:

The reason for men to be social, more so than any being or gregarious animal, is clear. Nature, as we say, does nothing in vain. Only men, among animals, have speech. The voice is a sign of pain or pleasure, which is why other animals also have it. (Their nature has allowed them to have the sensation of pain and pleasure and show each other these sensations). However, speech exists to show what is convenient and harmful, and what is just and unjust. And it is unique to man, unlike other animals, who possesses, a sense of

54 Plato, *Respublica*, 338.c.1-3:  
ἄκουε δή, ή δ' ὁ. φημὶ γάρ ἐγώ εἶναι τὸ δίκαιον οὐκ ἄλλο τι τὸ τοῦ κρείττονος συμφέρον. ἀλλὰ τί οὐκ ἐπαινεῖς; ἀλλ' οὐκ ἐθελήσεις.

55 Plato, *Respublica*, 338.e.1-4:  
τίθεται δέ γε τοὺς νόμους ἐκάστη ἡ ἀρχὴ πρὸς τὸ αὐτῆσυμφέρον, δημοκρατία μὲν δημοκρατικούς, τυραννίς δὲ τυραννικούς, καὶ αἱ ἄλλαι οὕτως: Θέμεναι δὲ ἀπέφηγαντοῦτο δίκαιον τοῖς ἀρχομένοις εἶναι, τὸ σφίσι συμφέρον.

good and evil, of the just and unjust, etc. From this community the family house and the polis are born<sup>56</sup>.

Man is a rational being who has language in order to socialise with other men. Human nature is different from animal nature, for it possesses, through reason, a sense of justice that is natural to it and therefore, innate. Political life is founded on this rational natural justice; and this is the difference between men and animals, which are bound to the law of the strongest. In this sense, there is a natural justice and therefore a natural law that is valid everywhere, beyond mere conventional justice:

Political justice is partly natural and partly legal. That which has the same strength everywhere and does not depend upon our approval or disapproval is the natural part. What in principle is indifferent, such as paying a mine to rescue a prisoner or to sacrifice a goat and not two sheep is the legal part, as are arrangements for specific cases, like offering a sacrifice in honour of Brasidas, and things ordered by regulations. It seems to some that all law is merely legal. They argue that nature is immutable and has the same strength everywhere, like fire, that burns in the same way here or in Persia, but, on the contrary, in the human order we see things that are considered just change. Things do not happen precisely this way, although in a certain sense they do. Although among gods there might be no change at all, among us everything is by nature subject to change. This does not prevent some things from being natural and others not<sup>57</sup>.

This concept of natural justice as rational justice, constructed without the aid of religious values, which opposes the law of the strongest, continued through Roman law<sup>58</sup> and into modern rationalism and forms the foundation of a group of rights, namely modern human rights, which every State must respect and which limit sovereignty.

56 Aristoteles, *Politica*, 1253a.9-17:

λόγον δὲ μόνον ἀνθρωπος ἔχει τῶν ζώων: ἡ μὲν οὖν φωνὴ τοῦλυπτροῦ καὶ ἡδός ἔστι σημεῖον, διὸ καὶ τοῖς ἄλλοις ὑπάρχεις ζώοις (μέχρι γὰρ τούτου ἡ φύσις αὐτῶν ἐλήλυθε, τοῦ ἔχειναισθησιν λυπτροῦ καὶ ἡδός καὶ ταῦτα σημαίνειν ἀλλήλωις), ὁ δὲ λόγος ἐπὶ τῷ δηλοῦν ἔστι τὸ συμφέρον καὶ τὸ βλαβερόν, ὅστε καὶ τὸ δίκαιον καὶ τὸ ἄδικον: τοῦτογάρ πρός τὰ ἄλλα ζῷα τοῖς ἀνθρώποις ἴδιον, τὸ μόνον ἄγαθον καὶ κακοῦ καὶ δικαίου καὶ ἀδίκου καὶ τῶν ἄλλωναισθησιν ἔχειν: ἡ δὲ τούτων κοινωνία ποιεῖ οἰκίαν καὶ πόλιν.

57 Aristoteles, *Ethica Nicomachea*, 1134b.18-26:

τοῦ δὲ πολιτικοῦ δικαίου τὸ μένφυσικόν ἔστι τὸ δὲ νομικόν, φυσικὸν μὲν τὸ πανταχοῦ τὴναύτην ἔχον δύναμιν, καὶ οὐ τῷ δοκεῖν ἡ μή, νομικὸν δὲ ὁ ἔξαρχης μὲν οὐδὲν διαφέρει οὕτως ἡ ἄλλως, ὅταν δὲ θῶνται, διαφέρει, οἷον τὸ μνᾶς λντροδσθαι, ἡ τὸ αἴγα θύειν ἀλλάμη δύο πρόβατα, ἔτι δοσα ἐπὶ τῶν καθ' ἔκαστα νομοθετοῦσιν, οἷον τὸ θύειν Βρασιδα, καὶ τὰ ψηφισματώδη. δοκεῖ δ' ἐνίοις εἶναι πάντα τοιαῦτα, ὅτι τὸ μὲν φύσει ἀκίνητον καὶ πανταχοῦ τὴν αὐτὴν ἔχει δύναμιν, ὥστε τὸ πῦρ καὶ ἐνθάδε καὶ ἐν Πέρσαις καίει, τὰ δὲ δίκαια κινούμενα ὥρῶσιν, τοῦτο δ' οὐκ ἔστιν οὕτως ἔχον, ἀλλ' ἔστιν ὡς: καίτοι παρά γε τοῖς θεοῖς ἵσως οὐδαμῶς, παρ' ἡμῖν δ' ἔστι μὲν τικαὶ φύσει, κινητὸν μέντοι πᾶν, ἀλλ' ὅμως ἔστι τὸ μὲν φύσει τὸ δ' οὐ φύσει.

58 Traditionally, the influence of the Stoa in the formation of the concept of *ius naturale* has been stressed. Nevertheless, Winkel has demonstrated the profound reception of Aristotelian thought in Ulpian's definition of justice and natural law. See Winkel, Laurens, *Die stoiche* (n. 5) pp. 669-679.

## **Abstract**

This article traces the classical roots of natural law and human rights. Although in antiquity there was no concept of human rights, among poets, philosophers and jurists there was an idea of justice that no government could overrule. Although the idea of rights was absent from these constructs, they form the basis of modern legal ideas. We find the first exposition of basic rights in the work of Hesiod, which, after the fifth-century crisis in the Greek concept of the world, led to a new idea of natural justice that was developed by Aristotle.